Opinion issued November 29, 2018

In The

Court of Appeals

For The

First District of Texas

NO. 01-17-00572-CR

CLENTON MOTON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 179th District Court
Harris County, Texas
Trial Court Case No. 1455728

MEMORANDUM OPINION

Clenton Moton appeals his conviction for aggravated assault with a deadly weapon. He argues that the evidence was legally insufficient to support his conviction; the trial court wrongly overruled his motions to suppress; and he

received ineffective assistance of counsel because his counsel did not object to in-court identifications. We disagree and affirm the judgment of the trial court.

Background

Clenton Moton and Nathan Henderson waited together, in a holding cell with 8 to 16 others, to be booked into the Harris County Jail. As time passed, Henderson fell asleep. He woke to Moton cutting his neck with a scalpel. His hand and chest had also been cut. Holding his throat while blood gushed from his wounds, Henderson ran to the cell door and banged until someone opened it.

Officer J. Bell, a detention officer working in the jail, opened the door. Henderson reached out, his throat spurting blood. Officer Bell escorted Henderson into the clinic.

Dr. Chris Bedford, the physician on duty, attended to Henderson. Dr. Bedford described Henderson's bleeding as arterial, or pulsing. The cut went through Henderson's muscle so Dr. Bedford could see Henderson's trachea. It appeared that Henderson's neck had been carved. Henderson expressed concern that he was "going to die." Medical personnel jumped into action, putting him on a stretcher, giving him IV fluids, and calling paramedic services to rush him to the hospital.

Dr. Bedford classified the injury as a life-threatening and noted that Henderson lost a liter of blood before the ambulance arrived. Henderson was hospitalized in intensive care and remained in the hospital for eight days. When he

woke up in the hospital, he initially could not eat and had stitches in his hand, chest, and throat.

After Officer Bell helped Henderson to the clinic, Bell returned to the holding cell. Moton had blood on his clothes and had been standing near Henderson. A deputy found the head of a scalpel on a cement bench in the holding cell; the handle was in a trashcan in the cell. The scalpel was the type available to doctors in the medical clinic, where Moton had been treated for back and joint pain about ten minutes before the stabbing. While being treated, Moton was able to respond to the doctor's questions, and he did not have blood on his clothing.

Later in the morning, Detective K. Cote and Detective B. O'Neal interviewed each of the inmates who had been in the holding cell, and five of them said that Moton was "the one that did it." Detective Cote then interviewed Moton. After waiving his legal rights, Moton confessed to Detective Cote. At first he said that he did not remember the incident, but then he admitted taking the scalpel from a trash can. He told Detective Cote that he did not know Henderson. He explained that someone told him a man named Smiley had committed murders and was going to "get him." He believed Henderson was Smiley because Henderson smiled at him.

Moton was charged with aggravated assault with a deadly weapon. He was found competent to stand trial. At trial, in addition to witnesses testifying to the facts above, the jury heard the victim and a fellow cellmate, Modest Welch, identify

Moton. Dr. Diane Bailey testified as an expert for the defense, explaining that Moton has a low IQ. And the defense called Moton's mother.

The jury found Moton guilty, he pleaded true to an enhancement, and the court sentenced him to 15 years' imprisonment. This appeal followed.

Discussion

Moton raises four issues on appeal. He contends that (1) insufficient evidence supported the verdict, (2) the court erred in denying his motion to suppress his statement to the police, (3) the court erred in denying his motion to suppress the identification offered by Welch, one of the men who was waiting with Moton and Henderson in the holding cell during the incident, and (4) his counsel was ineffective for failing to object to in-court identifications. We address each in turn.

Sufficiency of the Evidence

Moton challenges the sufficiency of the evidence to support his conviction. He asserts that no rational factfinder could believe beyond a reasonable doubt that he committed aggravated assault with a deadly weapon. We disagree.

A. Standard of Review

Every criminal conviction must be supported by legally sufficient evidence as to each element of the offense. *Jackson v. Virginia*, 443 U.S. 307, 315, 99 S. Ct. 2781, 2787 (1979); *Adames v. State* 353 S.W.3d 854, 859 (Tex. Crim. App. 2011). The State must prove each element of the offense beyond a reasonable doubt. *Merritt*

v. State, 368 S.W.3d 516, 525 (Tex. Crim. App. 2012). A criminal conviction may be based upon circumstantial evidence. *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007).

