Affirmed and Memorandum Opinion filed September 8, 2016.

In The

Fourteenth Court of Appeals

NO. 14-15-00709-CV

IN THE MATTER OF A.F., A CHILD

On Appeal from the 314th District Court
Harris County, Texas
Trial Court Cause No. 2014-03135J

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

The State petitioned for A.F.'s commitment to the Texas Juvenile Justice Department, alleging that A.F. engaged in delinquent conduct by committing an aggravated robbery. After a bench trial, the court found that A.F. engaged in delinquent conduct as alleged, and the court ordered A.F. committed to the Department for ten years.

On appeal, A.F. contends that (1) the evidence is legally and factually insufficient to support the adjudication, and (2) the trial court erred by "finding

appellant validly waived his right to a jury trial" under the Family Code. We affirm.

I. LEGAL SUFFICIENCY OF THE EVIDENCE

In his first issue, A.F. contends that "[n]o rational trier of fact could believe beyond a reasonable doubt that [the complainant]'s identification was accurate." Thus, A.F. challenges the sufficiency of the evidence to prove his identity as one of the three people who robbed the complainant and his wife at gunpoint.

A. Legal Principles

We use the standards for assessing the sufficiency of the evidence in a criminal case to assess the sufficiency of the evidence underlying a finding that a juvenile engaged in delinquent conduct. *In re R.R.*, 373 S.W.3d 730, 734 (Tex. App.—Houston [14th Dist.] 2012, pet. denied). Thus, we examine all the evidence in the light most favorable to the verdict to determine whether a rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Id.* (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). We presume the fact-finder resolved conflicting inferences in favor of the verdict, and we defer to that determination. *Id.* at 735 (citing *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007)).

"Unquestionably, the State must prove beyond a reasonable doubt that the accused is the person who committed the crime charged." *Smith v. State*, 56 S.W.3d 739, 744 (Tex. App.—Houston [14th Dist.] 2001, pet. ref'd). "Identity may be proved through direct or circumstantial evidence, and through inferences." *Id.* "The testimony of a single eyewitness alone can be sufficient to support a conviction." *Aviles-Barroso v. State*, 477 S.W.3d 363, 396 (Tex. App.—Houston [14th Dist.] 2015, pet. ref'd). The fact-finder alone "decides whether to believe

eyewitness testimony," and "resolves any conflicts or inconsistencies in the evidence." *Bradley v. State*, 359 S.W.3d 912, 917 (Tex. App.—Houston [14th Dist.] 2012, pet. ref'd).

B. The Evidence

There is direct evidence of A.F.'s identity as one of the robbers. The complainant testified that he and his wife were driving to his brother's townhouse on Memorial Day at about 8:45 p.m. The complainant saw three men walking down the street as he approached the townhouse parking lot. The complainant got a "good look" at the men. The complainant and his wife parked the car and were walking to the townhouse when the three men approached. The first man grabbed the complainant's neck, pointed a nine-millimeter gun at his head, and demanded the complainant's phone and wallet. The other two men went to the complainant's wife.

The complainant identified A.F. in court as the first man who approached. A.F. was the tallest of the robbers. The complainant testified that he was very close, less than a foot, from A.F. He got a "good look" at A.F. He saw A.F.'s face a "hundred percent" and was a "hundred percent sure" A.F. was the robber.

The complainant testified that A.F. took his wife's necklace, and one of the other robbers took her purse. The robbers fled on foot. After speaking with the police, the complainant described to his brother the three men in detail. The next day, the complainant's brother called the complainant because the brother saw some people walking nearby whom he thought could be the robbers. The complainant arrived in five minutes, saw the men he believed robbed him, and called the police. Police officers arrested the three suspects.

Although the complainant thought he would be able to identify all of the robbers in photo spreads, the complainant could identify only A.F. One officer testified that the complainant was "pretty certain" about the identification because the complainant "looked at it real quick and circled it." Another officer testified that the complainant was "certain" about the identification, and the identification was "pretty immediate." The complainant looked at the photo spread for only a few seconds before making the identification.

The complainant's wife testified through an interpreter[1] that the tallest of the robbers took her necklace while the shortest took her purse. She could not identify any of the robbers because she did not get a good look at them and she had her head down during the robbery.

