Opinion issued August 24, 2017

In The

Court of Appeals

For The

First District of Texas

NO. 01-16-00434-CR

DAMON ORLANDO MILTON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 338th District Court
Harris County, Texas
Trial Court Case No. 1472750

MEMORANDUM OPINION

Appellant Damon Orlando Milton appeals from a robbery conviction. We affirm.

BACKGROUND

L. Robertson, a cashier at CVS pharmacy, testified that appellant robbed the store two days in a row, on June 21, 2015 and June 22, 2015. The second robbery was the subject of the underlying charges in this case, but evidence of the earlier robbery was used at trial for identification purposes.

A. The June 22, 2015 Robbery

On June 22, 2015, Robertson noticed appellant come into the CVS and meander around the store for 10–15 minutes while Robertson was ringing up several other customers' purchases. After there was no one else in line, appellant brought several items to the register. Robertson testified that she began scanning and bagging the items when appellant told her "this is a stick up, give me whatever is in the register, do not try anything, or I will kill you." Appellant also told Robertson that he had a weapon. She testified to feeling very nervous, threatened, and scared; she feared for her life. Surveillance footage of the June 22 robbery was played at trial, and Robertson pinpointed the spot on the tape where appellant threatened her.

Robertson gave appellant all the bills from the register and appellant stuffed them in his pockets. Appellant then grabbed a shopping bag and told Robertson to dump all the coins from the register into there. Then, after taking the unpaid merchandise that Robertson had bagged for him, appellant grabbed four beers, a bag

of Starbursts, and some chips. He walked out the door, and then took off running towards other businesses in the area.

Robertson testified that appellant was wearing glasses, a blue collared shirt, jeans, and white tennis shoes. She saw he had a blue backpack that he left outside the door. Robertson provided in-court identification of appellant as the person who robbed her.

Immediately after appellant left the store, Robertson followed training protocol by calling her manager to notify the police. Officer Huckabee with the Houston Police Department testified that he was just across the freeway from the CVS when the call came in, so it took him only about a minute and a half to respond. Robertson described the perpetrator to Huckabee as African American, about 6' or 6'1" tall, short haircut, wearing a blue shirt, blue jeans, and carrying a bag. Robertson also told Huckabee that the robber had left travelling east on Crosstimbers. Huckabee radioed to all units in the area, and then began driving down Crosstimbers in the direction the robber fled. Less than half a mile from the CVS, Huckabee spotted appellant matching Robertson's description.

Huckabee detained appellant and, within 10 or 15 minutes after the robbery, he brought appellant to CVS and asked Robertson if she could identify him. She confirmed that it was appellant who had robbed her. The police also showed Robertson the items found in appellant's backpack, which she identified as

merchandise he had taken from the store. Robertson testified that he was still fresh in her mind, and she "didn't have any doubt. That was him."

Officer C. Inocencio with the Houston Police Department testified that she interviewed Robertson shortly after the robbery. Robertson gave her a description of the perpetrator, and, when other officers returned to the CVS with appellant, Inocencio noted that appellant matched Robertson's description of the robber and his clothes.

Inocencio also testified that appellant had been brought back to the CVS for a "show-up procedure." She explained this process as "[I]f you have a suspect that you believe to be part of a crime that happened very recently where you can bring them back to the scene, you will read an admonishment form to your witness, and tell them, you know, that this could may or may not be the suspect." Show-ups are done only when a suspect is apprehended in close time and proximity to a crime. Inocencio testified that Robertson identified appellant during this show-up procedure as the person who robbed her.

Inocencio approached appellant to see if he would give a statement, but he did not. She then took pictures of the property recovered. Huckabee testified that items taken from CVS were found in appellant's backpack, along with parole papers containing appellant's name. The beer cans in the backpack were still chilled,

indicating that they had recently been taken out of refrigeration. No weapon was found on appellant or in his possession.

B. The June 21, 2015 Robbery

Robertson testified that she was sure of appellant's identity in part because he had robbed her at the same store the previous day using the same words. She did not see a weapon either time, but she believed he had one because he told her he did. Surveillance video from the June 21 robbery was played, and Robertson identified appellant as the man in the video who threatened and robbed her. She confirmed that he wore the same clothes and spoke essentially the same words during both robberies. The only difference in his appearance was that he was not wearing glasses during the June 21 robbery, but was wearing glasses during the June 22 robbery.

C. The Verdict and Judgment

The jury found appellant guilty of robbery and, after finding two prior-conviction enhancement paragraphs "true," assessed punishment at 50 years' confinement. Appellant filed a motion for new trial, which was denied. Appellant timely appealed.

ISSUES ON APPEAL

Appellant brings the following six issues on appeal:

1. Did the trial court abuse its discretion in allowing the State to play a video of a lion attempting to maul an infant during its closing arguments?
2. Did the trial court err in denying Appellant's motion to suppress his identification by the complainant?
3. Did the trial court abuse its discretion in allowing an alleged extraneous offense as evidence pursuant to Texas Rule of Evidence 404(b) to establish identity?
4. Was Appellant's trial attorney ineffective in allowing evidence of Appellant's parole status to be admitted during the guilt innocence phase of trial, and, if so, did the error deprive Appellant of a fair trial?
5. Did the trial court err in denying Appellant's request for a lesser included offense of theft in the jury charge?
6. Is the evidence sufficient to support the jury's verdict?

SUFFICIENCY OF THE EVIDENCE

In his sixth issue, appellant challenges the sufficiency of the evidence to support his conviction for robbery. Specifically, he argues that there was insufficient evidence that Robertson was in fear of imminent bodily injury or death, an element of robbery.

