Affirmed as Modified and Memorandum Opinion filed October 3, 2017.

In The

Fourteenth Court of Appeals

NO. 14-17-00288-CR

HANSON FERGUSON JR. AKA HANSOME FERGUSON JR., Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 264th District Court
Bell County, Texas
Trial Court Cause No. 74604

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

A jury found appellant Hanson Ferguson Jr., a/k/a Hansome Ferguson Jr., guilty of robbery and assessed punishment at 60 years' imprisonment and a fine of $10,000.00. On appeal, appellant contends that the evidence is insufficient to support his conviction because the complaining witness's identification of appellant as the robber was uncertain and uncorroborated. Appellant also contends that he suffered egregious harm as a result of an erroneous sequencing instruction in the court's charge that instructed the jury that it had to acquit appellant of robbery before

considering the lesser included offense of assault. We modify the judgment to delete the assessment of a fine. Otherwise, we affirm.

FACTUAL BACKGROUND

In 2014, the complainant, Derek Lee Boze, was an assistant manager of a Dollar General store in the city of Killeen, Texas, in Bell County. Shortly before closing on March 5, 2014, Boze was removing money from a safe behind the cash register area so that he could take it to the office to count it. Customers walking nearby would have been able to see Boze removing the money from the safe.

As Boze walked toward the office with the money, he noticed a man walking in front of the register area. The man followed Boze as he walked toward the employee break room adjacent to the office. When Boze told the man that he could not come back there, the man said, "Don't look at me mother fucker" and hit Boze in the jaw.

Boze continued toward the office and unlocked the door to go inside. The man followed Boze into the office, so Boze set the money down on a desk and the two began to "tussle." Boze pushed the man out of the office and into the break room. As he did so, the man reached for the money but did not get it. Once they were both out of the office, the door to the office locked behind them.

The two continued to "scuffle" and fight as Boze tried to get the man out of the store. At some point, Boze slipped and fell to the floor. The man then kicked Boze in the side three times. The man also hit Boze in the face several times, using what Boze believed to be brass knuckles, but which turned out to be a small flashlight in the man's hand. During the altercation, the small flashlight fell to the floor, and the man's baseball-cap style hat fell off in the break room. Boze eventually

pushed the man out of the store, and a cashier called the police. The man fled on foot.

When police arrived, the store manager gave them a video recording of the incident taken from four surveillance cameras located around the store. The officers also recovered the hat and flashlight the man left behind.

A detective eventually developed appellant as a suspect. He requested the Department of Public Safety (DPS) to prepare a photo line-up. Another detective, who was unfamiliar with the case, presented the photo line-up to Boze. Boze picked out appellant's photo and wrote on it that he was "pretty sure this might be the person who tried to rob me." At the time, Boze was 60% to 70% sure that appellant was the robber.

At trial, Boze identified appellant and stated that he was still 60% to 70% sure that appellant was the man who robbed him. Boze testified that he had seen the man come in the Dollar General store "quite a few times" and that appellant "has a very familiar face." According to Boze, when the man came into the store that night, he "looked older" than Boze and had some gray hair.

A still photograph taken from the surveillance video showed the man in the store wearing the hat, and another showed the man and Boze wrestling in the office with the money nearby on the desk. The photographs, along with the surveillance video, were admitted into evidence and shown to the jury.

The DPS crime lab in Waco was able to develop a DNA profile from the hat the robber left at the Dollar General store. Appellant was asked to voluntarily provide a DNA sample for comparison, but he refused. Officers later served appellant with a search warrant to obtain a DNA sample from him, and he reluctantly agreed.

A supervisor of the DNA section of the DPS crime lab examined the DNA from the hat and found that it was a mixture of DNA from two people, but there was much more DNA from one person than from the other. Although there was not enough DNA to develop a DNA profile for the minor contributor, the supervisor determined that the major contributor of the DNA found on the hat was consistent with appellant's DNA profile. The supervisor testified that it was 103 quintillion times more likely that the DNA originated from appellant and the unknown person than from two unknown individuals.