We review all of the evidence in the light most favorable to the verdict and assess whether a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson*, 443 U.S. at 319, 99 S. Ct. at 2789; *Brooks v. State*, 323 S.W.3d 893, 902 (Tex. Crim. App. 2010). We consider all evidence before the jury, whether it was admissible or inadmissible. *See Thomas v. State*, 444 S.W.3d 4, 8 (Tex. Crim. App. 2014). The jury is the sole judge of credibility and the weight to be attached to the testimony of witnesses. *Jackson*, 443 U.S. at 319, 99 S. Ct. at 2789. We permit juries to draw multiple reasonable inferences from facts as long as each is supported by the evidence presented at trial. *Id.* When the record supports conflicting inferences, we presume that the jury resolved the conflicts in favor of the verdict and defer to that determination. *Id.* at 326, 99 S. Ct. at 2793.

A person commits assault if the person intentionally, knowingly, or recklessly causes bodily injury to another. TEX. PENAL CODE § 22.01(a)(1). A person commits aggravated assault if the person causes serious bodily harm or uses or exhibits a deadly weapon during the commission of an assault. *Id.* §22.02(a).

B. Analysis

The evidence showed that Nathan Henderson suffered numerous deep incisions on his body. Henderson and Welch testified that Moton used a scalpel to cut Henderson. The head of a scalpel was found on the cement bench inside the holding cell where the attack occurred, and it appeared to have blood on it. The same type of scalpel was available in the medical clinic nearby, and a doctor at the jail testified that Moton was a patient in the clinic not long before the attack. Moton admitted that he got a scalpel out of the trash and attacked Henderson because Henderson smiled at him, and he had heard that someone called "Smiley" had murdered others.

Moton argues that a jury could not have found him guilty because Henderson identified him only in court (rather than immediately after the incident), there was no DNA testing, and other inmates also had blood on them after the attack. But considering the totality of the circumstances, the evidence was sufficient. DNA testing was not required to link the appellant to the scalpel. *See Delacerda v. State*, 425 S.W.3d 367, 382 (Tex. App.—Houston [1st Dist.] 2011, pet. ref'd) (stating that sufficient evidence can support a murder conviction even in the absence of physical evidence including DNA, fingerprints, and the weapon). In fact, Detective Cote explained that DNA testing would not have aided the investigation because only the victim was cut. Similarly, fingerprint evidence could have shown that Moton

touched the scalpel, but Moton admitted to detectives that he touched it in taking it out of the trash. The jury was free to assess credibility. *See Merritt*, 368 S.W.3d at 525 (jury is the sole judge of credibility and of the weight given to any evidence presented).

Viewing the evidence in the light most favorable to the verdict, we hold that sufficient evidence supported Moton's conviction.

Motion to Suppress Moton's Statement

Moton also contends that the trial court erred in denying his motion to suppress the statement he made to Detective Cote. Moton argues that he offered his statement without knowingly, intelligently, and voluntarily waiving his rights against self-incrimination and to counsel. We disagree.

A. Standard of Review

We review a trial court's denial of a motion to suppress under a bifurcated standard of review. *Turrubiate v. State*, 399 S.W.3d 147, 150 (Tex. Crim. App. 2013). We review the trial court's factual findings for an abuse of discretion and the trial court's application of the law to the facts de novo. *Id.* With regard to the motion, the trial court is the sole and exclusive trier of fact and the judge of credibility. *Maxwell v. State*, 73 S.W.3d 278, 281 (Tex. Crim. App. 2002).

When the trial court does not issue findings of fact, findings that support the trial court's ruling are implied if the evidence, viewed in a light most favorable to

the ruling, supports those findings. *See State v. Kelly*, 204 S.W.3d 808, 818–19 (Tex. Crim. App. 2006). We give almost total deference to the trial court's determination of historical facts, particularly when the trial court's fact findings are based on an evaluation of credibility and demeanor. *Valtierra v. State*, 310 S.W.3d 442, 447 (Tex. Crim. App. 2010). We sustain the trial court's ruling if it is reasonably supported by the record and is correct on any theory of law applicable to the case. *Id.*

B. Analysis

The United States and Texas Constitutions both protect a criminal defendant from being compelled to serve as a witness against himself. They also enshrine the right to the assistance of counsel. U.S. CONST. amend. V ("No person shall be held to answer for a capital, or otherwise infamous crime . . . nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . ."); *Id*. amend. VI. ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . and to have the Assistance of Counsel for his defen[s]e."); TEX. CONST. Art. 1, section 10 ("He shall not be compelled to give evidence against himself, and shall have the right of being heard by himself or counsel, or both, shall be confronted by the witnesses against him and shall have compulsory process for obtaining witnesses in his favor . . . .").