A.F.'s counsel cross-examined the complainant, his wife, and several officers about alleged inconsistencies and omissions concerning the testimony and statements made to police.[2] For example, A.F. notes on appeal that there were inconsistencies and omissions about whether all three robbers had guns or only two did, which of the three robbers took the necklace, whether any of the robbers grabbed the wife's neck, how tall one of the robbers was, and whether A.F. pushed the wife to the ground. Trial counsel also put forth an alibi defense: A.F.'s father testified that A.F. had been with the family at a park until about 9:00 p.m. and then was at home all night.

[1] The complainant and his wife's native language was Vietnamese. She spoke only a little English.

[2] The complainant interpreted for his wife's statement to the police, and he acknowledged that his wife later told him details that he had not reported to the police.

C. Analysis

On appeal, A.F. contends that the complainant's identification is the only evidence of guilt and that any rational fact-finder would doubt the accuracy of the identification. A.F. points to the inconsistencies among witnesses' testimony, A.F.'s alibi evidence, and the "bizarre" nature of how the complainant's brother spotted A.F. before the complainant made an identification.

The trial court, as fact-finder, could have decided not to believe A.F.'s father's alibi testimony. *See Evans v. State*, 202 S.W.3d 158, 163 (Tex. Crim. App. 2006) (noting that the fact-finder may choose not to believe the defendant's mother's alibi testimony; "She is, after all, the defendant's mother."). Further, it was the sole responsibility of the trial court, acting as the fact-finder, to resolve inconsistencies in the evidence and decide whether to believe the eyewitness identification. *See Bradley*, 359 S.W.3d at 917.

In *Bradley*, for example, this court held that the evidence of the defendant's participation in a robbery was sufficient based on a single eyewitness's identification. *See id.* at 917–18. The complainant had seen the defendant after the robbery in an area where the robbery took place. *Id.* at 918. The complainant learned the defendant's name and searched Facebook for the defendant's picture. *Id.* After giving the defendant's Facebook pictures to the police, the complainant identified the defendant in a photo spread and in court. *Id.* at 918. But, the defendant and his brother (who admitted to being one of the robbers) testified that the defendant was not one of the robbers. *Id.* at 917. The defendant also noted that the complainant's initial description to the police lacked some details, such as the defendant's tattoos. *Id.* at 917–18. This court held the evidence was legally sufficient because even if the complainant's searching social media for the defendant's picture rendered the photo spread impermissibly suggestive, there was

an independent basis for the in-court identification. *See id.* at 918. And, the complainant's "imperfect description" to police did not undercut the complainant's in-court identification. *Id.*

The complainant testified he was one hundred percent sure A.F. was one of the robbers, and he got a good look at A.F. while they were very close. The complainant identified A.F. in the photo spread within a few seconds and seemed certain. From this evidence, a rational fact-finder could believe that A.F. was one of the robbers. *See id.* at 917–18.

A.F.'s first issue is overruled.

II. FACTUAL SUFFICIENCY OF THE EVIDENCE

Also in his first issue, A.F. asks this court to "reconsider its decision" in *In re R.R.*, wherein this court held that it would review a finding that a juvenile engaged in delinquent conduct only under a legal-sufficiency standard, and not a factual-sufficiency standard. *See* 373 S.W.3d 730, 734 (Tex. App.—Houston [14th Dist.] 2012, pet. denied) (citing *Brooks v. State*, 323 S.W.3d 893 (Tex. Crim. App. 2010)).

"Absent a decision from a higher court or this court sitting en banc that is on point and contrary to the prior panel decision or an intervening and material change in the statutory law, this court is bound by the prior holding of another panel of this court." *Chase Home Fin., L.L.C. v. Cal Western Reconveyance Corp.*, 309 S.W.3d 619, 630 (Tex. App.—Houston [14th Dist.] 2010, no pet.). A.F. has not cited any controlling authority or statutory change to undermine *In re R.R.*[3] Thus, we may

[3] Indeed, A.F. acknowledges that "the Texas Supreme Court has not yet decided the issue," citing primarily to a dissent in the Beaumont Court of Appeals. *See In re C.Z.S.*, No. 09-14-00480-CV, 2015 WL 3407250, at *4 (Tex. App.—Beaumont May 28, 2015, pet. denied) (mem. op.) (Horton, J., dissenting).

not reconsider the decision, and we do not review the factual sufficiency of the evidence in this case.

