IN THE
TENTH COURT OF APPEALS

No. 10-16-00200-CR

DERRICK DEMOND GAINES,

Appellant

v.

THE STATE OF TEXAS,

Appellee

From the 19th District Court
McLennan County, Texas
Trial Court No. 2015-533-C1

MEMORANDUM OPINION

The jury convicted Derrick Gaines of the offense of aggravated assault and assessed his punishment at 15 years confinement and a $5,000.00 fine. We affirm.

Sufficiency of the Evidence

In the first issue, Appellant complains that the evidence is insufficient to support his conviction. The Court of Criminal Appeals has expressed our standard of review of a sufficiency issue as follows:

> In determining whether the evidence is legally sufficient to support a conviction, a reviewing court must consider all of the evidence in the light most favorable to the verdict and determine whether, based on that evidence and reasonable inferences therefrom, a rational fact finder could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007). This "familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Jackson*, 443 U.S. at 319. "Each 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*, 214 S.W.3d at 13.

Lucio v. State, 351 S.W.3d 878, 894 (Tex. Crim. App. 2011), *cert den'd*, 132 S.Ct. 2712, 183 L.Ed.2d 71 (2012).

The Court of Criminal Appeals has also explained that our review of "all of the evidence" includes evidence that was properly and improperly admitted. *Conner v. State*, 67 S.W.3d 192, 197 (Tex. Crim. App. 2001). And if the record supports conflicting inferences, we must presume that the factfinder resolved the conflicts in favor of the prosecution and therefore defer to that determination. *Jackson v. Virginia*, 443 U.S. 307, 326, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). Further, direct and circumstantial evidence are treated equally: "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." *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007). Finally, it is well established that the factfinder is entitled to judge the credibility of witnesses and can

choose to believe all, some, or none of the testimony presented by the parties. *Chambers v. State*, 805 S.W.2d 459, 461 (Tex. Crim. App. 1991).

On September 22, 2014, Willie Talley and his brother Anthony Bryant were hanging out with friends at an apartment complex. Talley got into a confrontation with Taivion Wilson, known as "Cowboy." Cowboy went into a house and returned with a gun and pointed the gun at Talley. Bryant grabbed the gun, and it shot at the ground. Cowboy then pointed the gun at Bryant's face, but the gun jammed. Cowboy then left and went to another residence. Several men came out of the residence, and one retrieved a gun from a silver or gold Malibu and started firing. Talley was shot in the back, but continued to run away from the scene. Talley was eventually taken to the hospital. The bullet was unable to be removed because of its location and is still lodged in his chest plate. Talley testified that he asked around and was told "Buster" was the person who shot him. Bryant also testified that at the scene people were saying "Buster" was the person who shot Talley.

Talley testified that on November 1, 2014, he was looking to buy marijuana. He was told that someone with a gun named "Buster" was looking for him. Then a person wearing a mask jumped over a fence and started shooting at Talley, and Talley returned fire. Talley stated that the same gold or silver Malibu was at that shooting. Talley reported the incident to the police.

Sergeant Alton Weiser, with the Waco Police Department, testified that on November 1, 2014, he received information that police officers responded to a call for discharge of a firearm that involved a gold Malibu. Sergeant Weiser had information that Appellant was the shooter and that he was in the gold Malibu. Another officer attempted to stop the vehicle, and Sergeant Weiser was there to help with the stop. The driver of the vehicle pulled into a parking lot and appeared to be stopping; however, the driver then sped away. The police officer pursued the vehicle, and a gun was thrown from the vehicle into a ditch. The driver eventually stopped the gold Malibu in the parking lot of an apartment complex. Appellant fled from the vehicle and was later apprehended in a creek by Officer Spann and Officer Mitzel. The officers searched Appellant and found .380 ammunition and also an empty holster.

Detective Jeff Rogers, with the Waco Police Department, testified that he was assigned to investigate the September 22, 2014 shooting of Willie Talley. Detective Rogers received information that "Cowboy," Denzel Clay, and "Buster" were involved in the shooting. Talley's mother informed Detective Rogers that Appellant is "Buster" and that he shot Talley. Appellant's mother contacted Detective Rogers and said that she wanted to bring Appellant to talk to the detective because she heard his name was being brought up in the incident. Appellant met with Detective Rogers and told him that he is referred to as "Little Buster." Appellant told Detective Rogers that he was at the scene on the day of the shooting and that he saw a fight and just kept walking. Talley and his mother met

with Detective Rogers. Talley told Detective Rogers that he knows Buster and that Buster is the person who shot him.

Detective Rogers further testified that he received information that a silver or gold Malibu was involved in the September 22 shooting. Detective Rogers said that a silver or gold Malibu was also involved in two other shootings on November 1. At the scene of those shootings, .380 ammunition and casings were found that matched the ammunition found on Appellant when he was apprehended on November 1.

Although Talley did not identify Appellant as the person who shot him on the witness stand during trial, Talley previously told Detective Rogers that Buster shot him and that he knows Buster. A gold or silver Malibu was involved in the shooting, and Appellant fled from a gold or silver Malibu that was also involved in a shooting with Talley. 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. *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007). We find that the evidence is sufficient to support Appellant's conviction. We overrule the first issue on appeal.

