Affirmed and Memorandum Opinion filed September 12, 2017.

In The

Fourteenth Court of Appeals

NO. 14-16-00483-CR

GEARLE E. MANNING, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 182nd District Court
Harris County, Texas
Trial Court Cause No. 1456185

MEMORANDUM OPINION

We consider four issues in this appeal from a conviction for aggravated robbery: (1) whether the evidence is sufficient to support the conviction, (2) whether appellant was denied the effective assistance of trial counsel, (3) whether the trial court abused its discretion by denying a motion to suppress a photographic array, and (4) whether the prosecutor engaged in certain forms of misconduct. For the reasons explained below, we overrule all four issues and affirm the trial court's judgment.

BACKGROUND

Two men in hooded sweatshirts approached the complainant in a parking garage and told the complainant to give them everything that he had. One of the men pointed a gun at the complainant while the other man took the complainant's iPhone and laptop. The two men left the garage in a getaway vehicle, and the complainant ran for help.

Officers were dispatched to the garage, where the complainant provided a description of the two men and their getaway vehicle. The complainant also provided the officers with his log-in information for "Find My iPhone," an application that allows a user to track his iPhone to within a 30-meter radius when the device becomes lost or stolen. Using that application, the officers tracked the complainant's iPhone to a residential area. The officers found a car in a nearby driveway that appeared to match the description given by the complainant. That car, the officers learned, was registered to appellant's mother and grandmother.

The following day, the officers tracked the iPhone to another area. The officers asked a worker at a nearby business if anyone had been seen in the area recently, and the worker provided the officers with appellant's name.

Believing that appellant was a likely suspect, the officers prepared a six-person photographic array that included a known picture of appellant. The officers showed the array to the complainant, who identified appellant as the man who had pointed the gun at him.

The officers then secured an arrest warrant for appellant. Using the Find My iPhone application, the officers found appellant at a home while in possession of the complainant's iPhone and laptop. The officers also found a hooded sweatshirt that

appeared to match the one that had been used in the robbery, as depicted on surveillance footage from within the parking garage.

SUFFICIENCY OF THE EVIDENCE

Appellant argues in his first issue that the evidence is insufficient to support the conviction. He also encourages us to review the record under the standards for both legal sufficiency and factual sufficiency. We only apply one standard when reviewing sufficiency challenges, and that standard is the standard for legal sufficiency. *See Temple v. State*, 390 S.W.3d 341, 360 (Tex. Crim. App. 2013).

When reviewing the legal sufficiency of the evidence, we examine all of the evidence in the light most favorable to the verdict and determine whether a rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Id.* The evidence is legally insufficient when the record contains no evidence, or merely a "modicum" of evidence, probative of an element of the offense. *See Garcia v. State*, 367 S.W.3d 683, 687 (Tex. Crim. App. 2012).

Although we consider everything presented at trial, we do not reevaluate the weight and credibility of the evidence or substitute our judgment for that of the fact finder. *See Williams v. State*, 235 S.W.3d 742, 750 (Tex. Crim. App. 2007). Because the jury is the sole judge of the credibility of witnesses and of the weight given to their testimony, any conflicts or inconsistencies in the evidence are resolved in favor of the verdict. *See Wesbrook v. State*, 29 S.W.3d 103, 111 (Tex. Crim. App. 2000).

Our review includes both properly and improperly admitted evidence. *See Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 20007). We also consider both direct and circumstantial evidence, as well as any reasonable inferences that may be drawn from the evidence. *Id.* Circumstantial evidence is as probative as direct evidence in establishing the guilt of an actor, and circumstantial evidence

alone can be sufficient to establish guilt. *See Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007).

To obtain a conviction in this case, the State was required to prove beyond a reasonable doubt that, while in the course of committing theft, and with the intent to obtain or maintain control of property, appellant intentionally or knowingly threatened or placed the complainant in fear of imminent bodily injury or death, and appellant used or exhibited a deadly weapon. *See* Tex. Penal Code § 29.03.

There is ample evidence that the complainant was robbed of his iPhone and laptop at gunpoint. There is also evidence that the complainant was placed in fear of imminent bodily injury or death. The complainant testified that he felt "scared" and "helpless" during the robbery because a gun was being pointed at him.

Appellant does not appear to quibble with this evidence that a robbery occurred. Instead, appellant asserts that there is no evidence establishing that *he* was the person who robbed the complainant at gunpoint. But even on this point of identity, there is still ample evidence to support the conviction.

The complainant identified appellant in the photographic array as the person who pointed a gun at him. The complainant made the same identification in court. This was direct evidence of identity.

The record also contains circumstantial evidence of identity. At the time of his arrest, appellant was found in possession of the stolen iPhone and laptop. He was also found in possession of the hooded sweatshirt that appeared to be used in the robbery. This evidence supports a finding that appellant was the person who committed the robbery.

