Affirmed and Memorandum Opinion filed January 28, 2010.

In The

Fourteenth Court of Appeals

NO. 14-08-00862-CR

WADE STEADMAN STAFFORD, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 185th District Court
Harris County, Texas
Trial Court Cause No. 1128682

MEMORANDUM OPINION

A jury convicted appellant Wade Steadman Stafford of aggravated robbery. Appellant elected for the trial judge to assess punishment. The trial court assessed punishment at confinement for life. In nine issues, appellant challenges the legal and factual sufficiency of the evidence to support his conviction, asserts that the trial court erroneously admitted hearsay testimony, and contends he was identified through a tainted identification procedure. We affirm.

Background

On February 25, 2007, Sarah Butard, a clerk at a smoking accessories shop called Smoke Toys located in Houston, was robbed at knifepoint. Numerous items from the shop were stolen, as well as Butard's wallet and cell phone. Butard identified appellant as the perpetrator of the robbery. Appellant had previously been to the store on three occasions and had purchased a lighter on his second visit. He had returned to the store a third time to replace the lighter, which he told Butard was not working properly. Butard explained that appellant returned to the store on the day of the robbery and waited until several other customers left. When she went to assist him, he asked to see a specific lighter. She opened the display case and took out the lighter; he looked at it and said he did not want it. Butard started to put the lighter back into the case, and appellant came around the counter, grabbed her by the shoulder, and squeezed very hard. Appellant then threatened Butard with a knife, warning her, "Do not scream or I will slit your throat."

Appellant pulled Butard into the back room of the shop; he again threatened to "cut" her when she explained that because of a back injury she could not lie on her stomach. Appellant forced her to lie on her stomach, cuffed her hands behind her back using "zip ties," and gagged her with a scarf. He then briefly returned to the front of the store, but came back into the back room and asked Butard how to open the cash register. He also tried to take Butard's wedding ring off her finger, but was unable to remove it. Butard heard appellant return to the front of the shop, open the cash register, and open the locked display cases where the more expensive lighters were stored. She then heard appellant leave the building, but he came back about five minutes later yelling that he could not find his cell phone. Butard heard him leave the store, but he told her he would be back.

Lance Losey, an employee with an insurance agency located next door to Smoke Toys, reported seeing appellant running back and forth in front of the strip mall in which the companies were located around the same time that the robbery was taking place.

Losey stated that appellant "jerked" on the door to his office, which was locked. Losey completed his work and left his office, but decided to check on Butard before he went home.

Meanwhile, in the Smoke Toys shop, Butard lay in the back room for about ten minutes, and then she started attempting to scoot into the front of the store. She heard the door chime and thought it was appellant returning, but it was Losey. She yelled for help and told Losey, "I've been robbed. . . Call the cops, call the police." Losey cut the ties off Butard's wrists and called the police. Houston Police Department Officer Madrid arrived at the scene and took down details of the robbery from Butard and Losey. Although Officer Madrid did not mention or describe the knife in the narrative portion of his offense report, he noted at the beginning of the report that the offense was "aggravated robbery, elderly, over 65, by a cutting instrument." Further, Officer Madrid noted that Butard stated she had "dealings" with the perpetrator prior to the robbery.

An officer from the Crime Scene Unit, Officer Nunez, arrived at the scene and took several photographs. Officer Nunez also collected several pieces of evidence, including zip ties, a scarf, several empty lighter boxes, and a cellular telephone. Nunez did not recover a knife from the crime scene. After the initial on-scene investigation, Sergeant Green was assigned to continue investigating the incident. Sergeant Green explained that no identifiable prints were discovered either at the robbery scene or on the cell phone recovered from the scene. During the investigation, Sergeant Green called a number found on the cell phone; the individual who answered the number identified herself as "Marge Stafford." Green then created a photo array including appellant's photograph because he had determined that appellant was a possible suspect. In early May 2007, Green showed the photo array to Butard, and she immediately identified appellant as the robber. A supplemental police offense report was also completed sometime after the robbery, which contains Butard's description of the knife.