III. JURY-TRIAL WAIVER

In his second issue, A.F. makes three related arguments: (1) there is fundamental error requiring a new trial because A.F. did not waive his right to a jury trial, which is secured by the Texas Constitution, (2) the trial court's failure to comply with Section 51.09 of the Family Code, which set the standards for waiving a jury trial in an adjudication hearing, is fundamental error requiring a new trial, or alternatively, (3) A.F. was harmed by the trial court's failure to comply with Sections 54.03(c) and 51.09.[4]

First, we review the undisputed facts and law applicable to this case. Then, we review A.F.'s three contentions. We hold consistent with this court's precedent that (1) A.F. had no right to a jury trial under the Texas Constitution, and even if he did, nothing in the record undermines the presumption of the truthfulness of the judgment's recital that A.F. waived a jury trial, (2) the trial court's failure to comply with the Family Code is not fundamental error and it is subject to a harmless error analysis, and (3) A.F. was not harmed.

A. Undisputed Facts and Law

Section 54.03(c) states that an adjudication trial "shall be by jury unless jury is waived in accordance with Section 51.09." Tex. Fam. Code Ann. § 54.03(c). Section 51.09 states that any right granted by the Juvenile Justice Code or the Texas or United States Constitution may be waived if "(1) the waiver is made by

[4] Although this issue is multifarious and we may disregard it, we will consider it in the interest of justice to the extent we can discern with reasonable certainty the alleged error. *See Aldrich v. State*, 928 S.W.2d 558, 559 (Tex. Crim. App. 1996); *Bell v. Tex. Dep't of Crim. Justice-Inst. Div.*, 962 S.W.2d 156, 157 n.1 (Tex. App.—Houston [14th Dist.] 1998, pet. denied).

the child and the attorney for the child; (2) the child and the attorney waiving the right are informed of and understand the right and the possible consequences of waiving it; (3) the waiver is voluntary; and (4) the waiver is made in writing or in court proceedings that are recorded." *Id.* § 51.09. The parties agree that the fourth requirement has not been met in this case. The record does not contain a written or recorded waiver of a jury trial.

It is also undisputed that the trial court's judgment, which A.F. signed, states that all parties waived a jury trial:

> Be it remembered that this cause being called for trial, came on to be heard before the above Court with the above numbered and entitled cause and came the State of Texas by her Assistant District Attorney . . . and came in person the Respondent, [A.F.], with his/her defense attorney . . . and the Respondent's parent(s), guardian(s), or custodian(s), and pursuant to the Texas Family Code all parties waived a jury . . . .

We now address A.F.'s contentions.

B. No Texas Constitutional Right to a Jury Trial, and the Presumption of Regularity

A.F. contends he did not "affirmatively waive" his right to a jury trial guaranteed by the Texas Constitution, resulting in structural error immune from a harm analysis. A.F. acknowledges that this court held in *In re R.R.* a juvenile does not have a constitutional right to a jury trial: "The Family Code—not the Texas constitution—creates a juvenile's right to a jury trial." 373 S.W.3d at 737. A.F. has not cited any controlling authority or statutory change to undermine *In re R.R.*, and as noted above, we are bound by the *In re R.R.* decision under these circumstances. *See Chase Home Fin.*, 309 S.W.3d at 630.

Further, as this court held in *In re R.R.*, a recitation in a judgment that "all parties waived a jury" is "binding in the absence of direct proof of its falsity." 373

S.W.3d at 738 (citing *Breazeale v. State*, 683 S.W.2d 446, 450 (Tex. Crim. App. 1985) (op. on reh'g)). Acknowledging that a defendant's waiver of a jury trial must be shown in the record, *Breazeale* held that a recitation in the judgment that the defendant waived his right to a jury trial carried "the presumption of regularity and truthfulness," and "the burden is then on the accused to establish otherwise, if he claims that the contrary is true." 683 S.W.2d at 451–51.

A.F. has not met this burden to overcome the presumption that he waived any right to a jury trial because the record contains nothing to refute the judgment's recitation that "all parties waived a jury." *See id.* at 450; *In re R.R.*, 373 S.W.2d at 738. Thus, even if A.F. had a constitutional right to a jury trial, he waived it.

C. Failure to Comply with Sections 54.03(c) and 51.09 of the Family Code Subject to a Harm Analysis

A.F. contends that the failure to comply with Section 54.03(c), and by reference Section 51.09, is "immune from a harmless error analysis." A.F. attempts to distinguish *In re R.R.*, claiming that unlike the juvenile in that case, A.F. "was never admonished of his right to a jury trial and he did nothing to affirmatively waive that right."

