Affirmed and Memorandum Opinion filed August 16, 2011.

In The

Fourteenth Court of Appeals

NO. 14-10-00845-CR

DANNY RAY WHITFIELD, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 351st District Court
Harris County, Texas
Trial Court Cause No. 1221659

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

A jury convicted appellant, Danny Ray Whitfield, of aggravated robbery with a deadly weapon and assessed punishment at ten years' confinement. In four issues, appellant contends the evidence is legally and factually insufficient to support the conviction and he received ineffective assistance of counsel. We affirm.

I. BACKGROUND

The complainant, Leonard Gunderson, testified as follows regarding the incident at issue. At approximately 11:30 p.m. on May 28, 2009, he shopped at a Walgreens store in Houston. While he was inside the store, a man made a passing comment about some

merchandise. After Gunderson exited the store and unlocked his truck, the same man approached. Gunderson first ignored the man, believing he would ask for money, and turned to enter his truck. However, the man then grabbed Gunderson from behind and pulled him between his truck and another vehicle. As they wrestled, Gunderson was knocked to the pavement. Gunderson screamed and kicked the man, attempting to repel him. The man retrieved a small "semi-automatic" gun, aimed it at Gunderson, and threatened to shoot if he did not "shut up." Another man exited the adjacent vehicle and removed Gunderson's wallet from his pocket. The men then fled in their vehicle. Gunderson described the suspects to Officer Nathaniel Alvarez, who responded immediately after the incident.

Gunderson further testified that he met with Officer Paul Reese of the Houston Police Department's robbery division about a week after the incident. Officer Reese showed Gunderson seven still photos obtained from the store's surveillance video. Gunderson also viewed the surveillance video earlier on the day that he provided his trial testimony. At trial, Gunderson identified appellant as the person whom he saw inside the store, the person who robbed him, and the person depicted in the surveillance photos and on the video. Gunderson further testified that, about a month after the robbery, Officer Reese showed him six additional photos and asked if the robber was depicted in any of them. At that time, Gunderson identified one such photo as depicting the robber.

Officer Alvarez testified that Gunderson was "rattled, nervous, shaken up . . . breathing pretty heavily . . . pacing . . . very scared, very nervous" when Officer Alvarez arrived at the scene although Gunderson eventually calmed down. Gunderson reported an aggravated robbery by two suspects, including a black male wearing a blue shirt and light-colored pants.

Another witness, Yolanda Hampton, testified that she shopped at the store sometime after 11:00 p.m. on the evening of the incident. After driving out of the parking lot, she noticed a black man and an Hispanic man struggling with a white man between two vehicles. She had seen the black man and the white man in the store.

Hampton reentered the parking lot and honked because all participants were on the ground and the "two guys" were "just all over the man." She followed the assailants as they fled and attempted to obtain a license number but eventually abandoned her pursuit. Although Hampton did not identify appellant at trial, she described the black assailant as wearing a blue shirt and khaki pants.

The State also presented testimony from Officer Reese. According to Officer Reese, several days after the incident, he interviewed Gunderson and viewed the store's surveillance video. Officer Reese developed a suspect because the video showed a person "casing" Gunderson. A few days later, Officer Reese showed still photos obtained from the video to Gunderson, who confirmed that the person depicted therein was the robber. At Officer Reese's request, a local television station aired some footage from the video. Via two anonymous callers to Crime Stoppers, Officer Reese discovered appellant's name and address. Officer Reese then acquired another photo of appellant which he included in a photo array of six African-American males of similar size, hair color, and facial hair. Officer Reese showed Gunderson the array, explaining the robber may or may not have been included. Gunderson identified appellant as the robber and became nervous when he saw appellant's photo. Appellant was arrested shortly thereafter. At trial, Officer Reese identified appellant as the person whom Gunderson identified in the photo array.

II. SUFFICIENCY OF THE EVIDENCE

In his first and second issues, appellant contends the evidence is legally and factually insufficient to support the verdict. While this appeal was pending, five judges on the Texas Court of Criminal Appeals held that only one standard should be employed to evaluate whether the evidence is sufficient to support a criminal conviction beyond a reasonable doubt: legal sufficiency. *See Brooks v. State*, 323 S.W.3d 893, 894–95 (Tex. Crim. App. 2010) (plurality op.); *id.* at 926 (Cochran, J., concurring). Accordingly, we review appellant's challenge to factual sufficiency of the evidence under the legal-sufficiency standard. *See Pomier v. State*, 326 S.W.3d 373, 378 (Tex. App.—Houston

[14th Dist.] 2010, no pet.) (applying single standard of review required by *Brooks*); *see also Caddell v. State*, 123 S.W.3d 722, 726–27 (Tex. App.—Houston [14th Dist.] 2003, pet. ref'd) (explaining that this court is bound to follow its own precedent).