A. Standard of Review and Applicable Law

We review a challenge to the legal sufficiency of the evidence under the standard enunciated in *Jackson v. Virginia*, 443 U.S. 307, 318–20, 99 S. Ct. 2781, 2788–89 (1979). *Williams v. State*, 235 S.W.3d 742, 750 (Tex. Crim. App. 2007). Under the *Jackson* standard, evidence is insufficient to support a conviction if, considering all the record evidence in the light most favorable to the verdict, no

rational factfinder could have found that each essential element of the charged offense was proven beyond a reasonable doubt. *See Jackson*, 443 U.S. at 317–19, 99 S. Ct. at 2788–89; *Laster v. State*, 275 S.W.3d 512, 517 (Tex. Crim. App. 2009). Evidence is insufficient under this standard in four circumstances: (1) the record contains no evidence probative of an element of the offense; (2) the record contains a mere "modicum" of evidence probative of an element of the offense; (3) the evidence conclusively establishes a reasonable doubt; and (4) the acts alleged do not constitute the criminal offense charged. *See Jackson*, 443 U.S. at 314, 318 n.11, 320, 99 S. Ct. at 2786, 2789 n.11; *Laster*, 275 S.W.3d at 518; *Williams*, 235 S.W.3d at 750.

The sufficiency-of-the-evidence standard gives full play to the responsibility of the factfinder to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. *See Jackson*, 443 U.S. at 319, 99 S. Ct. at 2789; *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007); *see also Brown v. State*, 270 S.W.3d 564, 568 (Tex. Crim. App. 2008) (stating jury is sole judge of credibility of witnesses and weight to give their testimony). An appellate court presumes that the factfinder resolved any conflicts in the evidence in favor of the verdict and defers to that resolution, provided that the resolution is rational. *See Jackson*, 443 U.S. at 326, 99 S. Ct. at 2793; *see also Clayton*, 235

S.W.3d at 778 (reviewing court must "presume that the factfinder resolved the conflicts in favor of the prosecution and therefore defer to that determination").

In viewing the record, direct and circumstantial evidence are treated equally; circumstantial evidence is as probative as direct evidence in establishing the guilt of an actor, and circumstantial evidence alone can be sufficient to establish guilt. *Clayton*, 235 S.W.3d at 778. In determining the sufficiency of the evidence, a reviewing court examines "whether the necessary inferences are reasonable based upon the combined and cumulative force of all the evidence when viewed in the light most favorable to the verdict." *Id*. (quoting *Hooper v. State*, 214 S.W.3d 9, 16–17 (Tex. Crim. App. 2007)). Finally, the "cumulative force" of all the circumstantial evidence can be sufficient for a jury to find the accused guilty beyond a reasonable doubt, even if every fact does not "point directly and independently to the guilt of the accused." *See Powell v. State*, 194 S.W.3d 503, 507 (Tex. Crim. App. 2006).

Robbery occurs when a person, in the course of committing theft and with the intent to obtain or maintain control of the property, or intentionally, knowingly, threatens or places another in fear of imminent bodily injury or death. TEX PENAL CODE ANN. § 29.02(a)(2). Theft occurs when a person commits an offense by unlawfully appropriating property with the intent to deprive the owner of the property and without the owner's effective consent. *Id*. § 31.03(a), (b)(2).

B. Analysis

Appellant argues that Robertson's "testimony regarding the words that allegedly caused her to fear for her person were not consistent throughout the trial." According to appellant, the trial was the first time Robertson claimed he said she must cooperate or "I'll kill you." Although appellant concedes that Robertson testified that appellant threatened her, he asserts that, because on the surveillance video, there were "no loud threats, no[r] movements as if she was going to be harmed . . . the evidence is insufficient to show that Robertson was in fear of imminent bodily injury or death."

We disagree. The record contains evidence from which a rational factfinder could have found that Robertson was "in fear of imminent bodily injury or death." Robertson testified that appellant told her, during the June 22, 2015 robbery, "this is a stick up, give me whatever is in the register, do not try anything, or I will kill you." Robertson also testified that appellant told her that he had a weapon, and she was very "nervous and threatened," and "very scared." She testified that she "feared for [her] life." She "tried to stay as calm as [she] could" and waited to call her manager to call the police until appellant had left because of his threats.

Appellant attacks Robertson's credibility by arguing that—while Robertson testified at trial that appellant threatened to kill her—she did not tell the police that in so many words immediately after the robbery. Robertson was cross-examined

extensively on this point at trial and acknowledged that she had not expressly stated previously that appellant threatened to kill her.

While her trial testimony may have differed from post-robbery interviews, she never wavered on her assertion that she was frightened for her life. When Officer Inocencio was asked at trial whether Robertson told her that appellant threatened to kill her, she testified "no." Inocencio did testify, however, that she wrote in her incident report that Robertson had said she was afraid she was going to get hurt because appellant told her he had a weapon.

In *Boston v. State*, the Court of Criminal Appeals considered the sufficiency of the evidence to support a finding that a store clerk felt in fear of imminent bodily injury for purposes of sustaining an aggravated robbery conviction. 410 S.W.3d 321, 327 (Tex. Crim. App. 2013). The perpetrator reached across the counter and grabbed money out of the cash register when the clerk opened it to give him change. *Id*. at 326. Although the perpetrator actually had a gun and laid it out on the counter, the store clerk was too flustered to notice the firearm, and no verbal threat was made against her. *Id.* Nonetheless, the court held that "the conduct in reaching over the counter and taking money from the cash register was threatening because [the perpetrator's] actions were "a menacing indication of (something dangerous, evil, etc.)." *Id*. at 327. The court ultimately concluded that these threatening actions, coupled with the clerk's testimony that "she feared that she could have been injured

during the robbery" was sufficient to support a conviction for aggravated robbery. *Id*.

