Affirmed and Memorandum Opinion filed November 9, 2010.

In The

Fourteenth Court of Appeals

NO. 14-09-00483-CR

JOSE CASTILLO LEDEZMA, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 338th District Court
Harris County, Texas
Trial Court Cause No. 1150417

M E M O R A N D U M O P I N I O N

A jury found appellant, Jose Ledezma, guilty of aggravated robbery, and the trial court sentenced him to fifteen years' confinement in the Institutional Division of the Texas Department of Criminal Justice. Appellant now contends (1) the evidence is insufficient to support his conviction, and (2) defense counsel was ineffective. We affirm.

I. BACKGROUND

On the morning of November 19, 2007, the complainant, J.C. Ethridge, a sixty-seven-year-old retiree, set out to run some errands. He first drove to a gas station. While filling up his car with gas, he noticed a dark-colored Honda drive up and park next to his

vehicle. The Honda's male driver and two female passengers watched him from their car's windows, but remained seated in the car.

Ethridge next drove to an office complex where he parked and waited in his car for a friend. Several minutes later, the same dark-colored Honda pulled into the lot and parked right in front of his car, blocking him in. The driver of the Honda, later identified as appellant, exited his car and approached Ethridge's car. Appellant reached through the car's open window, held a pocket knife with a 1½" to 2" blade to Ethridge's neck, and demanded money from Ethridge.

Ethridge denied having money. Appellant reached through the window and felt Ethridge's pockets. Ethridge withdrew his money clip and pocket knife and handed them to appellant. Appellant pulled out the eight dollars the money clip contained, returned the money clip, and drove away. Etheridge quickly wrote down a description of the Honda and its license plate and called the police. In total, the robbery lasted approximately three to five minutes.

Houston Police Officer Carey Vanuis responded to the call. Ethridge informed Officer Vanuis of the robbery, the vehicle, and the license plate number. Ethridge described the robber as a 25-year-old, 5'5", 175-pound, black-haired Hispanic male. Ethridge told Officer Vanuis the robber was wearing a light T-shirt and dark pants. Ethridge described no tattoos, birthmarks, or other distinguishing features.

Around 2:30 to 3:00 p.m. that same day, Houston Police Officer Dan Starr was dispatched to appellant's residence to arrest him for a separate, but similar, offense. He noticed a black Honda parked in appellant's driveway and recorded the license plate in his report. He also noted that appellant was wearing a beige shirt, black pants, and a short-sleeve shirt.

Police Officer Jeffrey Michael ran the license plate that Ethridge had provided the police. His search revealed the Honda had also been involved in the offense reported by Officer Starr. Starr's report described appellant as approximately 5'7"and 175 pounds. Officer Michael used one of appellant's previous booking photos to construct a photo

array, and upon showing it to Ethridge, he immediately identified appellant as the man who robbed him. Officer Michael intended to conduct a line-up, too, but when attempting to locate appellant, he discovered appellant was already in police custody.

Appellant was subsequently arrested and charged with aggravated robbery. At trial, Ethridge, Officer Vanuis, Officer Starr, and Officer Michael testified to their investigation and interaction with the appellant. Ethridge specifically identified appellant at trial as the man who had robbed him.

The defense called appellant's brother, Juan, to testify to appellant's tattoos in an effort to cast doubt on Ethridge's identification of appellant. The defense noted that the appellant's tattoos were prominent, and Ethridge had failed to note them in his identification of the appellant.

The jury found appellant guilty of aggravated robbery, and the trial court sentenced him to fifteen years' confinement. Appellant now contends (1) the evidence is factually insufficient to support his conviction, and (2) defense counsel was ineffective.

II. DISCUSSION

A. Sufficiency of the Evidence

1. Standard of Review

Appellant challenges the factual sufficiency of the evidence. However, a majority of the judges of the Texas Court of Criminal Appeals recently determined that the *Jackson v. Virginia*[1] standard is the only standard a reviewing court should apply to determine whether the evidence is sufficient to support each element of a criminal offense the State is required to prove beyond a reasonable doubt. *See Brooks v. State*, — S.W.3d—,—, No. PD-0210-09, 2010 WL 38946l3, at *1 (Tex. Crim. App. Oct. 6, 2010) (plurality op.) (Hervey, J., joined by Keller, P.J., Keasler, and Cochran, J.J.); *id.*, 2010 WL 38946l3, at *14–15 (Cochran, J., concurring, joined by Womack, J.) (same

[1] 443 U.S. 307, 99 S. Ct. 2781, 61 L.Ed.2d 560 (1979).

conclusion as plurality). Accordingly, under current Texas law, in reviewing appellant's issues we apply the *Jackson v. Virginia* standard and do not separately refer to legal or factual sufficiency.