The trial court's charge authorized the jury to find appellant guilty of robbery or the lesser offense of assault. The jury found appellant guilty of robbery. In the punishment phase, appellant pleaded "true" to two enhancement paragraphs contained in the indictment. The jury found the two enhancement allegations true and assessed punishment at sixty years in prison and a $10,000.00 fine. Appellant appealed to the Third Court of Appeals, and the case was subsequently transferred to this court.[1]

ISSUES AND ANALYSIS

Appellant raises two issues on appeal. In the first, he contends that the evidence is insufficient to support his conviction because no evidence corroborates Boze's uncertain identification of appellant as the man who attacked him in the Dollar General store. In the second, appellant contends that he suffered egregious harm as a result of an erroneous sequencing instruction in the court's charge that required the jury to acquit appellant of robbery before it could consider the lesser included offense of assault. We address each in turn.

[1] Because of the transfer, we must decide the case in accordance with Third Court of Appeals's precedent if our decision otherwise would have been inconsistent with that court's precedent. *See* Tex. R. App. P. 41.3.

I. Sufficiency of the Evidence

When Boze picked appellant out of a photo line-up, he testified that he was 60% to 70% sure that appellant was the robber. He also wrote on the photo that he was "pretty sure" that was the man who tried to rob him. Three years later, Boze remained 60% to 70% sure that appellant was the robber when he identified him in court. Appellant maintains that Boze's "tentative and uncertain" identification testimony, absent corroborating evidence, is insufficient to support his conviction.

A. Standard of Review and Applicable Law

In a legal sufficiency review, 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. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). This standard of review applies to cases involving both direct and circumstantial evidence. *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007). Although we consider everything presented at trial, we do not substitute our judgment regarding the weight and credibility of the evidence for that of the factfinder. *Williams v. State*, 235 S.W.3d 742, 750 (Tex. Crim. App. 2007). We presume the jury resolved conflicting inferences in favor of the verdict, and defer to that determination. *Clayton*, 235 S.W.3d at 778.

A witness's uncertain in-court identification of an accused as the perpetrator of a crime, standing alone, is insufficient to support a guilty verdict. *See, e.g.*, *Criff v. State*, 438 S.W.3d 134, 138 (Tex. App.—Houston [14th Dist.] 2014, pet. ref'd); *Anderson v. State*, 813 S.W.2d 177, 179 (Tex. App.—Dallas 1991, no pet.). But, if an equivocal identification is corroborated by other evidence, the conviction may still be affirmed. *Prihoda v. State*, 352 S.W.3d 796, 803 (Tex. App.—San Antonio 20100, pet. ref'd) (citing *Anderson*, 813 S.W.3d at 179). In such a case, the witness's uncertainty goes to the weight of the testimony and is an issue for the factfinder. *Id.*

Identity may be proven by direct or circumstantial evidence. *Earls v. State*, 707 S.W.2d 82, 85 (Tex. Crim. App. 1986); *Roberson v. State*, 16 S.W.3d 156, 167 (Tex. App.—Austin 2000, pet. ref'd). Identity may also be proven by inferences drawn from the evidence. *Roberson*, 16 S.W.3d at 167.

B. The Evidence is Sufficient to Support Appellant's Conviction

The State contends that sufficient evidence was presented at trial to corroborate Boze's identification of appellant as the robber. For example, the detective who presented the photo line-up to Boze testified in detail about the procedures involved in preparing and presenting the photo line-up. He explained that the methods used were designed to minimize the possibility that Boze could be improperly influenced to select appellant. After receiving instructions from the detective, Boze reviewed the photo line-up and wrote "Pretty sure this might be the person who tried to rob me" next to appellant's photo. The jury also heard Boze positively identify the man in the surveillance photographs as the robber. These photographs, as well as the video taken from the four surveillance cameras, were admitted into evidence for the jury's consideration and comparison to appellant. Most significantly, the jury heard evidence that appellant's DNA was consistent with one of two DNA profiles found on the hat the robber left at the Dollar General store. The jury also heard that appellant was by far the major contributor of the DNA, and that it was 103 quintillion times more likely that the DNA found on the hat came from appellant and an unknown person than from two unknown persons.