Despite police not finding a weapon in appellant's possession, appellant told Robertson that he did, and she testified that put her in fear of injury or death. *Howard v. State*, 333 S.W.3d 137, 140 (Tex. Crim. App. 2011) (recognizing it is enough that "the defendant is aware that his conduct is reasonably certain to place someone in fear, and that someone actually is placed in fear."). Because appellant has not established that no rational factfinder could have found that each essential element of the charged offense was proven beyond a reasonable doubt, we overrule his sixth point of error.

PRE-TRIAL IDENTIFICATION

In his second point of error, appellant complains that the trial court should have suppressed Robertson's identification of him because "it was tainted in the show-up identification by the display of all of the items recovered from Appellant next to him on the hood of the police car" and was "impermissibly suggestive."

A. Standard of Review and Applicable Law

"[A] pre-trial identification procedure may be so suggestive and conducive to mistaken identification that subsequent use of that identification at trial would deny the accused due process of law." *Barley v. State*, 906 S.W.2d 27, 32–33 (Tex. Crim. App. 1995) (citing *Stovall v. Denno*, 388 U.S. 293, 87 S. Ct. 1967 (1967)).

"[T]he admissibility of an in-court identification is determined by a two-step analysis: 1) whether the out-of-court identification procedure was impermissibly suggestive; and 2) whether that suggestive procedure gave rise to a very substantial likelihood of irreparable misidentification." *Santiago v. State*, 425 S.W.3d 437, 439–40 (Tex. App.—Houston [1st Dist.] 2011, pet. ref'd). "It is appellant's burden to prove the in-court identification is unreliable by proving both of these elements by clear and convincing evidence." *Santos v. State*, 116 S.W.3d 447, 451 (Tex. App.—Houston [14th Dist.] 2003, pet. ref'd) "An analysis under these steps requires an examination of the 'totality of the circumstances' surrounding the particular case and a determination of the reliability of the identification." *Santiago*, 425 S.W.3d at 440 (citing *Barley*, 906 S.W.2d at 33).

If the indicia of reliability outweigh the influence of an impermissibly suggestive pretrial identification, the identification testimony is admissible. *Santos*, 116 S.W.3d at 451.

We review the trial court's factual findings deferentially, but we review de novo the trial court's legal determination of whether the reliability of an in-court identification has been undermined by an impermissibly suggestive pretrial identification procedure. *See, e.g.*, *Loserth v. State*, 963 S.W.2d 770, 773–74 (Tex. Crim. App. 1998).

B. Analysis

Appellant filed a pre-trial motion to suppress the items found in his backpack. The written motion does not mention Robertson's out-of-court identification of appellant at the show-up, and it is not mentioned until the end of appellant's counsel's argument at the pre-trial motion-to-suppress hearing:

> You know, and I also find it egregious that they laid all this stuff out on the hood of their car, and then bring out the complaining witness and say, hey, by the way, is this the guy that stole all this stuff from you that you've laid right here on the front of the squad car? This is not appropriate.
>
> So the Defense did not file a motion to suppress the outcry identification, but we would like to add that into our motion to suppress; that the Court take into consideration the testimony and suppress everything that was found in the backpack, everything found in Mr. Milton's pocket, or pockets, and the out-of-court identification of Mr. Milton by the complainant.

Robertson was not called as a witness at the hearing, and the identification issue was not mentioned again. Instead, the focus of the hearing remained on the admissibility of the backpack contents. Appellant did not object to Robertson's in-court identification of appellant at trial. The State contends that appellant has waived any complaint about the identification procedures and, alternatively, that both Robertson's out-of-court and in-court identification of appellant was proper.

We need not address whether appellant has demonstrated that the show-up identification was impermissibly suggestive because we conclude that he has not established that the show-up identification procedure "gave rise to a very substantial likelihood of irreparable misidentification." *See, e.g.*, *Santos*, 116 S.W.3d at 451

(recognizing appellant's burden to demonstrate both that the out-of-court identification procedure was unduly suggestive and that it likely caused a misidentification).

"The non-exclusive factors that we consider include: (1) the witness's opportunity to view the defendant at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the criminal; (4) the witness's level of certainty at the time of confrontation; and (5) the length of time between the offense and the confrontation." *Nunez-Marquez v. State*, 501 S.W.3d 226, 235 (Tex. App.—Houston [1st Dist.] 2016, pet. ref'd). Application of these factors does not demonstrate a likelihood of misidentification by Robertson.

Robertson testified that she was able to view the defendant close-up not only on the night of the July 22, 2015 robbery, but also when he robbed her the night before, on July 21, 2015. On the night of the July 22 robbery, she gave the responding police officer an accurate description of appellant and his clothes. She testified that the perpetrator was wearing the same clothes both nights, and the surveillance video from both nights confirmed the robber was wearing the same clothes as appellant when he was apprehended. A very short amount of time passed between the July 22 robbery and the show-up identification.

