Affirmed and Memorandum Opinion filed February 15, 2011.

In The

Fourteenth Court of Appeals

NO. 14-10-00208-CR

AUGUSTINE GRIFFIN, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 248th District Court
Harris County, Texas
Trial Court Cause No. 1204023

MEMORANDUM OPINION

Appellant Augustine Griffin challenges his conviction for aggravated robbery on the grounds that the evidence is insufficient to support his conviction, the trial court abused its discretion in denying the admission of relevant evidence, the trial court erred in admitting extraneous offense evidence, and his trial counsel was ineffective. We affirm.

BACKGROUND

In August 2007, Houston Police Department ("HPD") Officer T.M. Hawkins responded to an armed robbery call at a Family Dollar store located on North Wayside

Drive in Houston. When he arrived, the robbery was over, and the assailant had fled the scene. Hawkins spoke with several witnesses, including the cashier who was robbed, another cashier who was within several feet of the assailant when the robbery occurred, and a customer who also witnessed the robbery. Hawkins viewed the surveillance tape at the store and developed a description of the suspect: a black male, approximately twenty-eight years old.

HPD Detective John Rivera conducted the follow-up investigation of the robbery. He reviewed the surveillance tape of the robbery and printed still photographs from the video. He placed the video and photographs on local television news; through police investigation, appellant later became a suspect in the robbery. Rivera developed a photograph array using six photographs, including appellant's. He showed the array to the complainant, and she identified appellant as the individual who had robbed her. Appellant was indicted and arrested for aggravated robbery.

In February 2010, appellant's jury trial began. The three witnesses from the Family Dollar store, including the complainant, identified appellant in court as the robber. The video surveillance tape and still photographs from the tape were admitted into evidence. Officer Hawkins and Detective Rivera also testified regarding their investigation into the robbery.

Appellant presented several alibi witnesses during his case-in-chief. A family friend, his wife, and two of his stepsons testified that, at the time of the robbery, appellant was living with his wife and stepsons in Omaha, Nebraska. In addition, a private investigator testified that she measured the door at the Family Dollar store; from her testimony, the jury could have inferred the height of the robber. A nurse working in the Harris County jail testified that, on February 1, 2010, appellant was suffering from a scalp condition called "keloid," but because of the State's objections to the relevance of the nurse's testimony and her lack of expertise in the area of dermatology, the nurse was not permitted to testify regarding this condition before the jury. Finally, an expert in

eyewitness testimony explained that even though an eyewitness may be very confident of his or her identification of a person as the perpetrator of an offense, the eyewitness could often be "dead wrong." He testified that around two hundred fifty convictions based on eyewitness identification have later been overturned by DNA evidence. At the conclusion of this expert's testimony, the defense rested.

Over appellant's objection, the State presented extraneous offense evidence in rebuttal to appellant's alibi evidence. A cashier from a Walgreens store located near the Family Dollar store testified that appellant was the perpetrator of a robbery on August 22, 2007. Additionally, a cashier from a CVS pharmacy, also in close proximity to the Family Dollar store, identified appellant as the perpetrator of an attempted robbery that occurred on August 15, 2007. After these witnesses testified, the State rested. In rebuttal to testimony by these two witnesses that appellant had approached them to purchase cigarettes before robbing or attempting to rob them, appellant's wife took the stand and testified that appellant does not smoke cigarettes.

After hearing the evidence and being charged by the court, the jury convicted appellant of aggravated robbery. The jury assessed punishment at twelve years' confinement in the Institutional Division of the Texas Department of Criminal Justice, and the trial court entered judgment accordingly. This appeal timely ensued.

ANALYSIS

A. Sufficiency of the Evidence

In his first issue, appellant challenges the factual sufficiency of the evidence. However, while this appeal was pending, a majority of the judges of the Texas Court of Criminal Appeals determined that "the *Jackson v. Virginia* legal-sufficiency standard is the only standard that a reviewing court should apply in determining whether the evidence is sufficient to support each element of a criminal offense that the State is required to prove beyond a reasonable doubt." *Brooks v. State*, 323 S.W.3d 893, 895 (Tex. Crim. App. 2010) (plurality opinion); *id.* at 926 (Cochran, J., concurring).

Accordingly, we review the sufficiency of the evidence in this case under a rigorous and proper application of the *Jackson v. Virginia*[1] legal sufficiency standard. *Brooks*, 323 S.W.3d at 906.