Hearsay

In the second issue, Appellant argues that the trial court erred in admitting hearsay evidence. In determining whether a trial court erred in admitting evidence, the standard for review is abuse of discretion. *McDonald v. State*, 179 S.W.3d 571, 576 (Tex.Crim.App.

2005). A trial court abuses its discretion when its decision is so clearly wrong as to lie outside that zone within which reasonable persons might disagree. *Id*.

Appellant contends that the trial court erred in allowing the State to introduce Talley's testimony that he asked around and was told that someone named "Buster" shot him. Appellant also complains that the trial court erred in allowing Talley's testimony that someone named "Buster" had a gun and was looking for him.

Any improper admission of hearsay testimony is harmless unless the error affected the appellant's substantial rights. TEX. R. APP. P. 44.2(b); *Garcia v. State*, 126 S.W.3d 921, 927 (Tex. Crim. App. 2004). An error is harmless if we are reasonably assured that the error did not influence the verdict or had only a slight effect. *Garcia v. State*, 126 S.W.3d at 927. Likewise, the improper admission of evidence is not reversible error if the same or similar evidence is admitted without objection at another point in the trial. *See Leday v. State,* 983 S.W.2d 713, 718 (Tex.Crim.App.1998).

Detective Rogers testified without objection that Talley told him that he knows Buster and that Buster is the person who shot him. Detective Rogers further testified without objection that in conducting his investigation he received information that a person named Buster was the shooter. When asked if he knew that "Buster" was on the scene the day of the shooting, Bryant responded without objection "… that's who people was saying it was." We find that any error in admitting Talley's testimony was harmless and did not affect Appellant's substantial rights. We overrule the second issue.

Extraneous Offenses

In the third issue, Appellant argues that the trial court erred in admitting evidence of extraneous offenses. We review a trial court's ruling on the admissibility of extraneous-offense evidence for an abuse of discretion. *Williams v. State*, 301 S.W.3d 675, 687 (Tex. Crim. App. 2009). As long as the trial court's ruling is not outside the "zone of reasonable disagreement," there is no abuse of discretion. *Martinez v. State*, 327 S.W.3d 727, 736 (Tex. Crim. App. 2010); *see also Newton v. State*, 301 S.W.3d 315, 317 (Tex. App.--Waco 2009, pet. ref'd) (citing De La Paz v. State, 279 S.W.3d 336, 343-44 (Tex. Crim. App. 2009)).

Appellant complains that the trial court erred in allowing testimony that someone shot at Talley on November 1 after he was told someone with a gun named "Buster" was looking for him. Appellant also complains that the trial court erred in allowing testimony from Officer Spann that a few hours before Appellant was apprehended on November 1, he responded to a call about a shooting at an apartment complex. Officer Spann stated that witnesses reported that a gold Malibu entered the apartment complex, shots were fired from the vehicle, and the driver sped away. Officer Spann testified that the .380 casings found at the scene of the shooting were similar to those found on Appellant when he was apprehended later that day. Appellant further complains that the trial court erred in allowing testimony concerning the stop of the gold Malibu that resulted in a car chase.

Rule 404 (b) of the Texas Rules of Evidence provides that "evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." TEX.R.EVID. 404(b). However, the evidence may be admissible "for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." TEX.R.EVID. 404(b).

For extraneous offense evidence to be admissible under both Rule 404(b) and Rule 403, that evidence must satisfy the following two-prong test: 1) whether the extraneous offense evidence is relevant to a fact of consequence in the case apart from its tendency to prove conduct in conformity with character; and 2) whether the probative value of the evidence is sufficiently strong so that it is not substantially outweighed by unfair prejudice. *Johnston v. State*, 145 S.W.3d 215, 220 (Tex.Crim.App. 2004).

Identity was an issue at trial. The State's case was based on circumstantial evidence, and when identity is a contested issue, admission of extraneous offenses may be necessary to establish identity. *See Devoe v. State*, 354 S.W.3d 457, 470-71 (Tex.Crim.App. 2011). Due to the lack of direct evidence, the State established a need for the extraneous offenses to establish Appellant's identity. The evidence showed that a gold Malibu was present at the September 22 shooting, and the extraneous offenses connected Appellant to the gold Malibu. Appellant was apprehended with ammunition

that was the same caliber and brand as that found at the other shootings. We find that the trial court did not abuse its discretion in admitting the extraneous offense evidence.

In the fourth issue, Appellant argues that his trial counsel was ineffective in failing to request an instruction on the extraneous offenses. To prevail on a claim of ineffective assistance of counsel, an appellant must meet the two-pronged test established by the U.S. Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) adopted by Texas two years later in *Hernandez v. State*, 726 S.W.2d 53, 57 (Tex.Crim.App.1986). Appellant must show that (1) counsel's representation fell below an objective standard of reasonableness, and (2) the deficient performance prejudiced the defense. *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052. Unless appellant can prove both prongs, an appellate court must not find counsel's representation to be ineffective. *Id.* at 687, 104 S.Ct. 2052. In order to satisfy the first prong, appellant must prove, by a preponderance of the evidence, that trial counsel's performance fell below an objective standard of reasonableness under the prevailing professional norms. To prove prejudice, appellant must show that there is a reasonable probability, or a probability sufficient to undermine confidence in the outcome, that the result of the proceeding would have been different. *Id*.