Appellant suggests that the evidence is insufficient because the surveillance footage did not prove that he exhibited a gun. Even if true, that point is not

dispositive. The complainant testified that appellant exhibited a gun, and that testimony alone is sufficient to satisfy the State's burden on this element.

Appellant also suggests that the evidence is insufficient because the trial witnesses provided inconsistent testimony about the make and model of the getaway vehicle. This point lacks merit because the make and model of the getaway vehicle is not an essential element of the offense.

Appellant finally suggests that the evidence is insufficient because there is no evidence ruling out a third party who could have committed the offense, and because the complainant's in-court identification was not reliable. These points merely invoke questions about the credibility of the evidence, which was for the jury to decide. Viewing the evidence as a whole in the light most favorable to the verdict, we conclude that a rational juror could have found every essential element of the offense beyond a reasonable doubt.

INEFFECTIVE ASSISTANCE OF COUNSEL

Appellant next argues, in several points, that he was denied the effective assistance of trial counsel.

We examine claims of ineffective assistance of counsel under the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). Under that standard, the defendant must prove that his trial counsel's representation was deficient, and that the deficient performance was so prejudicial that it deprived him of a fair trial. *Id.* at 687.

To establish deficient performance, the defendant must demonstrate that his counsel's performance fell below an objective standard of reasonableness. *Id.* at 688. To establish prejudice, the defendant must demonstrate a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have

been different. *Id.* at 694. Failure to make the required showing of either deficient performance or prejudice defeats the claim of ineffectiveness. *Id.* at 697.

Our review of counsel's performance is highly deferential, beginning with the strong presumption that counsel's decisions were reasonably professional and were motivated by sound trial strategy. *See Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994). When the record is silent as to counsel's strategy, we will not conclude that the defendant received ineffective assistance unless the challenged conduct was "so outrageous that no competent attorney would have engaged in it." *See Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005). Rarely will the trial record contain sufficient information to permit a reviewing court to fairly evaluate the merits of such a serious allegation. *See Bone v. State*, 77 S.W.3d 828, 833 (Tex. Crim. App. 2002). In the majority of cases, the defendant is unable to meet the first prong of the *Strickland* test because the record on direct appeal is underdeveloped and does not adequately reflect the alleged failings of trial counsel. *See Mata v. State*, 226 S.W.3d 425, 430 (Tex. Crim. App. 2007).

A sound trial strategy may be imperfectly executed, but the right to effective assistance of counsel does not entitle a defendant to errorless or perfect counsel. *See Robertson v. State*, 187 S.W.3d 475, 483 (Tex. Crim. App. 2006). Isolated instances in the record reflecting errors of omission or commission do not render counsel's performance ineffective, nor can ineffective assistance of counsel be established by isolating one portion of counsel's performance for examination. *See Ex parte Welborn*, 785 S.W.2d 391, 393 (Tex. Crim. App. 1990). Moreover, it is not sufficient that the defendant show, with the benefit of hindsight, that counsel's actions or omissions during trial were merely of questionable competence. *See Mata*, 226 S.W.3d at 430. Rather, to establish that counsel's acts or omissions were outside the range of professional competent assistance, the defendant must show that counsel's

errors were so serious that counsel was not functioning as counsel. *See Patrick v. State*, 906 S.W.2d 481, 495 (Tex. Crim. App. 1995).

Voir Dire. Appellant's first complaint focuses on a line of inquiry that occurred during voir dire. In this inquiry, the prosecutor said the following:

> So, the defendant has a Fifth Amendment right to not testify. Now, what that—what it actually says is if the defendant does not testify, you cannot and must not refer to or allude to the fact throughout your deliberations or take it into consideration for any purpose whatsoever. So, talk to me about a reason why someone may not want to testify.

Appellant argues that this line of inquiry directly violated his Fifth Amendment right against self-incrimination, and that counsel was ineffective because counsel did not object. This argument totally lacks merit. The prosecutor's comment did not violate appellant's Fifth Amendment right because the comment was made during voir dire, before the prosecutor knew whether or not appellant would testify. *See Godfrey v. State*, 859 S.W.2d 583, 585 (Tex. App.—Houston [14th Dist.] 1993, no pet.) ("Since the prosecutor's statement was made at voir dire, the statement was not a comment on appellant's subsequent failure to testify.").

Appellant also complains about a separate portion of voir dire, in which the prosecutor made these comments:

> So, sometimes there is no DNA. Sometimes there's no fingerprints. Sometimes there's no enhanced surveillance videos. But we still try these cases. So, like I said earlier, the defendant is the one who picks the time, the place, who's around, what kind of evidence there is. So, we still prosecute these cases. But the evidence that we do have and what I always want you to remember is that testimony is evidence. So, you're going to hear a ton of evidence in most cases, and it's going to be through testimony. And that's generally how evidence is presented is through testimony. Okay?