We can also consider whether the witness has previously identified a different person as the perpetrator before identifying the defendant in a challenged show-up

procedure, as well as whether the witness has previously identified (or failed to identify) the defendant. *Santos*, 116 S.W.3d at 453. Robertson was unwavering in her identification of appellant both when first confronted with him during the show-up, and then again at trial.

We further note that he fails to argue, and the evidence does not establish, harm from the alleged error of admitting Robertson's in-court identification. *E.g.*, *Williams v. State*, 402 S.W.3d 425, 432 (Tex. App.—Houston [14th Dist.] 2013, pet. ref'd) (holding admission of in-court identification harmless, even if pretrial procedures were unduly suggestive and tainted witness's identification). In addition to Robertson's identification, there was significant other evidence in support of appellant's conviction. The jury viewed surveillance video of both the June 21, 2015 and June 22, 2015 robberies. Appellant matched the description Robertson gave the police immediately following the June 22 robbery. Appellant was apprehended a short time later, less than half a mile away, walking in the same direction as Robertson told police that the perpetrator had headed on foot. He matched the physical description given by Robertson, including the clothes he was wearing.

The person who robbed Robertson put the bills from the cash register into his pocket and had Robertson put her till's change in the CVS bag containing the merchandise he also stole. The backpack appellant was carrying when apprehended contained a CVS bag holding items identical to those stolen from CVS, as well as

loose change. The backpack also contained a slip of paper with appellant's name on it.

Because appellant has not demonstrate a likelihood that the police's show-up procedures created a likelihood of misidentification by Robertson, and because he has not argued nor established harm, we overrule appellant's second point of error.

EXTRANEOUS OFFENSE

In his third point of error, appellant argues that the trial court abused its discretion by admitting evidence that appellant allegedly robbed the CVS on June 21, 2015—the day before the robbery for which he was being tried.

A. Standard of Review and Applicable Law

The Texas Rules of Evidence provide that "evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." TEX. R. EVID. 404(b); *Johnston v. State*, 145 S.W.3d 215, 219 (Tex. Crim. App. 2004). Extraneous-offense evidence may be admissible for other purposes, however, such as showing identity. TEX. R. EVID. 404(b). *Johnston*, 145 S.W.3d at 219. An extraneous offense may be admissible to show identity, however, only when identity is at issue in the case. *Page v. State*, 213 S.W.3d 332, 336 (Tex. Crim. App. 2006). "Whether extraneous offense evidence has relevance apart from character conformity . . . is a question for the trial court." *Moses v. State*, 105 S.W.3d 622, 627 (Tex. Crim. App. 2003).

The standard of review for a trial court's ruling under the Rules of Evidence is abuse of discretion. *Sauceda v. State*, 129 S.W.3d 116, 120 (Tex. Crim. App. 2004). "If the ruling was correct on any theory of law applicable to the case, in light of what was before the trial court at the time the ruling was made, then we must uphold the judgment." *Id*. Appellate courts will uphold a trial court's ruling on the admissibility of evidence as long as the trial court's ruling was at least within the "zone of reasonable disagreement." *Montgomery v. State*, 810 S.W.2d 372, 391 (Tex. Crim. App. 1991) (op. on reh'g).

B. Analysis

Appellant argues that evidence about robbery the previous night at CVS was not relevant to a material, non-propensity issue under Rule 404(b), and that its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury under Rule 403.

The State argues that evidence about the prior robbery was admissible under Rule 404(b) because appellant made identity an issue, and that appellant did not preserve an objection under Rule 403.

We conclude that the trial court's decision to admit evidence about the previous day's robbery was within the zone of reasonable disagreement and, thus, not error. "The issue of identity may be raised by the defendant during cross-examination of the State's witnesses." *Lane v. State*, 933 S.W.2d 504, 519 (Tex.

Crim. App. 1996). "For instance, the issue of identity is raised when the state's only identifying witness is impeached by cross-examination concerning a material detail of the witness' identification." *Id*. (citing *Siqueiros v. State*, 685 S.W.2d 68, 71 (Tex. Crim. App. 1985). "That the impeachment was not particularly damaging or effective in light of all of the evidence presented is not the question. The question is whether impeachment occurred that raised the issue of identity." *Segundo v. State*, 270 S.W.3d 79, 86 (Tex. Crim. App. 2008).

While cross-examining Robertson, appellant's attorney questioned her identification of appellant. He made frequent references to the fact that she was only shown one suspect and to the alleged vagueness of her description:

> Q. Okay. So they didn't bring, like, a line up of six people to look at, is what I'm asking?
>
> A. No, just one.
>
> Q. And after they — once they got him out, was the gentlemen wearing blue jeans?
>
> A. Yes. He had on the same blue collared shirt, the jeans, and the tennis shoes. The only difference was he had took off his glasses.
>
> Q. Okay. So the person you saw had on glasses?
>
> A. Right.
>
> Q. And the person they brought back did not have on glasses?
>
> A. Right.
>
> Q. And you would agree with me that wearing blue jeans is very common, correct?
>
> A. Correct.
>
> Q. And you would agree with me that a dark blue collared shirt is very common, correct?