At appellant's trial, Butard and Losey testified regarding the details of the robbery described above. During Butard's testimony, appellant's counsel objected to the reliability of Butard's identification of appellant. The trial court overruled his objection, but granted a running objection regarding the reliability of Butard's in- and out-of-court identifications of appellant. Butard testified that she had recognized appellant from her previous interactions with him and stated that she identified him in the photo array prepared by Sergeant Green. She stated that none of the other individuals in the photo array had ever come into the Smoke Toys shop. Butard identified appellant as the person who had robbed her using a knife and stated that her in-court identification was based only on the events that occurred the day of the robbery. She also stated that she was "positive" that appellant had a knife in his right hand when he initially grabbed and threatened her. Finally, a video of an individual outside the strip mall who attempted to open a door to one of the shops was admitted into evidence, and Butard stated that appellant is the person depicted in the video.

Appellant's counsel also objected to Losey's in-court identification of appellant, based on the fact that Losey admitted that, moments before testifying, he had seen a copy of the photo array in which appellant's picture was identified. The trial court overruled his objection, but again granted a running objection to Losey's identification of appellant. Losey testified that he only saw the photo array for a very brief amount of time and that he did not notice that Butard had selected appellant's photograph. He further stated that his in-court identification of appellant resulted only from his recollection from the day of the robbery and was not based on the brief glimpse he had of the photo array before he testified. Losey also identified appellant as the person in the video seen attempting to open one of the shop doors.

Officers Madrid and Nunez both testified regarding their involvement with the investigation described above. Sergeant Green also testified and described his investigation. During Sergeant Green's testimony, appellant's trial counsel requested a hearing outside the presence of the jury regarding his hearsay and confrontation clause

objections to Sergeant Green's testimony about the cell phone and how Green identified appellant as a suspect. During this hearing, Sergeant Green testified that he called a number labeled "parents" he found on the cell phone. A female, who identified herself as "Marge Stafford," answered the call. According to Green, Marge Stafford identified herself as appellant's mother and stated that the cell phone the officers discovered at the crime scene belonged to appellant. At the close of the hearing, the trial court overruled appellant's objections, but granted a running objection on hearsay grounds to Sergeant Green's testimony regarding his conversation with Marge Stafford. Sergeant Green testified before the jury only that (a) he called a phone number he discovered on the cellular telephone, (b) the person who answered the phone identified herself as "Marge Stafford," and (c) he created a photo array including appellant's photograph because he had determined appellant was a potential suspect. Sergeant Green further testified that Butard described the knife used during the offense and that this description was included in a supplemental offense report. Finally, Green reported that no DNA, fingerprint, or fiber evidence linking appellant to the crime scene was discovered at the Smoke Toys shop.

After hearing the evidence, the jury found appellant guilty of aggravated robbery as charged in the indictment. Finding two enhancement paragraphs true, the trial court sentenced appellant to life in the Texas Department of Criminal Justice, Institutional Division. This appeal timely ensued after a motion for new trial was overruled by operation of law.

Analysis

A. Sufficiency of the Evidence

In his first four issues, appellant challenges the legal and factual sufficiency of the evidence to show that (a) he unlawfully or knowingly committed the offense of robbery of the complainant and (b) he used or exhibited a knife in the commission of the robbery of the complainant. As is relevant here, a person commits aggravated robbery if, in the

course of committing theft[1] and with the intent to obtain or maintain control of property, he intentionally or knowingly threatens or places another in fear of imminent bodily injury or death by using or exhibiting a deadly weapon. *See* TEX. PENAL CODE ANN. §§ 29.02, 29.03 (Vernon 2003).

1. Standard of Review

In a legal sufficiency challenge, we employ the familiar standard of viewing the evidence in the light most favorable to the verdict. *King v. State*, 29 S.W.3d 556, 562 (Tex. Crim. App. 2000). If any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt, we will affirm. *Id.*

We also employ the familiar standard of review to analyze a factual sufficiency challenge: we review all the evidence in a neutral light, favoring neither party to determine (1) whether the evidence supporting the conviction, although legally sufficient, is nevertheless so weak that the jury's verdict seems clearly wrong and manifestly unjust, or (2) whether, considering conflicting evidence, the jury's verdict is against the great weight and preponderance of the evidence. *Watson v. State*, 204 S.W.3d 404, 414–15, 417 (Tex. Crim. App. 2006). We cannot conclude that a conviction is "clearly wrong" or "manifestly unjust" simply because, on the quantum of evidence admitted, we would have voted to acquit had we been on the jury, nor can we declare that a conflict in the evidence justifies a new trial because we disagree with the jury's resolution of that conflict. *Id.* at 417. We must give due deference to the jury's determinations, particularly those concerning the weight of the evidence and the credibility of the witnesses. *See Johnson v. State*, 23 S.W.3d 1, 8–9 (Tex. Crim. App. 2000).