We view all of the evidence in the light most favorable to the verdict to determine whether the jury was rationally justified in finding guilt beyond a reasonable doubt. *Brooks*, 2010 WL 3894613, at *5. We do not sit as a thirteenth juror and may not substitute our judgment for that of the fact finder by re-evaluating the weight and credibility of the evidence. *Id.* at *7; *Dewberry v. State*, 4 S.W.3d 735, 740 (Tex. Crim. App. 1999); *see also Sharp v. State*, 707 S.W.2d 611, 614 (Tex. Crim. App. 1986). We defer to the fact finder's resolution of conflicting evidence unless the resolution is not rational. *Brooks*, 2010 WL 3894613, at *7 n.8, *11. Our duty as a reviewing court is to ensure the evidence presented actually supports a conclusion that the defendant committed the crime. *Williams v. State*, 235 S.W.3d 742, 750 (Tex. Crim. App. 2007).

2. Application to Facts

Appellant argues the evidence is insufficient to show he was the robber. We disagree. Ethridge had the opportunity to observe appellant on two occasions, at the gas station as well as at the office parking lot. The robbery lasted three to five minutes, which was long enough for an argument with the appellant over whether Ethridge had money, and for appellant to feel Ethridge's pockets, remove the cash from the money clip, and return the money clip to him. Ethridge's description of the robber matched appellant, and his description of the robber's clothing also matched what appellant was wearing when arrested. Additionally, Ethridge identified appellant from a photo array and at trial as the man at the gas station and the man who robbed him in the office parking lot.

Also, Ethridge had the opportunity to observe appellant's Honda on two occasions, at the gas station as well as at the office parking lot. Appellant's description of the Honda and its license plate matched that of the Honda that was parked in

appellant's driveway.

Appellant argues the evidence tending to show that he was the assailant is greatly outweighed by Ethridge's failure to mention his tattoos. Nevertheless, the jury, being in the best position to evaluate the credibility of the witnesses, could have taken this into consideration.[2] *See Pena*, 251 S.W.3d at 609. We defer to the jury's conclusions as to the relative importance, if any, to be given to that evidence. *See id.*

Considering the evidence in the light most favorable to the verdict, we hold a rational trier of fact could find appellant was the robber. The evidence is sufficient to support the jury's verdict. Accordingly, we overrule appellant's first issue.

B. Ineffective Assistance

1. Standard of Review

In his second issue, appellant contends he received ineffective assistance of counsel. Specifically, appellant argues counsel was ineffective because he failed (1) to object to testimony of extraneous offenses; (2) to request a limiting instruction on the offenses; and (3) to move for a jury charge on the limited use and burden of proof of the offenses. Specifically, appellant takes issue with the following testimony: (a) the testimony of Juan, appellant's brother, that appellant received one of his tattoos while in prison; (b) Officer Starr's testimony that he arrested appellant for a separate incident; and (c) Officer Michael's references to appellant's previous arrests and imprisonment.[3]

Both the federal and state constitutions guarantee an accused the right to the reasonably effective assistance of counsel. *See* U.S. Const. amend. VI; Tex. Const. art. I,

[2] Appellant also argues the evidence showing he was the assailant is unreliable. Specifically, appellant argues Ethridge was very scared and was not focused on the assailant but rather his knife and his rummaging through Ethridge's pockets. The jury could have taken this too into consideration when evaluating the credibility of the witnesses.

[3] Specifically, appellant complains of Michael's testimony that (1) appellant's Honda was involved in a similar incident, (2) Michael used a previous booking photo of appellant for the photo array, (3) Michael ascertained appellant's height from a previous incident report, and (4) Michael was unable to conduct a line-up because appellant was already in custody.

§ 10; *Strickland v. Washington*, 466 U.S. 668, 686 (1984). When we review claims of ineffective assistance, we apply a two-pronged test. *See Salinas v. State*, 163 S.W.3d 734, 740 (Tex. Crim. App. 2005) (citing *Strickland*, 466 U.S. at 687). The defendant must prove by a preponderance of the evidence that (1) counsel's representation was deficient in that it fell below the standard of prevailing professional norms and (2) there is a reasonable probability that, but for counsel's deficiency, the result would have been different. *Id.* (citing *Strickland*, 466 U.S. at 687). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Mallett v. State*, 65 S.W.3d 59, 63 (Tex. Crim. App. 2001).

