

**Affirmed and Memorandum Opinion filed April 5, 2016.**



**In The**

**Fourteenth Court of Appeals**

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**NO. 14-15-00164-CR**

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**NICHOLAS OLIVER GOREE, Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

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**On Appeal from the 179th District Court  
Harris County, Texas  
Trial Court Cause No. 1396268**

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

A jury found appellant Nicholas Goree guilty of aggravated robbery and assessed his punishment at thirty-eight years' confinement. *See* Tex. Penal Code Ann. § 29.03 (West 2015). In his sole issue on appeal, appellant contends the trial court erred by excluding evidence that the complainant had made misidentifications during the first of two lineup procedures. Assuming, without deciding, the trial court erred when it excluded the misidentification evidence, we

conclude that the alleged error was not constitutional error and appellant has not shown he was harmed by the non-constitutional error. We affirm.

## I. BACKGROUND

The complainant, Larry Rodriguez, lived with his mother in an apartment. On July 29, 2013, Rodriguez was alone in the apartment when he was robbed at gunpoint by two individuals. Rodriguez's mother, Norma Leal, arrived home as one of the individuals, later identified as appellant, loaded her car with various items. Appellant and his co-defendant, Paul Byrd,<sup>1</sup> fled in Leal's direction. She saw both of their faces. Leal entered her apartment, saw Rodriguez facedown on the floor, and called the police. Two police officers arrived at the apartment complex, and Rodriguez and Leal gave the officers a description of the suspects, the stolen property, and the stolen car.

Shortly thereafter, Leal's car was found wrecked less than a mile away. Police officers, including a canine unit, were dispatched to the accident location to search for the suspects. Appellant and Byrd were found hiding under a tarp in a locked, gated area behind the nearby Sam's Club. Some of the stolen items were scattered around appellant and Byrd. Officers then escorted appellant and Byrd back to the apartment in separate patrol vehicles to conduct a show-up identification procedure with Leal. Rodriguez did not participate in the show-up identification procedure. Leal identified both appellant and Byrd as the individuals who drove off in her car.

The next day, Rodriguez observed two separate lineups. During the first lineup, Rodriguez identified two individuals as possibly being the robbers. Rodriguez testified outside the presence of the jury that neither of these people was

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<sup>1</sup> Byrd was convicted of aggravated robbery in Cause Number 1396267. He is currently incarcerated in the Texas Department of Criminal Justice for a term of eighteen years.

one of the defendants. During the second lineup, appellant was present along with four other individuals who were similar in build, complexion, and height to appellant. Rodriguez identified appellant as a strong tentative that he was one of the robbers.

During appellant's cross-examination of Rodriguez, appellant sought to elicit testimony regarding the prior misidentification. The court conducted a bench hearing regarding the admissibility of the misidentification evidence. Appellant argued the evidence was relevant to show that if Rodriguez was wrong during the first lineup procedure, then he could have been wrong in the second procedure also. The trial court disagreed and precluded any questioning about the prior misidentification.

The jury found appellant guilty of aggravated robbery, found an enhancement allegation true, and assessed punishment at thirty-eight years' confinement. Appellant filed a timely notice of appeal, and the trial court certified his right to appeal.

## **II. ANALYSIS**

In his sole point of error, appellant argues the trial court abused its discretion when it excluded evidence of Rodriguez's misidentifications during the first lineup procedure. Specifically, appellant contends the exclusion resulted in constitutional error because it precluded him from presenting his defensive theory of misidentification. We disagree that appellant suffered the requisite harm from the alleged error and therefore do not address whether the trial court erred in excluding the evidence.

In a criminal case, harm is evaluated under Texas Rule of Appellate Procedure 44.2. Rule 44.2(a) addresses constitutional error while Rule 44.2(b)

addresses non-constitutional error. *See* Tex. R. App. P. 44.2(a), (b). As a preliminary matter, we must determine whether the trial court's error in excluding the prior misidentifications was, as appellant contends, a constitutional error because it precluded him from presenting a meaningful defense. *See Ray v. State*, 178 S.W.3d 833, 835 (Tex. Crim. App. 2005) (citing *Potier v. State*, 68 S.W.3d 657, 665 (Tex. Crim. App. 2002)).