Appellant asserts that counsel was ineffective because counsel did not object to the prosecutor's comment that "the defendant is the one who picks the time, the place, who's around, what kind of evidence there is." However, the record does not reveal counsel's reasons for failing to object to this comment. Appellant did not move for a new trial, and counsel did not file an affidavit explaining his trial strategy. Thus, the record does not affirmatively establish counsel's alleged ineffectiveness. *See also Woodall v. State*, 77 S.W.3d 388, 399–400 (Tex. App.—Fort Worth 2002, pet. ref'd) (concluding that similar comments during voir dire did not warrant a mistrial).

In the same paragraph in his brief, appellant also complains that counsel did not object "regarding the discussion of enhancements" and that counsel "fail[ed] to preserve error due to prosecutorial misconduct." Appellant does not elaborate at all on these bare complaints, nor does he cite to the record where these complaints allegedly arise. We conclude that these complaints are waived for inadequate briefing. *See* Tex. R. App. P. 38.1(i).

Guilt Phase. Appellant's next claim of ineffectiveness arises out of an officer's trial testimony about the parking garage surveillance video. When describing the contents of that video, the officer said that "it looked like the suspects were actually searching or hunting for a victim." Counsel lodged an objection to the officer's statement on the basis of speculation, which the trial court sustained, but counsel did not request any additional relief after the trial court's ruling. Appellant now argues that counsel was ineffective because counsel did not request an instruction to disregard or move for a mistrial.

Again, the record is silent as to counsel's strategy, which means that appellant has not rebutted the strong presumption that counsel's failure to request an instruction or move for a mistrial was objectively reasonable.

Even if we were to assume for the sake of argument that counsel was deficient by failing to request an instruction or move for a mistrial, appellant has not established a reasonable probability that the outcome of the trial would have been different. There was overwhelming evidence that appellant had committed the robbery. The complainant directly testified that appellant robbed him, and appellant was found in possession of items that were stolen from the complainant. The officer's statement that the suspects in the video appeared to be "hunting for a victim" was not likely to influence the jury's determination that appellant had indeed robbed the complainant. Nor would a mistrial have been warranted for such a statement. *See Archie v. State*, 340 S.W.3d 734, 739 (Tex. Crim. App. 2011) (providing that a mistrial is warranted only when objectionable events "are so emotionally inflammatory that curative instructions are not likely to prevent the jury from being unfairly prejudiced against the defendant"); *Ford v. State*, 14 S.W.3d 382, 393–94 (Tex. App.—Houston [14th Dist.] 2000, no pet.) (holding that a mistrial was not warranted after the trial court instructed the jury to disregard a witness's statement suggesting that extraneous offenses had been committed).

Punishment Phase. Appellant's final complaints focus on evidence elicited in the punishment phase of trial. There, the State introduced evidence of two extraneous offenses.[1] Appellant asserts that counsel was ineffective because he did not object to this evidence, or to questions that were asked of appellant's mother about his previous offenses.

[1] The prosecutor misspoke when she said that one of these offenses (an assault on a public servant) occurred in 2003 (which would have meant that, at the time of the offense, appellant was only nine years old—a juvenile). The judgment and sentence clearly reflect that the offense occurred in 2013 (when appellant was nineteen—an adult). Still, appellate counsel repeatedly asserts in his brief that the offense occurred in 2003.

Appellant provides absolutely no argument for why counsel was deficient by failing to object. He simply asserts—without explanation—that counsel should have objected. Even if this argument were not waived for inadequate briefing, it would still fail because the record is silent as to counsel's strategies, and appellant has not rebutted the presumption that counsel's actions and omissions were objectively reasonable.

PHOTOGRAPHIC ARRAY

In his third issue, appellant argues that the trial court should have suppressed the photographic array because the array was impermissibly suggestive.

We normally review the trial court's ruling on a motion to suppress for an abuse of discretion. *See Shepherd v. State*, 273 S.W.3d 681, 684 (Tex. Crim. App. 2008). If the trial court's ruling turns on an evaluation of credibility and demeanor, we afford almost total deference to the trial court's ruling when it is supported by the record. *See Wiede v. State*, 214 S.W.3d 17, 25 (Tex. Crim. App. 2007). However, if the ruling turns on a pure question of law, or upon a mixed question of law and fact not depending on an evaluation of credibility and demeanor, we review the trial court's ruling de novo. *Id.*

When we determine the suggestiveness of a photographic array, we primarily examine the procedure in which the array was administered to the witness, as well as the content of the array itself. *See Burns v. State*, 923 S.W.2d 233, 237–38 (Tex. App.—Houston [14th Dist.] 1996, pet. ref'd). The procedure is suggestive when the police point to the defendant or suggest that the defendant is included in the array. *See Ibarra v. State*, 11 S.W.3d 189, 196 (Tex. Crim. App. 1999). The content may also be suggestive when the defendant is the only person in the array who closely resembles the description given by the witness. *See Brown v. State*, 29 S.W.3d 251, 254 (Tex. App.—Houston [14th Dist.] 2000, no pet.). Even if the identification is

suggestive, the defendant has the burden of showing by clear and convincing evidence that the identification was *impermissibly* suggestive. *See Barley v. State*, 906 S.W.2d 27, 33–34 (Tex. Crim. App. 1995).