We consider the totality of the representation and the particular circumstances of each case. *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999). We begin with the strong presumption that counsel's actions and decisions were reasonably professional and motivated by sound trial strategy. *Salinas*, 163 S.W.3d at 740; *Stults v. State*, 23 S.W.3d 198, 208 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd). To overcome the presumption, a defendant must show that his allegation of ineffectiveness is firmly established in the record. *Thompson*, 9 S.W.3d 814.

The record is best developed in a hearing on a motion for new trial or an application for a writ of habeas corpus. *Stults*, 23 S.W.3d at 208. Where, as here, there is no record relative to counsel's decisions and actions, an allegation of ineffective assistance can often lie beyond effective appellate review. *See id.* Of course, when no reasonable trial strategy could justify counsel's conduct, counsel's performance may fall below an objective standard of reasonableness as a matter of law, regardless of whether the record adequately reflects counsel's strategy. *Andrews v. State*, 159 S.W.3d 98, 102 (Tex. Crim. App. 2005). Our review of counsel's actions, however, must be highly deferential to trial counsel and avoid the deleterious effects of hindsight. *Ingham v. State*, 679 S.W.2d 503, 509 (Tex. Crim. App. 1984).

2. Application to Facts

a. Objections to Testimony of Extraneous Offenses

Appellant argues counsel was ineffective for failing to object to testimony from Juan, Officer Michael, and Officer Starr concerning appellant's extraneous offenses. Generally, however, isolated failures to object to improper evidence do not constitute ineffective assistance of counsel. *Ingham v. State*, 679 S.W.2d 503, 509 (Tex. Crim. App. 1984). Moreover, the decision not to object to inadmissible evidence may, in some instances, be justified as sound trial strategy. *Darby v. State*, 922 S.W.2d 614, 624 (Tex. App.—Fort Worth 1996, pet. ref'd). Thus, when the record is silent as to counsel's reasons for failing to object, as here, the appellant usually falls short of rebutting the presumption of reasonable assistance. *Thompson v. State*, 9 S.W.3d 808, 814 (Tex. Crim. App. 1999).

Here, counsel called Juan to the stand to testify about appellant's tattoos for the purpose of disproving Ethridge's identification of appellant. Counsel questioned Juan regarding the time period within which appellant received each tattoo, evidence that was designed to show that appellant had these tattoos at the time of the robbery of Ethridge. Such testimony, if believed, could be consistent with the defense theory that, because Ethridge did not mention any tattoos, somebody else – that is, an assailant *without* tattoos – could have committed the offense. Therefore, it would not have been unreasonable for counsel to have weighed the risks of Juan's testimony and concluded it was more probative than prejudicial.

Regarding counsel's failure to object to extraneous-offense testimony provided by Officers Michael and Starr, it is conceivable that counsel decided not to object in an effort to avoid drawing the jury's attention to adverse testimony. It is well-established that the decision not to object may be considered sound trial strategy, for that very reason. *See Darby*, 922 S.W.2d at 623–24. Whatever the reason, however, we cannot say on the limited record before us that counsel lacked sound trial strategy for failing to

object to testimony of extraneous offenses. Accordingly, we hold appellant has not shown counsel's representation was deficient. *See Salinas*, 163 S.W.3d at 740 (citing *Strickland*, 466 U.S. at 687).

b. Request for Limiting Instruction

Appellant also argues counsel was ineffective for failing to request a limiting instruction at the time testimony of extraneous offenses was admitted, and for failing to move for a charge on the limited use and burden of proof of such extraneous offenses. However, we need not decide whether counsel's representation was deficient with respect to these failures.

Considering the totality of the representation and the particular circumstances of this case, appellant has not shown there is a reasonable probability that, but for these failures, the result would have been different. *See id.* (citing *Strickland*, 466 U.S. at 687). In this case, Ethridge's description of appellant's age, race, height, weight, hair and clothing matched that of appellant when Officer Starr visited him at his residence. Ethridge also provided police with the license plate of appellant's vehicle, identified him from a photo array, and identified him in court. Accordingly, we overrule his second issue.

III. CONCLUSION

Having overruled both of appellant's issues on appeal, we affirm the judgment of the trial court.

/s/ Kent C. Sullivan
Justice

Panel consists of Justices Frost, Boyce, and Sullivan.
Do Not Publish — TEX. R. APP. P. 47.2(b).