#### **A. The Error Is Not Constitutional**

The erroneous exclusion of evidence in violation of the Texas Rules of Evidence generally is non-constitutional error and is reviewed under Rule 44.2(b). *See Tillman v. State*, 376 S.W.3d 188, 198 (Tex. App.—Houston [14th Dist.] 2012, no pet.) (citing *Walters v. State*, 247 S.W.3d 204, 219 (Tex. Crim. App. 2007)). However, improper exclusion of evidence may establish a constitutional violation in two circumstances: (1) when a state evidentiary rule categorically and arbitrarily prohibits the defendant from offering relevant evidence that is vital to his defense; or (2) when a trial court erroneously excludes relevant evidence that is a vital portion of the case and the exclusion effectively precludes the defendant from presenting a defense. *Ray*, 178 S.W.3d at 835; *Tillman*, 376 S.W.3d at 198. Appellant argues that the second circumstance is at issue here. Erroneous evidentiary rulings rarely rise to the level of denying a fundamental constitutional right to present a meaningful defense. *Wiley v. State*, 74 S.W.3d 399, 405 (Tex. Crim. App. 2002) (citing *Potier*, 68 S.W.3d at 663).

We hold that appellant was not effectively prevented from presenting his defense when the trial court excluded the misidentification evidence. *See Tillman*, 376 S.W.3d at 198–99 (because appellant was able to challenge reliability of police identification procedures through cross-examination of eyewitnesses and officer, and attacked their reliability during closing argument, he was not effectively

prevented from presenting his defense when the trial court excluded his expert witness). Appellant was able to challenge the reliability of both Leal's and Rodriguez's identifications of him through cross-examination. Therefore, we conclude that the excluded evidence would have furthered appellant's defensive theory of misidentification only incrementally. *See Walters*, 247 S.W.3d at 222; *see also Ray*, 178 S.W.3d at 836. For example, during appellant's cross-examination of Leal, he challenged the reliability of her identification of appellant during the show-up procedure:

Q. Now, you would agree a description of a black male wearing shorts and a tank top is not unusual in the state of Texas in July; would you agree?

A. I agree.

Q. The description could fit many people?

A. Yes.

Q. So it's not what we could call a very specific identification. Could fit many people; would you agree with that?

A. Yes.

Likewise, appellant was also able to cross-examine Rodriguez in order to challenge the reliability of his identification of appellant during the second lineup procedure:

Q. So you gave a description to the police that could fit many people, would you agree?

A. I believe so - - I mean, it was - -

Q. I mean, black male, wearing tank top and shorts. This was the middle of July, correct?

A. Yes.

...

Q. You would agree that many people dress that way?

A. Yes, summer, yeah.

...

Q. Now, when you went to the lineup, the officer drove you down, you wanted somebody to pay for this, correct?

A. No, at time I was still - - I was just still in shock.

...

Q. All right. Now, they gave you instructions about what was going on down there, correct?

A. Yes.

Q. And they told you the procedures involved.

A. Yes.

Q. Right? And they told you the levels of identification.

A. Yes.

Q. Right? And so, they wrote down what you told them, correct?

A. Yes.

Q. And the officer wrote down "strong tentative"?

A. Yes.

Q. Doesn't mean that would mean you're not a hundred percent sure, not exactly sure, but it's a possibility. Would you agree with that?

A. Yes.

Additionally, appellant challenged the reliability of both Leal's and Rodriguez's identifications during closing argument. He argued Leal could have easily been mistaken since she only saw the suspects for a brief period. Appellant also emphasized the fact that Rodriguez gave a strong tentative, rather than a positive identification of appellant.

Where the excluded evidence would only further the defendant's defensive theory incrementally, the error is not of a constitutional dimension. *Walters*, 247 S.W.3d at 222; *Ray*, 178 S.W.3d at 836. Therefore, the alleged error here was not constitutional, and the harm analysis is governed by Rule 44.2(b). *See Tillman*, 376 S.W.3d at 199.