In *In re R.R.*, the record showed that the trial court informed the juvenile of his right to a jury trial and the juvenile waived that right in open court. *See* 373 S.W.2d at 733. However, those facts were immaterial to the court's holding that the failure to follow the procedure for waiver in Sections 54.03(c) and 51.09 was subject to a harm analysis under Rule 44.2(b) of the Texas Rules of Appellate Procedure. *See id.* at 737. Instead, this court relied on *Johnson v. State*, reasoning that "a court's failure to follow statutory procedures for waiving a defendant's right to a jury trial is not structural error." *In re R.R.*, 373 S.W.3d at 736–37 (citing

Johnson v. State, 72 S.W.3d 346, 348 (Tex. Crim. App. 2002)). In *Johnson*, the Court of Criminal Appeals presumed that the defendant understood his right to a jury trial because the judgment recited the defendant "waived trial by jury." 72 S.W.3d at 349.

Accordingly, consistent with *In re R.R.*, the trial court's failure to comply with Sections 54.03(c) and 51.09 is subject to a harmless-error analysis under Rule 44.2(b).

D. Harmless Error: Failure to Make Waiver in Writing or Open Court

Because the judgment recites that A.F. and his attorney "came on to be heard" and that "all parties waived a jury," we presume that A.F. and his attorney knew about his right to a jury trial and knowingly relinquished that right. *See Johnson*, 72 S.W.3d at 349; *see also In re R.R.*, 373 S.W.3d at 738. Thus, in the absence of direct proof of the falsity of the recitation in the judgment, we presume that A.F. and his attorney voluntarily waived the right to a jury trial with information and understanding of that right and the possible consequences as required by Section 51.09(1)–(3). *See Johnson*, 72 S.W.3d at 349; *In re R.R.*, 373 S.W.3d at 738.

The State concedes error regarding Section 51.09(4), however, because the waiver was not made in writing or in court proceedings that are recorded. A.F. contends he was harmed because the evidence at trial was "unconvincing" and "it is probable that other reasonable fact finders would have found the evidence factually insufficient."

In conducting a harm analysis of this error, we must determine whether A.F.'s substantial rights were affected. *See In re R.R.*, 373 S.W.3d at 737 (citing Tex. R. App. P. 44.2(b)). "In a non-jury case, an error does not affect substantial rights if the error does not deprive the complaining party of some right to which he

was legally entitled." *Id.* "A substantial right is affected when the error has a substantial and injurious effect or influence." *Mason v. State*, 322 S.W.3d 251, 255 (Tex. Crim. App. 2010). In making this determination, we consider the entire record. *In re R.R.*, 373 S.W.3d at 737–38.

This case fits squarely within *Johnson*. Adult defendants may waive a jury trial, but according to statute, the waiver must be made in person by the defendant in writing and in open court. *Johnson*, 72 S.W.3d at 347 (citing Tex. Code Crim. Proc. Ann. art. 1.13(a)). *Johnson* held that a defendant is not harmed under Rule 44.2(b) from the lack of a written waiver when (1) the judgment recites that the defendant waived a jury trial, and (2) there is no direct proof of the falsity of the recitation. *See id.* at 349. Under these circumstances, the court presumes that the defendant was aware of his right to a jury trial and opted for a bench trial, and the failure to comply with the statute is harmless. *Id.*

The rationale from *Johnson* applies to this case. The failure of the waiver to be in writing or recorded did not deprive A.F. of a substantial right when the record otherwise indicates that he and his attorney in fact waived the right to a jury trial. *See Johnson*, 72 S.W.3d at 349; *In re R.R.*, 373 S.W.3d at 738. The strength of the evidence is not a factor that either this court or the Court of Criminal Appeals has considered for similar error. *See Johnson*, 72 S.W.3d at 349; *In re R.R.*, 373 S.W.3d at 738. Thus, although a reasonable fact finder could have reached a different conclusion in this case, the record as a whole does not show that the error had a substantial and injurious effect or influence on the proceedings.

A.F.'s second issue is overruled.

CONCLUSION

Having overruled both of A.F.'s issues, we affirm the trial court's judgment.

/s/ Sharon McCally
Justice

Panel consists of Chief Justice Frost and Justices McCally and Brown.