Appellant's argument is centered on the content of the array. He points out that, of the six men depicted, only he has a beard and mustache, which was the description of the man with the gun given by the complainant.

The array depicts six African-American men, all roughly the same age. They all have similar dreadlock-style haircuts. And three of the men, including appellant, have facial hair of some sort.

The array is not suggestive simply because appellant was depicted as the only man with a beard and mustache. Neither due process nor common sense requires that the persons used in an array have features exactly matching those of the suspect. *See Turner v. State*, 600 S.W.2d 927, 933 (Tex. Crim. App. [Panel Op.] 1980); *Fisher v. State*, No. 14-16-00108-CR, — S.W.3d —, 2017 WL 1957723, at *2 (Tex. App.—Houston [14th Dist.] May 11, 2017, pet. filed). Also, the complainant was admonished in writing before the array was shown to him that all of the pictures should be examined, notwithstanding differences in facial hair: "Keep in mind that things like hair styles, beards, and mustaches can be easily changed and that complexion colors may look slightly different in photographs."

We conclude that appellant has not carried his burden of showing that the array was impermissibly suggestive. Even if we held otherwise, we would review any error associated with the admission of the array for harm using the standard for nonconstitutional error, and under that standard, we would conclude that the error was harmless.

Nonconstitutional error must be disregarded unless it affects a defendant's substantial rights. *See* Tex. R. App. P. 44.2(b). An error affects a defendant's substantial rights when the error has a substantial and injurious effect or influence on the jury's verdict. *See King v. State*, 953 S.W.2d 266, 271 (Tex. Crim. App. 1997). If the error had no or only a slight influence on the verdict, the error is harmless. *See Johnson v. State*, 967 S.W.2d 410, 417 (Tex. Crim. App. 1998).

Looking at the record as a whole, we can confidently say that the State produced overwhelming evidence of guilt outside of the photographic array. The evidence showed that, at the time of his arrest, appellant was found to be in possession of the complainant's iPhone and laptop—the same two items that the complainant said were taken from him. Appellant was also found in possession of a distinctive hooded sweatshirt that matched the clothing worn by the robber on the surveillance footage. This evidence strongly indicated that appellant committed the robbery. The array did not significantly add to this conclusion. If erroneous, the array had a slight influence, at best. Accordingly, we conclude that any error in the admission of the array was harmless.

PROSECUTORIAL MISCONDUCT

In his final issue, appellant complains that the prosecutor engaged in a pattern of misconduct that resulted in the denial of a fair trial. More specifically, appellant argues that the prosecutor improperly (1) commented on appellant's "potential silence in trial" by asking during voir dire why someone would not want to testify; (2) told the venire panel that "the defendant is the one who picks the time, the place, who's around, [and] what kind of evidence there is"; (3) questioned the venire panel about enhancements and introduced inadmissible evidence during voir dire; (4) coached the complainant into making an in-court identification of appellant after

initially failing to do so; and (5) elicited inadmissible evidence of extraneous offenses during the punishment phase of trial.

We conclude that none of these complaints has been preserved for appellate review.

The proper method of preserving error in cases of prosecutorial misconduct is by objecting on specific grounds, then by requesting an instruction to disregard, and then by moving for a mistrial. *See Penry v. State*, 903 S.W.2d 715, 764 (Tex. Crim. App. 1995). Appellant never objected to the prosecutor's actions. By failing to object, appellant has preserved nothing for our review. *Id.*

Appellant appears to believe that timely objections were not required in this case, citing *Rogers v. State*, 725 S.W.2d 350 (Tex. App.—Houston [1st Dist.] 1987, no pet.). In *Rogers*, our sister court reversed a conviction on unpreserved error because the prosecutor's repeated misconduct created impermissible prejudice that "permeate[d] the entire record." *Id.* at 360. Much of the misconduct involved inflammatory questions having no basis in the evidence and on other comments directly bearing on the credibility of witnesses. *Id.*

Even if we were to excuse appellant's failure to object in this case, we could not conclude, as in *Rogers*, that the prosecutor here engaged in such inflammatory misconduct that impermissible prejudice permeated the entire record.

CONCLUSION

The trial court's judgment is affirmed.

/s/ Tracy Christopher
Justice

Panel consists of Justices Christopher, Brown, and Wise.
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