Article 38.22 of the Code of Criminal Procedure establishes procedural safeguards for securing the privilege against self-incrimination and the right to counsel. TEX. CODE CRIM. PROC. art. 38.22. As relevant, it provides that no oral statement of an accused made as a result of custodial interrogation shall be admissible against the accused in a criminal proceeding unless (1) the statement was recorded and (2) prior to the statement but during the recording, the accused was warned of his rights and knowingly, intelligently, and voluntarily waived those rights. TEX. CODE CRIM. PROC. art. 38.22, § 3. The warning must inform a defendant of the following rights:

> (1) [H]e has the right to remain silent and not make any statement at all and that any statement he makes may be used against him at his trial;
>
> (2) any statement he makes may be used as evidence against him in court;
>
> (3) he has the right to have a lawyer present to advise him prior to and during any questioning;
>
> (4) if he is unable to employ a lawyer, he has the right to have a lawyer appointed to advise him prior to and during any questioning; and
>
> (5) he has the right to terminate the interview at any time[.]

TEX. CODE CRIM. PROC. art. 38.22, § 2; *see also Herrera v. State*, 241 S.W.3d 520, 526 (Tex. Crim. App. 2007) (warnings set forth in the Texas Code are required during a custodial interrogation and are identical to *Miranda* warnings, with the exception of an added requirement that an accused "has the right to terminate the interview at any time").

Moton does not argue that he was not given the required warnings. He instead argues that he did not knowingly, intelligently, and voluntarily waive his rights. The State bears the burden of showing his that his waiver was knowing, intelligent, and voluntary. *Joseph v. State*, 309 S.W.3d 20, 24 (Tex. Crim. App. 2010).

Precedent dictates that a defendant's waiver of his rights does not have to assume any particular form. *Id.* at 24–25. No express waiver is required. *Id.* Instead, the waiver may be inferred from a defendant's actions and words. *Id*. Nevertheless, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. *Id.* at 25 (quoting *Moran v. Burbine*, 475 U.S. 412, 421, 106 S. Ct. 1135, 1141 (1986)). The waiver must have been made with full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. *Id*. And "[o]nly if the 'totality of the circumstances surrounding the interrogation' reveals both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived." *Id.*

Here, outside the presence of the jury, the trial court heard argument and evidence relating to Moton's motion to suppress. First, the court heard an audio recording of Detectives Cote and Neal interviewing Moton. The recording includes the required warnings. It shows that, when asked whether he understood, Moton

responded "I think so," and Detective Cote can be heard confirming that Moton meant "yes." Moton then elected to continue with the interview.

Detective Cote also testified. He explained that he interviewed Moton on the date of the incident. Detective Cote averred that he did not threaten or coerce Moton into giving a statement. He testified that Moton understood the warnings and questions asked, and that Moton's answers were responsive to his questions. Detective Cote also testified that when Moton responded "I think so," Cote clarified that Moton meant "yes," and Moton proceeded with the interview.

The court heard from Dr. Steven Coats, lead psychologist for the Competency and Sanity Evaluation Unit in the Harris Center for Mental Health. Coats evaluated Moton just a few months after the incident and found him competent. At the suppression hearing, Coats also stated his belief that a mild intellectual disability does not necessarily prevent a person from understanding basic questions.

Dr. Diane Bailey, a licensed psychologist, testified for Moton. More than a year after the assault, she evaluated Moton's intelligence and cognitive abilities. She opined, based on her evaluation of Moton's verbal reasoning and comprehension skills, that he did not understand the *Miranda* warnings. Her reasoning was that he must not have understood the warnings because he did not ask for an attorney and instead gave a statement. On cross-examination, she admitted that she had not heard

Moton's entire 37-minute interview—and she did not listen to all of the discussion in which Moton received warnings and waived his legal rights.

The trial court denied the motion to suppress and announced several findings on the record. The court found that Detective Cote read the warnings in a normal, rather than hurried, manner. The court also found that Moton understood the warnings, admitted he understood them, and voluntarily chose to speak with detectives. The trial court explained that the officer clarified Moton's "I think so" by asking if that meant "yes." Moton then elected to continue and give a statement without invoking his right to counsel.