In a legal sufficiency review, we view all the evidence in the light most favorable to the verdict and determine whether a rational fact-finder could have found the defendant guilty of all the elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Williams v. State*, 270 S.W.3d 140, 142 (Tex. Crim. App. 2008). We must give deference to the responsibility of the trier of fact to fairly resolve conflicts in testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007). Thus, we defer to the fact-finder's resolution of conflicting evidence unless the resolution is not rational. *See Brooks*, 323 S.W.3d at 906–07.

The testimony of a single eyewitness can be legally sufficient to support a conviction. *See Aguilar v. State*, 468 S.W.2d 75, 77 (Tex. Crim. App. 1971). Here, *three* eyewitnesses identified appellant as the assailant in the Family Dollar robbery. Although several of appellant's friends and family members testified that he was not in Texas when the robbery occurred, we defer to the fact-finder's resolution of conflicting evidence unless the resolution is not rational. *Brooks*, 323 S.W.3d at 906–07. The jury rationally could have found the eyewitnesses' testimony more credible than the testimony of appellant's friend and family members. We may not sit as a thirteenth juror or substitute our judgment for that of the fact-finder by re-evaluating the weight and credibility of the evidence. *See id*. at 911–12. Viewing all of the evidence in the light most favorable to the verdict, a rational fact-finder could have found appellant guilty of aggravated robbery beyond a reasonable doubt. Accordingly, we overrule appellant's sufficiency challenge.

[1] 443 U.S. 307, 319 (1979).

B. Exclusion of "Expert" Testimony

In issue two, appellant complains of the trial court's refusal to permit a registered nurse who examined appellant in February 2010 to testify regarding a scalp condition called "keloid." The admission of evidence is within the discretion of the trial court, and the trial court will not be reversed absent an abuse of discretion. *Moses v. State*, 105 S.W.3d 622, 627 (Tex. Crim. App. 2003); *Osbourn v. State*, 92 S.W.3d 531, 537–38 (Tex. Crim. App. 2002); *Woods v. State*, 301 S.W.3d 327, 332 (Tex. App.—Houston [14th Dist.] 2009, no pet.). A trial court does not abuse its discretion if its evidentiary ruling was within the "zone of reasonable disagreement," and was correct under any legal theory applicable to the case. *Winegarner v. State*, 235 S.W.3d 787, 790 (Tex. Crim. App. 2007); *Woods*, 301 S.W.3d at 332. Because the trial court is usually in the best position to decide whether evidence should be admitted or excluded, we must uphold its ruling unless its determination was so clearly wrong as to lie outside the zone within which reasonable persons might disagree. *See Winegarner*, 235 S.W.3d at 790 (quoting *Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997)); *Woods*, 301 S.W.3d at 332–33.

Here, the State objected to the nurse's testimony because (a) appellant's February 2010 scalp condition was not relevant to how he looked when the crime was committed in August 2007, (b) the nurse was not qualified as an expert, and (c) the State had not been provided with proper notice. After hearing this witness's testimony outside the presence of the jury, the judge sustained the objection on all three grounds:

> I'm going to sustain on several bases. I'm going to sustain on not being noticed and on the original relevance in October and probably take expert testimony to date -- I mean, 2010, February 2010, not October, and it would take expert testimony to give the several-year information that she is advising us of.

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than

it would be without the evidence." Tex. R. Evid. 401. Neither in the trial court nor on appeal has appellant explained how the nurse's testimony about appellant's scalp condition on February 1, 2010 is relevant to this case. Appellant contends in his brief that this nurse testified that his scalp "condition had existed for a long time causing him to be bald[.]" However, this contention is not supported by the record: this nurse testified simply that (a) she observed appellant on February 1, 2010, (b) he had a condition known as "keloid," easily seen because he "didn't have any hair," and (c) he had had it for at least a year, possibly more. She never testified that this condition *caused* appellant to be bald. Further, whether appellant was bald in February 2010 has no bearing on whether he was bald in August 2007, when this offense occurred.[2]

Because appellant failed to establish that the nurse's testimony would have any tendency to make the existence of any fact consequential to the determination of this case more or less probable than it would be without it, we cannot say the trial court abused its discretion in sustaining the State's objection to the relevance of her testimony. We overrule appellant's second issue.

C. Admission of Extraneous Offense Evidence

In his third issue, appellant contends that the trial court erred in admitting evidence of two extraneous offenses. We review a trial court's evidentiary rulings for an abuse of discretion. *See Moses*, 105 S.W.3d at 627. To preserve error for appellate review, the complainant must make a timely, specific objection that the trial court refuses. Tex. R. Evid. 103(a); Tex. R. App. P. 33.1(a); *Young v. State*, 137 S.W.3d 65, 69 (Tex. Crim. App. 2004) (en banc). Ordinarily, an objection is required every time inadmissible evidence is presented. *See Valle v. State*, 109 S.W.3d 500, 509 (Tex. Crim. App. 2003).