A. Right.

Q. So it's not like this was some unique outfit, right?

A. Correct.

Q. Would you also agree with me that about 6-foot and African American is a fairly vague description?

A. Correct, it's vague.

Q. When they brought the gentlemen back in the car, he was handcuffed?

A. Yes, he was handcuffed when they got him out.

Q. Handcuffs kind of make you think of criminals, right?

A. No.

Appellant's counsel also intimated during his cross-examination of Robertson that the items recovered from appellant's backpack might not have been stolen from CVS, again because the items were common:

Q. And did [the police] also bring a light, blue backpack to the scene?

A. Right.

Q. Did you see them pull all the stuff out of the backpack?

A. Yes, I did.

Q. And when you saw them pull all the stuff out of the backpack, you see beer, right?

A. Yes. Everything that he took out of the store, I seen it.

Q. You saw beer?

A. Right.

Q. And you saw chips?

A. Right. Candy.

Q. And sodas?

A. Soda, yes.

Q. You saw all that stuff. Do you know the brand name of the chips?

A. I don't know the brand name of the chips because all of it was in the CVS bag that he took from 2 the store I was working at.

Q. Do you know brand name of the soda?

A. Could have been a Dr. Pepper, anything.

Q. Okay. So let's talk about that: Dr. Pepper, very common for people to have Dr. Pepper, right?

A. Right.

Q. Also very common for people to have chips, right?

A. Uh-huh.

Q. Is that a yes?

A. Yes.

Q. It's not uncommon for a grown person to have beer as well, correct?

A. Correct.

Q. So they brought back someone with this backpack, and you end up saying, yes, that's the CVS stuff?

A. Yes.

Q. So when you saw that, you believed that the police had the right person, right?

A. Yes, they did.

The trial court agreed with the State that cross-examination of Robertson brought identity into issue.

In his brief here, appellant insists that because he did not use the word "identity," these questions did not go to identity, but rather "to show that blue jeans, Dr. Pepper, and chips are common items." He argues that there "was no implication that because these three items are common that Robertson's identification of

Appellant was less credible." Instead, he asserts, his counsel's questions "merely pointed out that some of the items found in Appellant's backpack and one item of clothing he was wearing were common."

Admissibility under 404(b), however, does not turn on use of the word "identity." Courts have recognized the issue of identity may be raised during cross-examination of a State's witness by (1) impeaching on a material detail of the witness's identification, (2) questioning the certainty of the witness's identification, (3) questioning the witness's capacity to observe (i.e., maybe mistaken), or (4) questioning the witness's truthfulness (maybe lying). *E.g.*, *Price v. State*, 351 S.W.3d 148, 151 (Tex. App.—Fort Worth 2011, pet. ref'd).

Appellant also argues that Robertson's testimony that "she was sure he committed the offense the day before did not strengthen her identification of him the day of the offense for which Appellant was on trial." But appellant's counsel called into question Robertson's recognition of appellant, and Robertson testified that (1) the robberies were committed by the same person, and (2) she was able to get a good look at appellant during the earlier robbery because he did not have glasses on.

The trial court properly granted appellant's request for a limiting instruction restricting the jury's consideration of evidence about the extraneous act (i.e., July 21, 2015 robbery) to the issue of identification. The court did not abuse its discretion by concluding that appellant raised the issue of identity when cross examining

Robertson and that appellant's impeachment of Robertson rendered the extraneous offense admissible under Rule 404(b).

Appellant also argues the trial court erred by admitting evidence about the previous robbery under Rule 403 of the Texas Rules of Evidence because the probative value of the extraneous-offense evidence was substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. Because this complaint was not preserved in the trial court, we do not address it on appeal.

We overrule appellant's third point of error.

EVIDENCE ABOUT PAROLE STATUS

In his fourth point of error, appellant argues that he received ineffective assistance from trial counsel because she failed to object to evidence that he was on parole and, without that evidence, the appellant would not have been found guilty.

A. Standard of Review and Applicable Law

We consider claims of ineffective assistance of counsel under the two-prong test adopted in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052 (1984). To prevail on an ineffective assistance of counsel claim, appellant must show that (1) counsel's performance was deficient, meaning it fell below an objective standard of reasonableness, and (2) the deficiency prejudiced the defendant, meaning there was a reasonable probability that, but for the counsel's deficient performance, the

results of the trial would have been different. *Id*.; *Ex parte Napper*, 322 S.W.3d 202, 246, 248 (Tex. Crim. App. 2010). The burden is on appellant to prove by a preponderance of the evidence that counsel was ineffective. *See McFarland v. State*, 928 S.W.2d 482, 500 (Tex. Crim. App. 1996).

The first prong of *Strickland* requires that the challenged acts or omissions of counsel fall below the objective standard of professional competence under prevailing professional norms. *Perez v. State*, 310 S.W.3d 890, 893 (Tex. Crim. App. 2010). Appellate courts are highly deferential to trial counsel and avoid evaluating counsel's conduct in hindsight. *Ingham v. State*, 679 S.W.2d 503, 509 (Tex. Crim. App. 1984). Thus, courts must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Strickland*, 466 U.S. at 689, 104 S. Ct. 2065.

The second prong of *Strickland* requires a reasonable probability that the outcome of the case would have been different. *Id*. at 694, 104 S. Ct. at 2068. A reasonable probability is a probability sufficient to undermine confidence in the outcome, meaning that counsel's errors must be so serious that they deprive appellant of a fair trial. *Smith v. State*, 286 S.W.3d 333, 340–41 (Tex. Crim. App. 2009).