The question before us is whether the trial court committed reversible error in concluding that Moton waived his rights "knowingly, intelligently, and voluntarily." *See Miranda v. Arizona*, 384 U.S. 436, 444, 86 S. Ct. 1602, 1612 (1966). It did not. The trial court was the sole trier of fact and judge of the credibility of the suppression hearing witnesses. *Maxwell*, 73 S.W.3d at 281; *Galvan-Cerna v. State*, 509 S.W.3d 398, 411 (Tex. App.—Houston [1st Dist.] 2014, no pet.). The trial court acted within its discretion in making its determinations that the warnings were given to Moton in a normal, rather than hurried manner, and that Moton understood the warnings, admitted he understood them, and voluntarily chose to speak with Detective Cote. The totality of the circumstances supports the trial court's determinations, and the trial court did not err in applying the law to the facts.

We affirm the trial court's denial of Moton's motion to suppress. *See Joseph*, 309 S.W.3d at 24–25; *Galvan-Cerna*, 509 S.W.3d at 411; *Herrera*, 241 S.W.3d at 526.

Pretrial Identification by Modest Welch

Moton next argues that the trial court erred in overruling his motion to suppress the pretrial photograph identification by Modest Welch—one of the men waiting in the holding cell with Moton and the victim at the time of the incident. Moton argues that the identification was improper because Welch was shown only one photograph. On this record, we find no reversible error.

A. Applicable Law

A pretrial identification 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. *See Simmons v. United States*, 390 U.S. 377, 384, 88 S. Ct. 967, 971 (1968); *Barley v. State*, 906 S.W.2d 27, 32–33 (Tex. Crim. App. 1995); *Tutson v. State*, 530 S.W.3d 322, 326 (Tex. App.—Houston [14th Dist.] no pet.). When challenging the admissibility of a pretrial identification, a defendant must show that (1) the out-of-court identification procedure was impermissibly suggestive, and (2) the suggestive procedure gave rise to a substantial likelihood of irreparable misidentification. *Barley*, 906 S.W.2d at 33; *see also Neil v. Biggers*, 409 U.S. 188, 198, 93 S. Ct. 375, 381–82 (1972).

B. Analysis

Even if we were to assume without deciding that the pretrial identification procedure here (showing only one photograph) was impermissibly suggestive, the procedure did not give rise to a substantial likelihood of irreparable misidentification. *See Barley*, 906 S.W.2d at 33.

To determine whether a photo array created a substantial likelihood of irreparable misidentification, we consider all relevant reliability factors, including (1) the witness's opportunity to view the assailant at the time of the crime, (2) the witness's degree of attention, (3) the accuracy of the witness's prior description of the assailant, (4) the witness's level of certainty at the time of confrontation, and (5) the length of time between the crime and confrontation. *Barley*, 906 S.W.2d at 32–33; *Ibarra v. State*, 11 S.W.3d 189, 195 (Tex. Crim. App. 1999) (citing *Neil*, 409 U.S. at 199–200, 93 S. Ct. at 382). We weigh these factors "against the corrupting effect of any suggestive identification procedures." *Barley*, 906 S.W.2d at 35. Reliability is the linchpin in determining the admissibility of identification testimony. *Luna v. State*, 268 S.W.3d 594, 605 (Tex. Crim. App. 2008). "If indicia of reliability outweigh suggestiveness then an identification is admissible." *Barley*, 906 S.W.2d at 34.

1. Opportunity to view assailant at time of the crime

First, Welch had a unique opportunity to view Moton. Welch, Moton, and the victim had been confined to the same jail cell. Welch testified that he had been in the holding cell for a few hours, and he had a clear view of Moton, from just four feet away. *See id.* at 35 (emphasizing proximity and view); *Ortega v. State*, No. 01-16-00342-CR, 2017 WL 2980165, at *5 (Tex. App.—Houston [1st Dist.] July 13, 2017, no pet.) (mem. op., not designated for publication) (similar). Welch also testified that he had a clear view of what happened, and he saw Moton slice the victim's throat with a scalpel. *See Barley*, 906 S.W.2d at 35 (unobstructed view of defendant at time of crime supports reliability of pretrial identification); *Tutson*, 530 S.W.3d at 328 ("imperfect, but good" opportunity to view the appellant was reliable when witness saw appellant from close proximity for a few seconds).

2. The witness's degree of attention

This factor, too, favors the reliability of the identification. Welch testified that he had a clear view of the incident. Welch noticed that Moton was wearing a blue glove. He said that he did not see the blade in the cell before the incident, but he did notice that Moton had some item. Welch, Moton, and the victim were confined in a small space together. Under the circumstances, Welch was not just a casual, removed observer but one with reason to be attentive. *Barley*, 906 S.W.2d at 35; *Ortega*, 2017 WL 2980165, at *5.