## **B. Appellant Was Not Harmed**

Next, we consider whether the trial court's alleged error in excluding the misidentification evidence harmed appellant. A non-constitutional error that does not affect substantial rights does not justify overturning the verdict. *Potier*, 68 S.W.3d at 666. A substantial right is affected when the error had a substantial and injurious effect or influence in determining the jury's verdict. *Coble v. State*, 330 S.W.3d 253, 280 (Tex. Crim. App. 2010). However, such non-constitutional error is harmless when the improperly admitted evidence did not influence the jury or had but a slight effect upon its deliberations. *Id.* In performing a harm analysis, we examine the entire trial record and calculate, as much as possible, the probable impact of the error upon the rest of the evidence. *Id.* We consider the overwhelming evidence supporting the particular issue to which the erroneously admitted evidence was directed. *Id.*; *Morales v. State*, 32 S.W.3d 862, 867 (Tex. Crim. App. 2000). In doing so, we consider "everything in the record, including any testimony or physical evidence admitted for the jury's consideration, the nature of the evidence supporting the verdict, the character of the alleged error and how it might be considered in connection with other evidence in the case." *Motilla v. State*, 78 S.W.3d 352, 357 (Tex. Crim. App. 2002).

Here, appellant's substantial rights were not affected by the exclusion of the evidence regarding Rodriguez's misidentifications because abundant additional evidence tied appellant to the robbery. Just thirty minutes after Leal observed appellant and Byrd drive away in her car, Leal's car was found wrecked less than a mile from the apartment complex. The car had struck a METRO bus stop in front of a nearby Sam's Club. Officers set up a perimeter for the suspects, who had been seen running from the accident location. A canine unit was also dispatched to the accident location to assist in the search for the suspects. The canine alerted on a

locked gated area behind the Sam's Club. An officer summoned the manager from Sam's Club to unlock the gate. Appellant and Byrd were found hiding under a tarp inside the gated area. Scattered around them were some of the items stolen during the robbery, as well as two guns. Appellant and Byrd were then taken back to the apartment complex, less than an hour after committing the crime, to conduct the show-up procedure with Leal.

Leal saw appellant load her car with stolen property when she arrived home via bus around 5:30 p.m. Appellant was wearing a "striped tank top and shorts." Leal testified that appellant re-entered the apartment to get more items and came out with Byrd. Leal saw that Byrd was wearing a white tank top when appellant and Byrd got into the car and drove away "right close to" Leal. She clearly saw their faces and made statements about what the robbers were wearing. An hour later during the show-up identification procedure, Leal immediately identified appellant as the individual she saw loading items into her car. She also stated that appellant was in the passenger's seat and Byrd was in the driver's seat when the suspects drove away.

Based on our review of the record and the totality of the circumstances, we conclude the other evidence of appellant's identity as the perpetrator was strong; in particular (a) the other victim of the robbery, Leal, identified appellant, and (b) shortly after the robbery and near the wrecked stolen vehicle, appellant was found hiding with Rodriguez's stolen items at his feet and matching the description given by both Rodriguez and Leal. *Cf. Cruz v. State*, 122 S.W.3d 309, 314 (Tex. App.—Houston [1st Dist.] 2003, no pet.) (noting that the exclusion of evidence casting doubt on the reliability of complainant's identification was harmful because it was the only evidence linking appellant to the robbery). After reviewing the record as a whole, we have a fair assurance that the improperly excluded evidence did not



influence the jury or had but a slight effect upon the verdict. *See Coble*, 330 S.W.3d at 280. Therefore, assuming the trial court erred when it excluded evidence of Rodriguez's prior misidentifications, we conclude the error was harmless. Accordingly, we overrule appellant's sole point of error.

### III. CONCLUSION

Having overruled appellant's sole issue on appeal, we affirm the trial court's judgment.

/s/ Sharon McCally  
Justice

Panel consists of Justices Christopher, McCally, and Busby.  
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