Allegations of ineffectiveness must be firmly founded in the record, and the record must affirmatively demonstrate the ineffectiveness. *Mallett v. State*, 65 S.W.3d 59, 63 (Tex. Crim. App. 2001). "In the rare case in which trial counsel's ineffectiveness is apparent from the record, an appellate court may address and dispose of the claim on direct appeal." *Lopez v. State*, 343 S.W.3d 137, 143 (Tex. Crim. App. 2011). When the record is silent as to the reasoning behind an alleged deficiency by trial counsel, "we will assume that counsel had a strategy if any reasonable sound strategic motivation can be imagined." *Id.*; *see also Garcia v. State*, 57 S.W.3d 436, 440 (Tex. Crim. App. 2001) ("[I]n the absence of evidence of counsel's reasons for the challenged conduct, an appellate court . . . will not conclude the challenged conduct constituted deficient performance unless the conduct was so outrageous that no competent attorney would have engaged in it.").

B. Analysis

Outside the presence of the jury, the State and appellant's attorney came to an agreement about admitting into evidence various items found in appellant's backpack when he was detained. One such item was State's Exhibit 19, a piece of paper designating a time and place for appellant's appointment with a parole officer. Appellant's counsel agreed to its admission, subject to the State's promise to redact references to parole:

> [State's counsel]: Judge, . . .[o]ne of the things says he is on parole. The State is going to redact that, so all it says on there is his

> name. We just want to make that abundantly clear before it happened. The parole information is going to be redacted, and we'll leave everything else. The sentence at the bottom, failure to comply with warrant, we'll redact that as well. . . . I just want it cleared up before it gets in front of the jury. I don't want them to know he had been just released.

Exhibit 19 as admitted, however, contained an unredacted portion for a "Parole Officer/Parole Social Worker" to sign. Appellant asserts that, despite his trial counsel's inspecting the redacted document, she did not notice or object to the reference to a parole officer at the bottom of the document.

In addition, during his direct examination, Officer Huckabee made a reference to "parole papers" being found in appellant's backpack:

> Q. Did you find anything else at that time in the backpack?
>
> A. I believe in the outer pocket of the backpack on the outside there was a pair of reading glasses. He had some clothing items inside the main compartment of the backpack as well. I believe he had some parole papers inside the backpack as well.

Appellant's counsel did not object to the reference.

Appellant raised his trial counsel's alleged ineffective assistance in a motion for new trial, which attached an affidavit from his trial counsel. Neither the motion nor the affidavit mentioned the unredacted portion of Exhibit 19, but both discussed counsel's failure to object to Officer Huckabee's parole reference. Counsel's affidavit explained that she did not want to draw undue attention to the reference:

> During the guilt innocence phase of trial, an officer sponsored by the State, during the State's questioning, provided evidence that Mr. Milton

> was on parole. I did not object as the damage was already done and I thought it best not to highlight the testimony for the jury.

Appellant acknowledges that this "could be considered sound trial strategy," but claims that "in light of the failure to object to the parole information on State's Exhibit 19, her trial strategy is no longer valid." Appellant further contends that, but for the jury being aware of his prior incarceration, the result of the trial would have been different.

The State responds that counsel gave a valid trial strategy for her failure to object to Huckabee's testimony, which precludes a finding that failure to object amounted to deficient performance. We agree. *See, e.g.*, *Schiffert v. State*, 257 S.W.3d 6, 21 (Tex. App.—Fort Worth 2008, pet. ref'd) (valid trial strategy to not object to witness's reference to defendant being on parole to avoid emphasizing or calling jury's attention to comment).

As for Exhibit 19, the State points out that we are not privy to counsel's thought process because her failure to object to the unredacted reference to a parole officer was neither addressed in appellant's motion for new trial, nor in trial counsel's affidavit. In addition, the State argues that appellant cannot demonstrate harm, given that (1) there is no evidence that the jury saw Exhibit 19, as it was not described to the jury and there is no indication it was published to the jury, and (2) the reference to parole in Exhibit 19 was fleeting and "minimal in comparison to the

rest of the evidence pointing to appellant as the robber that it could not have had an effect on the jury."

Given appellant counsel's vigorous trial defense, as well as Robertson's eyewitness testimony, the surveillance tapes, and the stolen items found in appellant's backpack when he was apprehended in close proximity to the robbery, we cannot conclude that counsel's lack of objection to a reference to parole on Exhibit 19 (which may or may not have been seen by the jury) amounted to deficient representation or that it its redaction would have likely have led to a different result. *E.g.*, *Prejean v. State*, 32 S.W.3d 409, 411 (Tex. App.—Houston [14th Dist.] 2000, no pet.) ("Under the limited circumstances of this case, and given the overwhelming evidence of appellant's guilt, we do not believe that this omission, isolated in a record of generally competent representation, amounts to ineffective assistance of counsel . . . []or supports a reasonable probability that, but for this error, a different outcome might have been achieved.").

We overrule appellant's fourth point of error.

LESSER INCLUDED OFFENSE

In his fifth point of error, appellant contends that the trial court erred in denying his request that the jury be charged on theft as a lesser-included-offense.

A. Standard of Review and Applicable Law

The Texas Code of Criminal Procedure provides, "[i]n a prosecution for an offense with lesser included offenses, the jury may find the defendant not guilty of the greater offense, but guilty of any lesser included offense." TEX. CODE CRIM. PROC. art. 37.08. It also states that an offense is a lesser-included offense if

> (1) it is established by proof of the same or less than all the facts required to establish the commission of the offense charged;
>
> (2) it differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property, or public interest suffices to establish its commission;
>
> (3) it differs from the offense charged only in the respect that a less culpable mental state suffices to establish its commission; or
>
> (4) it consists of an attempt to commit the offense charged or an otherwise included offense.

TEX. CODE CRIM. PROC. art. 37.09.