3. Accuracy of the witness's prior description

Welch identified Moton soon after the incident, but the record does not include Welch's pretrial description of him. In court, Welch described Moton as medium-sized, in-between tall and short, and African American. He explained that Moton had been minding his business in the moments before the stabbing, and he saw Moton holding some item.

4. The witness's level of certainty at the time of confrontation

This factor favors reliability. Welch never expressed doubt about his identification, and he stated that he has a good memory. Welch also testified that his initial interview lasted only about three or four minutes. *See Burkett v. State*, 127 S.W.3d 83, 89 (Tex. App.—Houston [1st Dist.] 2003, no pet.) (considering fact that witness identified defendant as perpetrator "immediately and without hesitation"). In addition, Welch was one of only a few men confined with both the victim and Moton, and he testified to his view of the incident.

5. The length of time between the crime and the confrontation

This factor also supports the reliability of the identification. Welch was interviewed by Detective Cote shortly after the assault. As Detective Cote explained, the incident led to a different style of investigation because the witnesses were confined and remained at the scene. Welch had the opportunity to describe Moton while the offense was still fresh in his memory, reducing the likelihood of

misidentification. *See Ortega*, 2017 WL2980165 at *5 (emphasizing that pretrial identification occurred less than two hours after the crime, so the robbery was still fresh in the complainant's memory); *see also Mendoza v. State*, 443 S.W.3d 360, 364 (Tex. App.—Houston [14th Dist.] 2014, no pet.) (similar).

* * *

On this record, the indicia of reliability outweighed any corrupting influence of the pretrial identification procedure. The procedure did not give rise to a substantial likelihood of irreparable misidentification.

Ineffective Assistance

Finally, Moton argues that his trial counsel was ineffective for failing to object to in-court identifications by Nathan Henderson (the complainant) and Modest Welch. We disagree.

A. Standard of Review

To prevail on a claim of ineffective assistance of counsel, an appellant must show that his trial counsel's performance fell below an objective standard of reasonableness, and there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687–88, 694, 104 S. Ct. 2052, 2064, 2068 (1984); *Lopez v. State*, 343 S.W.3d 137, 142 (Tex. Crim. App. 2011).

We indulge a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065; *Ex parte White*, 160 S.W.3d 46, 51 (Tex. Crim. App. 2004). Absent contrary evidence, we will not second guess counsel's strategy through hindsight. *Blott v. State*, 588 S.W.2d 588, 592 (Tex. Crim. App. 1979); *Navarro v. State*, 154 S.W.3d 795, 799 (Tex. App.—Houston [14th Dist.] 2004, pet. ref'd).

An appellant must provide a record showing that counsel's performance was not based on sound trial strategy. *Mallett v. State*, 65 S.W.3d 59, 63 (Tex. Crim. App. 2001). When counsel has no opportunity to explain, an appellate court will not deem counsel's performance deficient unless the challenged conduct was "so outrageous that no competent attorney would have engaged in it." *Menefield v. State*, 363 S.W.3d 591, 593 (Tex. Crim. App. 2012) (quoting *Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005)).

To show ineffective assistance, appellant also must prove that he was prejudiced by counsel's actions. *Thompson*, 9 S.W.3d at 812.

B. Analysis

1. Identification by Modest Welch

First, Moton argues that his counsel was ineffective for failing to challenge the in-court identification of Moton by Modest Welch. But trial counsel *did* file motions to suppress Welch's pretrial and in-court identifications, and the court

denied the motions. Moton's claim that counsel was ineffective on this basis is not supported by the record.

2. Identification by Henderson

Second, Moton contends that his counsel was ineffective for failing to object to the in-court identification of Moton by victim Nathan Henderson. Although defense counsel did not object when Henderson identified Moton, counsel challenged the identification through cross-examination. For example, counsel established that Moton was one of only a few people in the courtroom who could have fit Henderson's description of the assailant. And counsel elicited testimony showing that Henderson was familiar with the basic set up of a courtroom, including where the attorneys sit, and that the defendant would be seated at a table.

On this record, we cannot conclude that counsel's course of conduct was so outrageous that no competent attorney would have engaged in it. *See McKinny v. State*, 76 S.W.3d 463, 473–74 (Tex. App.—Houston [1st Dist.] 2002, no pet.) (discussing various reasons why defense counsel might strategically decide not to object).

Conclusion

We affirm the judgment of the trial court.

Jennifer Caughey
Justice

Panel consists of Chief Justice Radack and Justices Brown and Caughey.

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