Appellant argues that none of this evidence corroborates Boze's uncertain identification. As to the DNA evidence from the hat the robber left at the Dollar General store, appellant points out that it shows that at least one other person wore the hat, and there is no evidence of when or where appellant's DNA was deposited on the hat. Nor is there evidence that appellant owned the hat at any time. Further,

appellant argues that the DNA expert did not have the ability to determine the order in which the samples in the mixture were deposited on the hat, and conceded that he could not determine who last wore the hat when it was left at the Dollar General store. Thus, appellant argues, it is just as plausible that appellant wore the hat long before the robbery, and that someone else later committed the robbery while wearing the hat.

Viewed in isolation, the presence of appellant's DNA on the hat establishes only that appellant wore the hat at some point in time. In this case, however, the jury was also presented with evidence that the robber was wearing the hat at the time of the robbery and lost it while fighting with Boze, the DNA found on the hat was consistent with appellant's DNA profile, and there was far more DNA from appellant than from the unknown minor contributor. Indeed, the DNA expert testified that there was not even enough DNA from the minor contributor to develop a profile of that person. Further, the jury heard that it was 103 quintillion times more likely that the DNA came from appellant than some unknown person.

In considering the DNA evidence presented, we note that "[e]ach fact need not point directly and independently to the guilt of the appellant, as long as the cumulative force of all the incriminating circumstances is sufficient to support the conviction." *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007). Viewing the cumulative force of this evidence in the light most favorable to the jury's verdict, we conclude that this evidence is sufficient to corroborate Boze's testimony that appellant was the robber. *See Littleton v. State*, No. 04-15-00594-CR, ___ S.W.3d ___, 2017 WL 1337654, at *2–3 (Tex. App.—San Antonio Apr. 12, 2017, no pet.) (holding that complainant's identification testimony and DNA evidence was legally sufficient evidence to support conviction); *Roberson*, 16 S.W.3d at 172 (holding that DNA testing was circumstantial evidence sufficient to establish identity); *Anderson*,

813 S.W.2d at 180 (holding that presence of appellant's fingerprint at scene and complainant's identification of appellant's picture from photographic identification corroborated complainant's "hesitant" in-court identification of the appellant).

As to the photo line-up in which Boze identified appellant and wrote that he was "pretty sure" that appellant was the man who tried to rob him, appellant argues that this identification is no more certain than Boze's tentative in-court identification of appellant and does not corroborate the in-court identification. Appellant attempts to further undermine Boze's identification by arguing that Boze described the assailant as being older than Boze, but the record reflects that Boze is actually about five years older than appellant. Appellant also argues that Boze described the robber as having gray hair, but appellant's photograph in the photo line-up shows that he, like the others in the line-up, had no hair on his head. And, appellant notes, no one testified that appellant has or had gray hair. However, the jury was free to weigh Boze's testimony and to resolve any discrepancies in his description of appellant against the photographic and video surveillance evidence. *See Earls*, 707 S.W.2d at 85 (stating that any discrepancies in testimony concerning description of appellant's clothing or appearance were for the jury to determine); *Anderson*, 813 S.W.2d at 179 (stating that the factfinder resolves questions of the credibility of witnesses and the weight of their testimony and is free to accept or reject all or a portion of any witness's testimony).

Appellant also complains that the evidence is insufficient because other types of evidence were not presented. Appellant notes that no witness stated that appellant matched the assailant depicted in the surveillance video; instead, only appellant's race and gender were shown to be similar to the assailant depicted in the video. Appellant also complains that the flashlight the assailant used to strike Boze was not connected to him, no confession or admissions were made by him, no proceeds from

the robbery were recovered from him, and no fingerprint evidence was recovered at the scene. Nor did the cashier who was in the store at the time of the robbery testify at trial to "shore up" Boze's identification testimony. Given the evidence already discussed, however, a rational jury could have found appellant guilty of robbery without such additional corroborating evidence. *See Harmon v. State*, 167 S.W.3d 610, 614 (Tex. App.—Houston [14th Dist.] 2005, pet. ref'd) (rejecting argument that evidence was insufficient to convict appellant of aggravated robbery absent DNA evidence, fingerprint evidence, or evidence of a gun or cash).

Having rejected appellant's challenges to the sufficiency of the evidence, we conclude that a rational trier of fact could have found beyond a reasonable doubt that appellant committed the offense of robbery. We overrule appellant's first issue.