The Court of Criminal Appeals has repeatedly stated that claims of ineffective assistance of counsel are generally not successful on direct appeal and are more appropriately urged in a hearing on an application for a writ of habeas corpus. *Lopez v.*

State, 343 S.W.3d 137,142-143 (Tex.Crim.App. 2011). On direct appeal, the record is usually inadequately developed and "cannot adequately reflect the failings of trial counsel" for an appellate court "to fairly evaluate the merits of such a serious allegation." *Id*. Unlike other claims rejected on direct appeal, claims of ineffective assistance of counsel rejected due to lack of adequate information may be reconsidered on an application for a writ of habeas corpus. *Id*.

Appellant's trial counsel objected to introducing the extraneous offenses, but did not request any limiting instruction for the evidence. The record is silent as to trial counsel's reasoning in failing to request a limiting instruction. In the absence of evidence of counsel's reasons for the challenged conduct, an appellate court commonly will assume a strategic motivation if any can possibly be imagined. *See Ex parte Saenz*, 491 S.W.3d 819, 828 (Tex. Crim. App. 2016). It is possible that trial counsel did not want to call further attention to the evidence by requesting a limiting instruction. Appellant has not shown that trial counsel fell below an objective standard of reasonableness in failing to request a limiting instruction. We overrule the fourth issue.

Gang Affiliation

In the fifth issue, Appellant argues that the trial court erred in allowing the State to introduce evidence that Appellant was associated with people who are members of a street gang. Sergeant D.J. Adams, with the Waco Police Department, testified that he responded to the September 22 shooting. Sergeant Adams testified that he learned that

Taivion Wilson, "Cowboy," and Denzel Clay were involved in the shooting and that he knew them to be members of the gang My Brother's Keeper. Sergeant Adams stated that My Brother's Keeper started out as a juvenile gang and as they got older they "escalated into drug dealing, aggravated assaults, shootings, you name it." Sergeant Adams testified that he knew Appellant associated with members of the gang. Some of the gang members were involved in an aggravated robbery in 2013, and Appellant was present during the robbery, but was not involved. Sergeant Adams did not testify that Appellant is a member of My Brother's Keeper.

The State asked Sergeant Adams how he was familiar with the individuals who were named to him as being involved in the shooting. Trial counsel objected "[t]o the extent that the answer calls for some extraneous thing outside of this indictment." There was a discussion off the record at the bench, and the trial court overruled the objection. Sergeant Adams then gave information on My Brother's Keeper and their criminal activity. The State then asked how Sergeant Adams is familiar with Appellant. Trial counsel objected, "to the extent that this covers extraneous matters." The State responded that it would not go "into an offense that the defendant was ever charged with. It's merely the defendant's association with these individuals that the witness has testified are members of the gang." The trial court overruled the objection "to that extent." Sergeant Adams then testified about the 2013 aggravated robbery in which Appellant was present but not involved.

On appeal, Appellant argues that the trial court erred in allowing any evidence of gang affiliation pursuant to Rule 404 (b). At trial, Appellant made a general objection to extraneous matters. It was not clear that Appellant was objecting to any reference to gangs. Trial counsel did not clarify the objection after the trial court's ruling to prevent any reference to gangs. We find that Appellant has not preserved this complaint for review. TEX.R.APP.P. 33.1. Moreover, we find that any error in admitting the testimony did not affect Appellant's substantial rights. TEX. R. APP. P. 44.2(b). We overrule the fifth issue.

Jail Recordings

In the sixth issue, Appellant complains that the trial court erred in admitting statements about how he would act if found guilty. After the first day of testimony, including the admission of recorded calls from jail, Appellant called his mother from the jail, and the call was again recorded. In this call, Appellant indicated that he will likely be found guilty and talked about his ability to handle being in prison. In this phone call, Appellant's mother refers to him as "Buster." Appellant argues that the statements are an extraneous bad act and are inadmissible. Appellant objected at trial that the "relevance would be in punishment and not guilt/innocence." The trial court overruled the objection.

Appellant's objection at trial did not preserve his complaint on appeal that the statements are an extraneous bad act. TEX. R. APP. P. 44.2(b). Moreover, the statements

do not reference an extraneous bad act, but discuss the possibility of future acts. Appellant's brief mentions relevance to guilt/innocence, but does not cite any authority. *See* TEX.R.APP.P. 38.1. We find that any error in admitting the testimony did not affect Appellant's substantial rights. TEX. R. APP. P. 44.2(b). During the majority of the phone call, Appellant is discussing his ability to handle a prison sentence, and Appellant's mother is encouraging him that he can handle prison if that is the outcome. We overrule the sixth issue.

Conclusion

We affirm the trial court's judgment.

AL SCOGGINS
Justice

Before Chief Justice Gray,
Justice Davis, and
Justice Scoggins
Affirmed
Opinion delivered and filed November 22, 2017
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