When reviewing sufficiency of the evidence, 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*, 323 S.W.3d at 899 (plurality op.). We may not sit as a thirteenth juror and substitute our judgment for that of the fact finder by reevaluating the weight and credibility of the evidence. *Id.* at 899, 901; *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) (expressing that jury may choose to believe or disbelieve any portion of the testimony). We defer to the fact finder's resolution of conflicting evidence unless the resolution is not rational. *See Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007). Our duty as 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).

A person commits aggravated robbery "if, in the course of committing theft and with intent to obtain or maintain control of the property, he . . . intentionally or knowingly threatens or places another in fear of imminent bodily injury or death" and "uses or exhibits a deadly weapon." Tex. Penal Code Ann. §§ 29.02(a)(2); 29.03(a)(2) (West 2011). Appellant does not dispute that Gunderson was the victim of an aggravated robbery; instead, appellant contends the evidence was insufficient to support the finding that appellant was one of the perpetrators.

Appellant contends Gunderson's identifications of appellant in the photo array and at trial were tainted by the fact that he had previously viewed the seven surveillance photos. However, at trial, Gunderson was emphatic in identifying appellant as one of the perpetrators and was "certain" the photo he chose in the array depicted the robber. Gunderson testified that these identifications were based on his recollection of the incident—not the surveillance photos. Therefore, Gunderson's earlier viewing of the

surveillance photos was merely a factor the jury was free to consider when determining whether his subsequent identifications were credible. Additionally, Officer Reese testified that appellant's photo in the array was "quite a bit different" than the "grainy" surveillance photos. Further, the surveillance and array photos were admitted at trial. Thus, the jury was allowed to personally evaluate the quality of the surveillance photos when deciding whether Gunderson was influenced by them in making the subsequent identifications.

Appellant also suggests that Gunderson's identifications of appellant were unreliable based on Gunderson's age (sixty-one years old) at the time of the incident and his physical and mental conditions precipitated by the robbery. Again, the jury was free to decide what weight, if any, to assign these factors when evaluating the credibility of his identifications.

Appellant further cites Gunderson's testimony that the area between the vehicles where appellant wielded the gun was dark and Gunderson focused more on the gun than on the perpetrator. However, Gunderson also explained that he saw appellant approach in the parking lot because light from the store illuminated the area, which was a handicapped-designated parking space only ten to fifteen feet from the door. Gunderson recognized appellant as he approached in the parking lot because Gunderson had seen his face inside the store.

Moreover, other evidence corroborated certain portions of Gunderson's testimony relative to the identification issue. Specifically, based on the aired surveillance footage, two anonymous tipsters independently provided information that led Officer Reese to appellant. In addition, Hampton's description of one assailant as a black male wearing a blue shirt and khaki pants whom she had seen inside the store before the robbery was consistent with Gunderson's description of appellant to Officer Alvarez immediately after the incident. Finally, Hampton and Officer Alvarez both testified the parking lot was well lit, and Officer Alvarez confirmed Gunderson was parked in a handicapped parking place near the door.

In sum, the evidence is legally sufficient to support the jury's finding that appellant committed aggravated robbery. We overrule his first and second issues.

III. ASSISTANCE OF COUNSEL

In his third and fourth issues, appellant contends he received ineffective assistance of counsel. To prevail on an ineffective-assistance claim, an appellant must prove (1) counsel's representation fell below the objective standard of reasonableness and (2) there is a reasonable probability that, but for counsel's deficiency, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687, 694 (1984); *Thompson v. State*, 9 S.W.3d 808, 812 (Tex. Crim. App. 1999). In considering an ineffective-assistance claim, we indulge a strong presumption that counsel's actions fell within the wide range of reasonable professional behavior and were motivated by sound trial strategy. *Strickland*, 466 U.S. at 689; *Thompson*, 9 S.W.3d at 813; *Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994). To overcome this presumption, a claim of ineffective assistance must be firmly demonstrated in the record. *Thompson*, 9 S.W.3d at 814. In most cases, direct appeal is an inadequate vehicle for raising such a claim because the record is generally undeveloped and cannot adequately reflect the motives behind trial counsel's actions. *Rylander v. State*, 101 S.W.3d 107, 110–11 (Tex. Crim. App. 2003); *Thompson*, 9 S.W.3d at 813–14. When the record is silent regarding trial counsel's strategy, we will not find deficient performance 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).