2. Application

Appellant does not dispute that Butard was robbed with a knife; rather, his legal and factual sufficiency challenges focus on his contention that there is insufficient

[1] A person commits theft if he unlawfully appropriates property with the intent to deprive the owner of it. *See* TEX. PENAL CODE ANN. § 31.03(a) (Vernon Supp. 2009).

evidence to prove beyond a reasonable doubt that he was the individual who committed the robbery using a knife. He asserts that, "at best, the evidence supports the undisputed fact that [a]ppellant had on several occasions frequented Smoke Toys, the shop wherein the robbery of [the] complainant[] had occurred." However, as discussed above, Butard identified appellant as her assailant, and Losey identified appellant as the individual he had seen on the day of the robbery. Although appellant complains that the "robber in the videotape appeared to be wearing sunglasses" and neither Butard nor Losey mentioned any sunglasses in their descriptions to the police, it is unclear from the videotape whether the individual in it is actually wearing sunglasses. Further, appellant emphasizes that no forensic evidence, such as fingerprints, DNA, or fibers, linking appellant to the offense were present, but cites no authority that such evidence is necessary.

In short, Butard, who was familiar with appellant due to several previous interactions with him, positively identified appellant as the individual who robbed her. She detailed the events surrounding the robbery, including the fact that appellant returned to the shop frantically searching for his cell phone. Losey identified appellant as the individual who had attempted to gain access to his office around the time that Butard stated appellant ran back into the shop looking for his cell phone. The evaluation of Butard and Losey's credibility and the reliability of their identification of appellant were matters to be decided by the jury. *See id.* at 7. Whether viewed neutrally or in the light most favorable to the jury's verdict, the evidence is clearly sufficient to support the jury's determination that appellant was the individual who committed the aggravated robbery in this case. We therefore overrule appellant's first four issues.

B. "Hearsay" Evidence

In his fifth, sixth, and seventh issues, appellant asserts that the trial court erroneously (a) admitted hearsay testimony regarding the identity of a speaker who answered a phone call to a telephone number recovered from the cellular phone

recovered at the scene, which (b) violated his Confrontation Clause rights, and (c) resulted in the production of an inadmissible photo array.

1. Standard of Review and Applicable Law

We review a trial court's evidentiary rulings under an abuse of discretion standard. *Montgomery v. State*, 810 S.W.2d 372, 379 (Tex. Crim. App. 1990) (en banc). We recognize that a trial court must be given wide latitude to admit or exclude evidence. *Theus v. State*, 845 S.W.2d 874, 881 (Tex. Crim. App. 1992); *Grant v. State*, 247 S.W.3d 360, 366 (Tex. App.—Austin 2008, pet. ref'd). Thus, we will not disturb the trial court's ruling if it is "within the zone of reasonable disagreement." *Winegarner v. State*, 235 S.W.3d 787, 790 (Tex. Crim. App. 2007).

The Texas Rules of Evidence prohibit the admission of hearsay evidence except as provided by statute or other rules. *See* TEX. R. EVID. 802. Hearsay is a statement,[2] other than one made by the declarant testifying at trial, offered for the truth of the matter asserted therein. *See* TEX. R. EVID. 801(d). Statements that are not offered to prove the truth of the matter asserted, but for some other purpose, are not hearsay. *Guidry v. State*, 9 S.W.3d 133, 152 (Tex. Crim. App. 1999); *Davis v. State*, 169 S.W.3d 673, 675 (Tex. App.—Fort Worth 2005, no pet.) (citing *Dinkins v. State*, 894 S.W.2d 330, 347–48 (Tex. Crim. App. 1995) (en banc)).