II. The Jury Charge

In his second issue, appellant contends that he suffered egregious harm as a result of an erroneous sequencing instruction in the court's charge requiring the jury to acquit appellant of robbery before considering the lesser included offense of assault.

A. Standard of Review

When reviewing potential jury charge error, we first decide whether error exists. *Ngo v. State*, 175 S.W.3d 738, 743 (Tex. Crim. App. 2005). If we determine that error exists, we then assess whether the defendant was harmed. *Id.* When, as here, the defendant has not preserved his objection to the charge in the trial court, we reverse only if the defendant suffered "egregious harm." *Id.* at 743–44.

To establish egregious harm, the charge error must have affected the very basis of the case, deprived the accused of a valuable right, or vitally affected a defensive theory. *Almanza v. State*, 686 S.W.2d 157, 172 (Tex. Crim. App. 1985)

(op. on reh'g). To determine whether an appellant was egregiously harmed by an erroneous jury instruction, we examine the relevant portions of the record, including: (1) the entire jury charge; (2) the state of the evidence, including contested issues and the weight of the probative evidence; (3) the parties' arguments; and (4) any other relevant information in the record. *Marshall v. State*, 479 S.W.3d 840, 843 (Tex. Crim. App. 2016). An egregious harm determination must be based on actual, rather than theoretical, harm. *Id*.

B. The Jury Charge was Not Erroneous

The application paragraphs of the court's charge authorized the jury to find appellant guilty of robbery or the lesser included offense of assault. Appellant contends that he was egregiously harmed by the instruction prefacing the application paragraph on assault: "If and only if you find the defendant not guilty of the offense of Robbery, you will next consider whether the defendant is guilty of the offense of Assault." Appellant argues that the court incorrectly instructed the jury that it had to acquit appellant of robbery before it could consider the lesser included offense of assault. According to appellant, the jury was entitled to consider the assault charge even if it could not agree on the robbery charge.

To place the instruction in context, we reproduce the relevant paragraphs:

* * *

> Now bearing in mind the foregoing instructions, if you believe from the evidence beyond a reasonable doubt, that the defendant . . . . did then and there while in the course of committing theft of property and with intent to obtain or maintain control of said property, intentionally or knowingly or recklessly cause bodily injury to Derek Lee Boze by striking him, you will find the defendant "Guilty" of the offense of Robbery and so say by your verdict, but if you do not so believe, or if you have a reasonable doubt thereof, you will acquit the defendant and say by your verdict "Not Guilty," and next consider whether defendant is guilty of the offense of Assault.

* * *

If and only if you find the defendant not guilty of the offense of Robbery, you will next consider whether the defendant is guilty of the offense of Assault.

A person commits the offense of assault if the person intentionally or knowingly or recklessly causes bodily injury to another.

The term "bodily injury" is defined for you above.

The terms intentionally and knowingly and recklessly are defined for you above.

* * *

Now hearing in mind the foregoing instructions, if you believe from the evidence beyond a reasonable doubt, that the defendant . . . did then and there intentionally or knowingly or recklessly cause bodily injury to Derek Lee Boze by striking him, you will find the defendant "Guilty" of the offense of Assault and so say by your verdict, but if you do not so believe, or if you have a reasonable doubt thereof, you will acquit the defendant and say by your verdict "Not Guilty."

* * *

In the event you have a reasonable doubt as to the defendant's guilt after considering all the evidence before you, and these instructions, you will acquit him and say by your verdict "Not guilty."[2]

* * *

Appellant relies on *Boyett v. State* for the proposition that a proper sequencing instruction in the charge does not require the jury to acquit the defendant of the greater offense before it can consider any lesser included offenses. *See* 692 S.W.2d 512 (Tex. Crim. App. 1985). In *Boyett*, the appellant was indicted for murder but the jury found him guilty of the lesser included offense of voluntary manslaughter, one of several lesser offenses contained in the charge. *Id.* at 514–15. The application

[2] Minor typographical errors in the charge have been corrected.

paragraphs for murder, voluntary manslaughter, and involuntary manslaughter sequentially instructed the jury as follows: "Unless you so find, or if you have a reasonable doubt thereof, you should consider whether or not the defendant is guilty of the lesser included offense of [offense named]." *Id.* at 515.