[2] Presumably, appellant was attempting to show through this testimony that he had been bald at the time of the robbery, because the witnesses and video surveillance tape and photographs all indicated that the individual who committed this robbery had hair showing under his cap. However, there was simply no indication during the nurse's testimony that appellant's scalp condition on February 1, 2010, either (a) caused him to be bald or (b) existed at the time of the robbery.

Error in allowing inadmissible evidence is cured when the same evidence is admitted without objection. *See id.*

Here, appellant's trial counsel objected to evidence regarding the first extraneous offense on the basis that it was not relevant.[3] Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Tex. R. Evid. 401. During appellant's case-in-chief, his witnesses testified that he had not been in the Houston area in August 2007. This particular offense occurred on August 22, 2007. Evidence that appellant committed a similar robbery in a nearby location a few days after he was alleged to have committed the charged offense is relevant to rebut appellant's alibi witnesses' testimony that he was not in Houston at the time of the charged offense.

Moreover, appellant's trial counsel neither objected before the witness who described the second offense testified, nor did his counsel object before HPD Detective Ken Nealy testified and described these extraneous offenses and how appellant was developed as a suspect in these crimes. Thus, the trial court's error, if any, in admitting testimony regarding the first extraneous offense was cured by appellant's failure to object when the same evidence was introduced through the unobjected-to testimony of Detective Nealy. *See Valle*, 109 S.W.3d at 509. Accordingly, we overrule appellant's third issue.

D. Ineffective Assistance of Counsel

In his fourth issue, appellant asserts that his trial counsel was ineffective for failing to object to the allegedly "tainted" in-court identifications. We apply a two-prong test in reviewing claims of ineffective assistance of counsel. *See Perez v. State*, 310 S.W.3d 890, 892–93 (Tex. Crim. App. 2010) (citing *Strickland v. Washington*, 466 U.S. 668, 687

[3] Appellant's trial counsel made the following comments before the testimony regarding the first extraneous offense: "And although there is obviously some argument whether or not we opened the door, if that is the case, extraneouses must still be relevant to what is going on here and now."

(1984)). To prove ineffective assistance, an appellant must demonstrate that (1) his counsel's performance was deficient because it fell below an objective standard of reasonableness, and (2) there was a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Id.* Any allegation of ineffectiveness must be firmly founded in the record, and the record must affirmatively demonstrate the alleged ineffectiveness. *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999). Appellant bears the burden of proving by a preponderance of the evidence that counsel was ineffective. *Id.* Failure to show either prong of the *Strickland* test defeats an ineffectiveness claim. *Id.* When the record is silent as to trial counsel's strategy, we will not conclude that defense counsel's assistance was ineffective unless the challenged conduct was "so outrageous that no competent attorney would have engaged in it." *Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005) (quoting *Garcia v. State*, 57 S.W.3d 436, 440 (Tex. Crim. App. 2001)).

Appellant's fourth issue is based on his allegation that the in-court identification of appellant was tainted by an unduly suggestive pretrial identification. Although an in-court identification may be tainted by an unduly suggestive pretrial identification, *see Loserth v. State*, 963 S.W.2d 770, 771–72 (Tex. Crim. App.1998), in this case, only the complainant identified appellant through a pretrial identification process. The other two eyewitnesses did not participate in any pretrial identification procedures. Thus, their in-court identifications of appellant could not have been tainted by any unduly suggestive pretrial identification procedure, and appellant's counsel had no basis to make this particular objection regarding the other two eyewitnesses' in-court identifications of appellant.

Further, we note that our record is silent as to trial counsel's strategy; thus, we will not conclude that defense counsel's assistance was ineffective unless the challenged conduct was "so outrageous that no competent attorney would have engaged in it." *See Goodspeed*, 187 S.W.3d at 392. Rather than objecting to the complainant's and other eye

witnesses' identification of appellant, appellant's counsel presented lengthy expert testimony identifying some of the pitfalls associated with eyewitness testimony, including that numerous convictions based on eyewitness identification have been overturned by DNA evidence. These actions could represent sound trial strategy; clearly it is not so outrageous that no competent attorney would have engaged in it. *See id.*

Under these circumstances, appellant has failed to establish by a preponderance of the evidence that his counsel was ineffective. We overrule his fourth issue.

Having overruled all of appellant's issues, we affirm the trial court's judgment.

/s/ Adele Hedges
Chief Justice

Panel consists of Chief Justice Hedges and Justices Frost and Christopher.
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