The determination of whether a lesser-included-offense instruction requested by a defendant must be given requires a two-step analysis. *Rousseau v. State*, 855 S.W.2d 666, 672–73 (Tex. Crim. App. 1993); *Royster v. State*, 622 S.W.2d 442, 446 (Tex. Crim. App. 1981) (plurality op. on reh'g). The first step asks whether the lesser-included offense is included within the proof necessary to establish the offense charged. *McKithan v. State*, 324 S.W.3d 582, 587 (Tex. Crim. App. 2010). We must compare the statutory elements and any descriptive averments in the indictment for the greater offense with the statutory elements of the lesser offense. *Ex parte Amador*, 326 S.W.3d 202, 206 n.5 (Tex. Crim. App. 2010); *Ex parte Watson*, 306 S.W.3d 259, 263 (Tex. Crim. App. 2009). Because "a defendant cannot

be held to answer a charge not contained in the indictment brought against him," the evidence produced at trial does not determine the first step. *See Watson*, 306 S.W.3d at 263.

The second step of the lesser-included-offense analysis is to determine if there is some evidence from which a rational jury could acquit the defendant of the greater offense while convicting him of the lesser-included offense. *Guzman v. State*, 188 S.W.3d 185, 188–89 (Tex. Crim. App. 2006). The evidence must establish the lesser-included offense as "a valid rational alternative to the charged offense." *Segundo v. State*, 270 S.W.3d 79, 90–91 (Tex. Crim. App. 2008). We review all of the evidence presented at trial. *Hayward v. State*, 158 S.W.3d 476, 478–79 (Tex. Crim. App. 2005); *Rousseau*, 855 S.W.2d at 673.

B. Analysis

The trial court refused appellant's request that the jury be charged with theft as a lesser-included offense of robbery. Appellant argues that there is evidence that "refutes or negates that Appellant threatened Robertson or placed her in fear of imminent bodily injury or death." Accordingly, he argues, there is evidence from which the jury could have rationally convicted appellant of the lesser-included-offense of theft, rather than robbery.

The State responds that a charge of theft would have been improper, because there was no evidence that appellant only committed theft, but did not threaten Robertson or place her in fear of imminent bodily injury or death. We agree.

In performing our analysis, we "consider all admitted evidence without regard to the evidence's credibility or potential contradictions or conflicts." *Roy v. State*, 509 S.W.3d 315, 317 (Tex. Crim. App. 2017). "Although little evidence is needed to trigger an instruction, the relevant evidence must affirmatively 'raise[] the lesser-included offense and rebut[] or negate[] an element of the greater offense.'" *Roy*, 509 S.W.3d at 317 (quoting *Cavazos v. State*, 382 S.W.3d 377, 385 (Tex. Crim. App. 2012)).

Appellant's argument is premised on the speculation that the jury could have believed only part of Robertson's testimony, i.e., believed her testimony that appellant stole items from CVS while disbelieving that—in the course of doing so—he threatened her or placed her in fear of imminent bodily injury or death. However, "it is not enough that the jury may disbelieve crucial evidence pertaining to the greater offense, but rather, there must be some evidence directly germane to the lesser-included offense for the finder of fact to consider before an instruction on a lesser-included offense is warranted." *Sweed v. State*, 351 S.W.3d 63, 68 (Tex. Crim. App. 2011).

Robertson's uncontradicted testimony was that appellant told her that he had a weapon, and that she was scared that he might injure or kill her. Appellant points to evidence of the ways in which he did *not* threaten her, focusing on the fact that he did not display a gun, did not make threatening gestures, and did not reach into his pockets. But this is not affirmative evidence contradicting the evidence of the ways that he *did* threaten her. Because appellant cites no evidence negating the manner in which Robertson testified that he threatened her nor any affirmative evidence that he is guilty only of theft, the trial court did not err in denying his request for a jury instruction on the lesser-included offense of theft.

We overrule appellant's fifth point of error.

CLOSING ARGUMENT VIDEO

In his first point of error, appellant argues that the trial court abused its discretion in allowing the State "to play a video of a lion attempting to maul an infant during its closing argument."

A. Standard of Review and Applicable Law

A trial court's ruling on an objection to improper jury argument is reviewed for abuse of discretion. *See Garcia v. State*, 126 S.W.3d 921, 924 (Tex. Crim. App. 2004). The law provides for, and presumes, a fair trial, free from improper argument by the State. *Long v. State*, 823 S.W.2d 259, 267 (Tex. Crim. App. 1991). Proper jury argument generally must encompass one of the following general areas: (1) a

summation of the evidence presented at trial; (2) a reasonable deduction drawn from that evidence; (3) an answer to the opposing counsel's argument; or (4) a plea for law enforcement. *Guidry v. State*, 9 S.W.3d 133, 154 (Tex. Crim. App. 1999); *Sandoval v. State*, 52 S.W.3d 851, 857 (Tex. App.—Houston [1st Dist.] 2001, pet. ref'd). To determine whether a party's argument properly falls within one of these categories, we must consider the argument in light of the entire record. *Sandoval*, 52 S.W.3d at 857.

Determining harm in improper argument cases requires balancing the following three factors: "(1) severity of the misconduct (prejudicial effect), (2) curative measures, and (3) the certainty of conviction/punishment absent the misconduct." *Klock v. State*, 177 S.W.3d 53, 65 (Tex. App.—Houston [1st Dist.] 2005, pet. ref'd) (citing *Mosley v. State*, 983 S.W.2d 249, 259 (Tex. Crim. App. 1998)).