Appellant suggests his counsel's performance was deficient in three respects: (1) failing to file a motion to suppress evidence concerning Gunderson's identification of appellant; (2) failing to investigate appellant's alibi; and (3) insufficiently cross-examining Yolanda Hampton.

A. Motion to Suppress

Appellant first complains that his counsel failed to file a motion to suppress evidence regarding Gunderson's identification of appellant on the ground it was tainted by Gundersons's viewing the surveillance photos shortly after the incident.

Appellant cites the law applicable to determining whether an in-court identification is inadmissible because of a tainted pre-trial identification procedure. A due-process violation may occur if a suggestive pre-trial identification procedure causes "a very substantial likelihood of irreparable misidentification." *Neil v. Biggers*, 409 U.S. 188, 198 (1972); *see Webb v. State*, 760 S.W.2d 263, 269 (Tex. Crim. App. 1988). We perform a two-step analysis to determine admissibility of an in-court identification. *Delk v. State*, 855 S.W.2d 700, 706 (Tex. Crim. App. 1993). First, we inquire whether the out-of-court identification procedure was impermissibly suggestive; and if so, we determine whether the suggestive procedure gave rise to "a very substantial likelihood of irreparable misidentification" at trial. *Id.* The appellant bears the burden to establish the in-court identification is unreliable by proving both of these elements by clear and convincing evidence. *See id.*

Appellant suggests that counsel should have moved to suppress any identification of appellant whether pre-trial (in the surveillance photos and the photo array) or in-court because Gunderson's viewing the surveillance photos resulted in an impermissibly-suggestive pre-trial identification procedure. *See Neil*, 409 U.S. at 198 (stating that "very substantial likelihood of irreparable misidentification" standard "serves equally well as a standard for the admissibility of testimony concerning the out-of-court identification itself").

To prevail on an ineffective-assistance claim based on counsel's failure to file a motion to suppress, an appellant must show that such a motion would have been granted. *Jackson v. State*, 973 S.W.2d 954, 957 (Tex. Crim. App. 1998); *see also Vaughn v. State*, 931 S.W.2d 564, 566 (Tex. Crim. App. 1996) (stating that, before court will sustain ineffective-assistance claim based on counsel's failure to make objection at trial, an

appellant must show trial court would have erred by overruling objection); *Mooney v. State*, 817 S.W.2d 693, 698 (Tex. Crim. App. 1991) (recognizing, in effective-assistance context, that counsel is not required to file futile motions).

Appellant has not shown that the trial court would have properly granted a motion to suppress. In *Jackson v. State*, 808 S.W.2d 570 (Tex. App.—Houston [14th Dist.] 1991, pet. ref'd), our court addressed a substantially similar issue. The complainant viewed the surveillance-camera photo of a convenience-store robbery and verified that it depicted the offense, including the two perpetrators. *Id.* at 571. The complainant then viewed a standard photo array of six persons with similar appearances and immediately identified the defendant as one of the robbers. *Id.* During the array procedure, the officers exercised care to prevent any hint or suggestion regarding which photo might be selected. *Id.* The trial court denied the defendant's motion to suppress testimony regarding the array and in-court identifications. *Id.* At trial, the complainant testified with "absolute certainty" regarding his immediate identification of the defendant in the photo array and correctly identified the defendant in open court based on his memory of the incident. *Id.* at 572. When affirming, our court held that the pre-trial identification procedure was not impermissibly suggestive. *Id.* at 572–73.

Our court acknowledged well-established law holding that "a substantial likelihood of irreparable misidentification may result where a *suspect's* photograph is shown to a complaining witness and is followed shortly thereafter by the complainant viewing a lineup or photo array which displays *that suspect* in a suggestive fashion." *Id.* at 572 (emphasis in original) (citing *Neil*, 409 U.S. at 199). The court further acknowledged the law holding that "the danger of irreparable misidentification will be increased if the witness views *only* the picture of a single individual who *generally resembles* the person he saw, and the witness views a photo array that emphasizes the photo of the *suspect* or the *suspect's* picture reappears within the array." *Id.* (emphasis in original) (citing *Simmons v. United States*, 390 U.S. 377, 383 (1968); *Webb*, 760 S.W.2d at 269). However, the court distinguished these scenarios from its case because the

surveillance photo at issue did not "display a *suspect* or someone *resembling* appellant"; instead, the photo "display[ed] the *actual perpetrators* in commission of the crime." *Id.* (emphasis in original). The court further emphasized that the defendant was recognized and named from the photo by authorities and the photo was authenticated by the complainant who witnessed the entire crime at close hand under satisfactory viewing conditions. *Id.*