Generally, the Confrontation Clause[3] bars the admission of out-of-court "testimonial" statements unless the declarant is unavailable to testify and the defendant had a previous opportunity to cross-examine the declarant. *Campos v. State*, 256 S.W.3d 757, 761 (Tex. App.—Houston [14th Dist.] 2008, pet. ref'd). Generally, a statement is considered "testimonial" if it was a solemn declaration made for the purpose of establishing some fact. *Dixon v. State*, 244 S.W.3d 472, 481 (Tex. App.—Houston [14th

[2] Statements may be either oral or written, or nonverbal conduct that is intended as a substitute for verbal expression. TEX. R. EVID. 801(a).

[3] U.S. CONST. amend. VI.

Dist.] 2007, pet. ref'd) (citing *Crawford v. Washington*, 541 U.S. 36, 51 (2004)). Although "testimonial" has not been explicitly defined by the United States Supreme Court, the "core class[es] of 'testimonial statements'" include: (1) ex parte in-court testimony; (2) affidavits; (3) depositions; (4) confessions; (5) custodial examinations; and (6) statements made under circumstances that would lead an objective witness to reasonably believe that the statement could be used at a later trial. *See Crawford*, 541 U.S. at 51–52.

2. Application

Much of the information appellant complains about was adduced during his trial counsel's voir dire of Sergeant Green *outside* the jury's presence. The jury was informed only that (a) Sergeant Green called a telephone number he found on the cell phone, (b) the person who answered the call identified herself as "Marge Stafford," and (c) Sergeant Green created a photo spread including a photograph of appellant because Green had developed appellant as a suspect.

Sergeant Green's testimony was not offered to prove the truth of what was said—that the person who answered the telephone was Marge Stafford—but to explain how appellant became a suspect. *Cf. Guidry*, 9 S.W.3d at 152 (noting that address book entry was admissible because it was not offered for the truth of the entry, but to establish a link between conspirators); *Dinkins*, 894 S.w.2d at 347 (concluding victim's appointment book containing entry indicating defendant had appointment with victim during time of murder was not hearsay because it was offered to explain how the defendant became a suspect); *see also Davis*, 169 S.W.3d at 676–76 ("Thus, a police officer may testify about anonymous tips received for the purpose of showing why the investigation focused on a particular defendant."). Accordingly, Sergeant Green's testimony about the identity of Marge Stafford was not hearsay because it was not offered for the truth of the matter asserted therein. We therefore overrule appellant's hearsay challenge to this evidence.

Further, we cannot discern anything "testimonial" about Stafford's response regarding her own identity to Sergeant Green because her identity was not an issue at appellant's trial. *Cf. Kimball v. State*, 24 S.W.3d 555, 565 (Tex. App.—Waco 2000, no pet.) (concluding that because statement was offered to show reason for officer's actions rather than for its truth, it was not hearsay and did not violate appellant's constitutional right to confrontation). Thus, we overrule appellant's Confrontation Clause challenge to this evidence.

Finally, because we conclude that Stafford's statement was neither hearsay nor testimonial, the fact that it may have been employed in the creation of the photo array is immaterial. Moreover, appellant has not identified any legal authority to support his claim that a photo array itself is inadmissible because police officers identified a suspect through out-of-court conversations.[4] We further note that appellant did not object to the photo array on this basis, but instead complained that the identification procedure was tainted and that Losey saw the photo array on the day of trial. Thus he has not preserved this issue for our review. *See Guevara v. State*, 97 S.W.3d 579, 583 (Tex. Crim. App. 2003) (concluding that appellant failed to preserve error on appellate complaint because it did not comport with objection at trial). We therefore overrule appellant's challenge to the photo array.

In sum, we overrule appellant's fifth, sixth, and seventh issues relating to his "hearsay" complaints.