B. Analysis

The State began its closing argument in the punishment phase by playing, over appellant's objection, a video clip of a lion aggressively trying to gain access to a baby that was protected by a glass wall. The State then described the analogy between the video and appellant's sentence, intimating that keeping appellant confined in prison protected society just as the glass wall protected the child from the lion:

> Let me talk to you about that video. That lion was cute, and it was laughable, and it was funny because he's behind that piece of glass. That motive of that lion is never changing, never changing. It's innate. Given the opportunity, remove that glass, it's no longer funny, it's a tragedy. That's what's going to happen, that's a tragedy. That's what going on with this case.
>
> . . . .
>
> Nothing funny about that lion when he's outside that piece of glass, that's a tragedy. Nothing funny when Damon Milton is outside of prison, that's a tragedy.
>
> . . . .
>
> When you've got five [prior convictions] and another one reduced, quit giving him chances, quit removing that glass. Keep that glass there, remove the opportunity, and send him to prison for every second that he deserves.

Appellant argues that use of the video to compare the prospect of appellant's presence outside of prison to that of a lion that would be mauling an infant was inflammatory and suggested to the jury an improper basis for determining appellant's punishment.

The State responds that (1) colorful speech and analogies may be used to convey the idea that a defendant will recommit a crime and place upon the jury the responsibility to prevent future crime through punishment, (2) the State's use of the video was a permissible summation of the evidence, (3) the State was responding to the defendant's closing argument, (4) the State's use of the video was an appropriate plea for law enforcement.

The State also points out that this Court has previously held that reference to the same lion and baby video was a permissible analogy relevant to a plea for law enforcement. *See Thompson v. State*, 01-14-00862-CR, 2015 WL 9241691, at *3 (Tex. App.—Houston [1st Dist.] Dec. 17, 2015, no pet.) (mem. op., not designated for publication). In that case, the State did not play the video, but described it:

> I don't know if any of you saw that[;] it was in a video back on CNN . . . where it was a mother, who had her little baby, and she was holding—she was at the zoo—and she [was] holding this baby near the lion cage. And there was a clear plastic barrier between the baby and the lion, and the baby is sitting there dancing, moving around, and the lion comes out. It's gnawing right there. Everybody thinks, oh, it's hilarious. It's cute. It's so great mom's filming it, sends it to CNN, everybody watches it. But was that really cute? What would have happened if the glass barrier was not there? That baby is a goner. Because the motivation of a lion, a lion is a killer. A lion is a predator. That lion would have eaten that baby and nothing would have changed.
>
> The Defendant is a killer. He is a predator.

Id. We held that the "use of the analogy of appellant as a lion that must remain caged" is "in the context of this case, proper as [a] plea[] for law enforcement." *Id*.

Finally, the State argues that, even if the trial court abused its discretion in allowing the tape to be played, appellant has not demonstrated harm.

We reject the State's argument that the video represented a visual aid in the summation of the evidence. Thus, we are presented with the question: Was the video within the permissible bounds of responding to appellant's arguments or making a plea for law enforcement?

In *Thompson*, we explained that that while some cases have found comparisons of defendants to animals during the punishment phase of trial permissible, other cases have found such analogies to be improper when not warranted on the record. *Id*. Whether such a reference is appropriate is determined on a case-by-case basis dependent upon context. *Id*. ("Texas law has made it clear that context is highly important when deciding whether a closing argument is proper or improper." (citing *Burns v. State*, 556 S.W.2d 270, 285 (Tex. Crim. App. 1977)). In *Thompson*, the defendant shot at two people, killing one of them, as the victims were running away from the defendant. *Id*. In that context, we held that the State's comments, "[D]o we want to remove that clear plastic barrier between the lion and the baby? Do we want to do that?" were part of the prosecutor's exhortation for the jury to give appellant a lengthy sentence so as to keep the community safe. *Id*.

During the punishment phase of this case, the jury was presented evidence of appellant's numerous prior convictions, which all involved theft to some degree, including forgery, unauthorized use of a motor vehicle, theft from a person, and robbery. Appellant's counsel argued that, while appellant has an extensive criminal history, it is not a violent one. She also argued that he has already been punished for all the past crimes highlighted by the State. Finally, she pleaded for leniency, stressing that Robertson was not injured in this robbery, "I understand he messed up, I get that, but how long are we going to have him pay for this situation where no

weapon was used, she wasn't touched, she wasn't bruised, she wasn't scratched, she wasn't hit."

The State's argument that—given the opportunity to reoffend—appellant would continue to commit crimes was a response to the theme of appellant's closing argument, i.e., that appellant has paid for his crimes and should be given a lighter sentence and another chance. The State's analogy between the glass being necessary to restrain the lion and jail being necessary to restrain appellant was a plea for law enforcement and protection of the community in light of the sheer volume of appellant's prior offenses.

We note, however, that *Thompson* and other cases permitting comparisons of defendants to predatory animals were cases involving murder or other violent behavior. The appropriateness of the same analogy in this case is tenuous given the nature of the crime. Our resolution of this issue rests on the entire context of the case; if appellant had not had a sustained record of reoffending upon release from confinement, and if appellant's attorney had not pleaded for a lower sentence to give appellant another chance in society, use of the video may well have been improper. Given the context, we hold the trial court did not abuse its discretion by overruling appellant's objection to the use of the video during the State's closing argument.

We overrule appellant's first issue.

CONCLUSION

We affirm the trial court's judgment.

Sherry Radack
Chief Justice

Panel consists of Chief Justice Radack and Justices Keyes and Massengale.

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