On appeal, the appellant argued that the charge was fundamentally defective because it did *not* instruct the jury to acquit him of a greater offense before considering his guilt of a lesser offense—the opposite of the argument before us today. *See id.* The *Boyett* court agreed that the charge "should have more explicitly instructed the jurors that if they did not believe, or if they had reasonable doubt of appellant's guilt of the greater offense, they should acquit appellant and proceed to consider whether appellant was guilty of the lesser included offense." *Id*. at 516. The court noted that charge also instructed the jury that if it had a reasonable doubt as to the defendant's guilt after considering all the evidence and the instructions, it should find the defendant not guilty. *Id.* Although not a "model charge," the court held that when read as a whole, the charge adequately instructed the jury. *Id.*

As appellant points out, *Boyett* was reaffirmed in *Barrios v. State*, 283 S.W.3d 348, 352–53 (Tex. Crim. App. 2009). In *Barrios*, the court considered the same contention as appellant makes in this case, concerning a paragraph in the charge that was substantively identical to that presented in this case. *See id*. at 349–50. There, the jury was instructed:

> Unless you so find from the evidence beyond a reasonable doubt, or if you have a reasonable doubt thereof, you will acquit the defendant of capital murder and next consider whether the defendant is guilty of robbery.

Id. at 349. The charge next instructed the jury on the elements of robbery and directed it to "acquit the defendant of robbery" unless it found from the evidence "beyond a reasonable doubt" that the defendant was guilty of robbery. *Id.*

On appeal, the *Barrios* court rejected the appellant's complaint that the charge was fundamentally defective, explaining:

> Juries make many decisions while in the jury room, most of which are not announced to the court. In making decisions such as the method of discussion, speaking order, and the like, the jury is left to its own devices. So, too, is the order in which the parts of the jury charge are considered left to the discretion of the jury.

Id. at 352. The court also noted that the trial judge reads the entire charge to the jury before it retires to deliberate. *Id.* at 353. Accordingly, the court held that "the charge allowed the jury to consider the entire charge as a whole" and that "the complained-of instruction does not require the jury to unanimously agree that a defendant is not guilty of the greater offense before considering a lesser-included offense." *Id.* Finding no error in the charge, the court did not consider whether the appellant was harmed. *Id.*

In this case, the trial court read the entire charge to the jury before the start of deliberations, making the jury aware of the lesser offense. The application paragraphs included instructions requiring the jury to acquit appellant of the greater offense before considering the lesser offense, and also instructed the jury to acquit appellant if it had a reasonable doubt that appellant was guilty of any offense after considering the evidence and the instructions. The order in which the jury took up the various parts of the charge was within its discretion. We conclude that the trial court's charge was not erroneous. *See Barrios*, 283 S.W.3d at 352–53; *see also Sholars v. State*, 312 S.W.3d 694, 699–70 (Tex. App.—Houston [1st Dist.] 2009, pet. ref'd) (holding that similar charge instructing jury to decide whether appellant was guilty or innocent of offense before considering lesser included offense was a proper sequencing instruction). We therefore overrule appellant's second issue.

III. Reformation of the Judgment

Appellant was punished as a habitual offender and assessed a $10,000.00 fine. However, the habitual-offender statute does not contain a provision allowing the imposition of a fine. *See* Tex. Penal Code § 12.42(d); *Dolph v. State*, 440 S.W.3d 898, 908 (Tex. App.—Texarkana 2013, pet. ref'd) (holding that § 12.42(d) did not authorize $10,000.00 fine assessed and modifying judgment to delete fine). We can modify the judgment when the matter has been called to our attention by any source. *French v. State*, 830 S.W.2d 607, 609 (Tex. Crim. App. 1992); *see* Tex. R. App. P. 43.2(b) (appellate court may modify the trial court's judgment and affirm it as modified). Accordingly, we *sua sponte* modify the judgment of conviction to delete the unauthorized fine assessed in this case.

CONCLUSION

We modify the judgment to delete the imposition of a $10,000.00 fine. We affirm the trial court's judgment as modified.

/s/ Ken Wise
Justice

Panel consists of Justices Christopher, Brown, and Wise.
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