C. "Tainted" Identification Procedure

In issues eight and nine, appellant asserts that Butard's identification of appellant in a photo array was the product of a tainted identification procedure and that Losey's

[4] The cases appellant relies on do not support this contention. *See Schaffer v. State*, 777 S.W.2d 111, 114 (Tex. Crim. App. 1989) (explaining concept of "backdoor" hearsay); *Coots v. State*, 826 S.W.2d 955 (Tex. App.—Houston [1st Dist.] 1992, no pet.) (concluding that detailed conversation officer had with two witnesses and subsequently relayed to jury violated hearsay rule even though State claimed evidence was admissible to show how officer came to include appellant's picture in photo spread).

identification of appellant was the product of police misconduct and a tainted identification.

1. Standard of Review and Applicable Law

An in-court identification is inadmissible when, considering the totality of the circumstances, the photographic identification procedure was "'so impermissibly suggestive'" that it gave rise to a "'very substantial likelihood of irreparable misidentification.'" *Luna v. State*, 268 S.W.3d 594, 605 (Tex. Crim. App. 2008) (quoting *Ibarra v. State*, 11 S.W.3d 189, 195 (Tex. Crim. App. 1999)). Ultimately, "[r]eliability is the linchpin in determining the admissibility of identification testimony." *Id.* Finally, the appellant must prove, by clear and convincing evidence, that the out-of-court identification procedure was impermissibly suggestive and that the suggestive procedure gave rise to a very substantial likelihood of misidentification. *Barley v. State*, 906 S.W.2d 27, 32–33 (Tex. Crim. App. 1995) (en banc).

2. Application

Appellant argues that the pretrial identification procedure was unduly suggestive because, according to Butard, she was asked by Sergeant Green only if she "recognized" anyone. He asserts that the instructions given by Green "were impermissibly suggestive and tainted Butard's identification of [a]ppellant because she recognized him solely from prior interactions as a client of the shop." However, both Butard and Sergeant Green testified that Butard immediately pointed to appellant's photograph and stated that he was the person who robbed her. Appellant provides no legal authority for his contention that the complainant's familiarity with him prior to the robbery taints her pre-trial identification of him. Indeed, if anything, the fact that Butard was familiar with appellant prior to the robbery serves to strengthen her identification of him.

Further, appellant has failed to establish that Sergeant Green used an impermissibly suggestive identification procedure; he does not claim that the individuals in the photo array were markedly different from appellant or caused appellant's

photograph to stand out in any way. Additionally, Butard testified that there was nothing unique or special about the photograph of appellant compared to the other pictures. She also testified that no one suggested to her which photograph to select, and Sergeant Green stated he admonished her that she was under no obligation to pick anyone and that one of the people in the photo array was possibly, but not necessarily, involved in the case. *Cf. id.* (stating that suggestiveness may be created by the manner in which the pretrial identification is conducted, such as by police pointing out the suspect or suggesting that the suspect is included in the photo array).

The record reflects that Butard identified appellant's photograph because she recognized him as the person who robbed her, not simply because she recognized him as a former customer. Consequently, appellant has failed to establish by clear and convincing evidence that the pre-trial identification procedure was impermissibly suggestive or that it gave rise to a very substantial likelihood of misidentification, and we overrule his eighth issue.

Turning to appellant's ninth issue, he asserts that the trial court erred in overruling his objection and permitting Losey to identify appellant at trial as the same person he had observed the day of the robbery. His complaint is based on the fact that Losey testified that he had seen State's Exhibit 30, the photo array showing appellant as the individual identified by the complainant, shortly before testifying. However, Losey testified that he had viewed the exhibit for only a very brief moment—he described it as "one second[.]" He further testified that he did not notice that Butard had identified appellant's photograph in the photo array. Finally, he stated that his identification of appellant was based solely on his recollections of the day of the robbery and that he was "a hundred percent sure" that appellant was the person he saw pull on his office door that day, even though he only saw appellant for a few seconds. Considering the entirety of Losey's testimony, his in-court identification of appellant appears to be reliable. *See Luna*, 268 S.W.3d at 605. We therefore overrule appellant's ninth issue.

Conclusion

We affirm the trial court's judgment.

/s/ Margaret Garner Mirabal
Senior Justice

Panel consists of Chief Justice Hedges, Justice Anderson, and Senior Justice Mirabal.[*]

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[*] Senior Justice Margaret Garner Mirabal sitting by assignment.