Likewise, Officer Reese did not show Gunderson a random photo of a *suspect* or a *person resembling* appellant to inquire whether it might depict the same person who committed the offense. Rather the surveillance photos depicted the *actual perpetrator* during commission of part of the offense—his "casing" Gunderson inside the store. Accordingly, Gunderson merely verified that the photos depicted an event he personally witnessed because he clearly observed appellant inside the store. Indeed, Officer Reese testified that he showed Gunderson the photos for "liability" purposes; he wished to avoid incorrectly representing to the public that a person was a criminal suspect when footage from the surveillance video aired on television, and Gunderson was the only person who could verify that the photos showed the perpetrator. Similar to *Jackson*, Officer Reese then independently ascertained appellant's identity based on tipsters' recognizing him in the aired footage and obtained a different photo to use in the subsequent array. Appellant does not contend that the array procedure itself was suggestive; indeed, appellant was one of six persons of similar appearance included in the array, and Officer Reese did not inform Gunderson that the suspect was necessarily included therein. Finally, Gunderson made clear that his identifications of appellant in the photo array and in court were based on his recollection of the incident. Accordingly, appellant could not have shown by clear and convincing evidence that Gunderson's viewing the surveillance photos created an impermissibly-suggestive identification procedure.

In sum, because Gunderson's viewing the surveillance photos was not an impermissibly suggestive procedure, we need not consider whether the procedure

"created a substantial likelihood of misidentification." *See Webb*, 760 S.W.2d at 269 (recognizing that finding a pretrial identification procedure was not impermissibly suggestive will obviate the need to assay whether it created "substantial likelihood of misidentification"); *Jackson*, 808 S.W.2d at 572 (stating that, because challenged identification procedure was not impermissibly suggestive, court need not analyze whether it resulted in "substantial likelihood of misidentification").

Consequently, any motion to suppress Gunderson's pre-trial and/or in-court identifications would have lacked merit. Rather, as we have discussed, Gunderson's viewing the surveillance photos was merely a factor for the jury to consider in evaluating the credibility of his subsequent identifications, as opposed to a fact negating admissibility of his identifications. In fact, trial counsel attempted to demonstrate, albeit unsuccessfully, via cross-examination that the identifications were tainted on this basis. Accordingly, counsel was not ineffective by failing to file a motion to suppress.

B. Appellant's Alibi

Appellant also argues that his trial counsel was ineffective by failing to investigate appellant's alibi. In appellant's affidavit supporting his motion for new trial, he averred that counsel did not investigate his alibi and the jury would have found reasonable doubt if counsel had presented evidence regarding appellant's "whereabouts" at the time of the offense. However, appellant's general statement did not constitute conclusive proof that counsel failed to investigate appellant's alibi. To support the motion for new trial, appellant presented no testimony from counsel that he failed to investigate any alibi. We cannot foreclose the possibility that counsel did pursue such an investigation and determined the alleged alibi was not exculpatory. Moreover, even if counsel failed to investigate the alleged alibi, we cannot conclude he was ineffective because the record is silent on the reason he did not pursue an investigation. Finally, even if counsel failed to investigate the alleged alibi, without any explanation from appellant regarding the nature of the alibi, he has not proved the result of the trial would have been different if counsel had pursued an investigation.

C. Cross-examination of Yolanda Hampton

Appellant also complains that counsel did not aggressively cross-examine Hampton to prove she was unable to identify appellant. However, on direct examination, the State did not elicit testimony, or attempt to prove, that Hampton could identify appellant, and she never claimed that she was able to make such identification. Therefore, counsel was not ineffective by failing to cross-examine Hampton about any such identification. Accordingly, we overrule appellant's third issue.

Finally, in his fourth issue, appellant contends he received ineffective assistance based on the cumulative effect of the alleged foregoing deficiencies. We also overrule his fourth issue because he has failed to demonstrate counsel was deficient in these respects.

We affirm the trial court's judgment.

/s/ Charles W. Seymore
Justice

Panel consists of Justices Anderson, Seymore, and McCally.
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