IN THE
TENTH COURT OF APPEALS

No. 10-19-00181-CR

CHARLIE RAY BELL,

Appellant

v.

THE STATE OF TEXAS,

Appellee

From the 13th District Court
Navarro County, Texas
Trial Court No. D37853-CR

MEMORANDUM OPINION

Charlie Bell appeals from a conviction for robbery. TEX. PENAL CODE ANN. § 29.02. Bell complains that the trial court committed fundamental error by a comment made during voir dire, abused its discretion by denying his motion for mistrial, abused its discretion in the admission of evidence, and that the evidence was insufficient for any rational juror to have found that he was the individual who committed the robbery. Because we find no reversible error, we affirm the judgment of the trial court.

FUNDAMENTAL ERROR

In his first issue, Bell complains that the trial court committed fundamental error by shifting the burden of proof from the State to the defense in a comment made to the jury panel during voir dire. In the early stages of voir dire, the trial court made a series of remarks that included an attempt to explain that the evidence and the trial would not be like television, including multiple witnesses, DNA, and fingerprint evidence, that can all be wrapped up in one hour. At the end of his remarks, Bell approached the trial court and objected to his comments regarding fingerprints and DNA as constituting an improper comment on the weight of the evidence. The trial court overruled the objection but agreed to clarify his remarks to the jury. The trial court then stated to the jury panel:

> Let me clear up one issue before we go any further. I said something about don't believe what you see on television. I think what y'all should take away from that is, those shows happen as I said, and I think I did follow up with it, they happen in one hour. Y'all are free to expect from the state or defense anything that you think they need to show. Now, I'm not telling you not to watch television. I think what I wanted to make sure was that y'all knew that those shows last one hour and most of those shows, there's a crime committed. There's an arrest made. There's a trial and a finishing of a trial usually in one hour. So that's what I intend it to mean. We'll go from there. Thank you. You may proceed.

Bell did not object to this additional instruction at trial; however, on appeal, Bell argues that the statement that "[y]'all are free to expect from the state or defense anything that you think they need to show" impermissibly placed a burden of proof on the defense. Bell argues that this constituted fundamental error of such a nature that an objection to the remark was not necessary to preserve error.

The Court of Criminal Appeals has expressed that there is no common law "fundamental error" exception to the rules of error preservation. *Proenza v. State*, 541 S.W.3d 786, 793-94 (Tex. Crim. App. 2017). The court reiterated that it "had already rejected the idea that 'fundamental error,' as a freestanding doctrine of error-preservation, exists independently from" the categorized approach the court set out in *Marin v. State*, 851 S.W.2d 275 (Tex. Crim. App. 1993). *Proenza*, 541 S.W.3d at 793.

The Court of Criminal Appeals stated as follows regarding fundamental error: "In *Marin*, we described the Texas criminal adjudicatory system as containing error-preservation 'rules of three distinct kinds: (1) absolute requirements and prohibitions; (2) rights of litigants which must be implemented by the system unless expressly waived; and (3) rights of litigants which are to be implemented upon request.'" *Proenza*, 541 S.W.3d at 792 (*quoting Marin*, 851 S.W.2d at 279). The court "referred to these separate classifications as category-one, -two, and -three *Marin* rights, respectively." *Id.* If an alleged error falls into one of the first two *Marin* categories — if it involves (1) a violation of an absolute systemic requirement, or (2) a violation of a right that is waivable only — it may be raised for the first time on appeal. *See id*. All other complaints involve category three rights that are forfeited unless preserved. *See id*.

In light of *Proenza*, we reject Bell's argument that the unpreserved complaints regarding the trial judge's comments during voir dire must be addressed on the merits because the complaint involves "fundamental error." *See id*. at 792-801. Pursuant to *Proenza*, there is no freestanding "fundamental error" exception to the rules of error

preservation established by *Marin*. *See id.* at 793.

No matter how the error is titled, however, a trial court's comments during voir dire would be considered an error that does not require an objection to preserve error when the comments taint the defendant's presumption of innocence or impermissibly shift the burden of proof in front of the venire. *See Jasper v. State*, 61 S.W.3d 413, 421 (Tex. Crim. App. 2001). Stated differently, if "the trial judge's comments rose to such a level as to bear on the presumption of innocence or vitiate the impartiality of the jury[,]" then the error may be heard on appeal despite there being no objection to the trial judge's comments at trial. *Id*.

In making this determination, a trial court's comments during the voir dire process are not considered in isolation. In our assessment of whether a trial court's voir dire comments deprived an appellant of a fair and impartial trial, we consider the trial court's comments as a whole. *See Unkart v. State*, 400 S.W.3d 94, 98-99 (Tex. Crim. App. 2013) (reviewing the trial court's comments in light of the trial court's entire statement to the venire panel); *Infante v. State*, 397 S.W.3d 731, 738 (Tex. App.—San Antonio Feb. 6, 2013, no pet.) ("Not[ing] the importance of viewing the surrounding statements of the trial judge and viewing the comment in context.").

Bell does not address whether his complaint involves a violation of a category one, two, or three right under *Marin*. We will assume without deciding that Bell's complaint falls within the first or second *Marin* category and did not require an objection to preserve the alleged error. Bell does not cite to any authorities to support his argument that the

single comment by the trial court regarding the improper shifting of the burden of proof constituted reversible error. Nor does he present argument regarding what harm analysis, if any, should be applied or that he was harmed by the trial court's single statement.

In our analysis of the entirety of voir dire, when we view the trial court's statements as a whole, we do not find that the isolated statement tainted the presumption of innocence or otherwise deprived Bell of a fair and impartial trial. The trial court had otherwise properly instructed the jury that the burden of proof is always on the State, that it never shifts to the defense, and that Bell is presumed innocent. Bell's first issue is overruled.

MOTION FOR MISTRIAL

In his second issue, Bell complains that the trial court abused its discretion by denying his motion for mistrial after the victim of the robbery improperly identified Bell at trial. The victim had been unable to see the face of the perpetrator during the robbery because the perpetrator had a scarf covering his face and wore a wide-brimmed hat. The victim described the perpetrator's pants and shoes at the time he reported the offense and had heard the perpetrator's voice. During the trial, the State attempted to ask the victim about the distinctive shoes that the perpetrator had been wearing during the robbery in an effort to connect the shoes to a photograph the victim had been shown of Bell wearing the alleged shoes which had been used to identify Bell when he was arrested. The State then asked if the person wearing the shoes was in the courtroom today, to which the

victim answered, “Yes.” The State then asked the victim to “point them out and –” at which time Bell objected. After a discussion at the bench, the trial court excused the jury and after hearing arguments from Bell and the State, the trial court sustained Bell’s objection. Bell asked for a mistrial, which was denied, although the trial court decided to give a limiting instruction to the jury. After the jury returned, the trial court gave an instruction to the jury to disregard the last question. In this appeal, Bell argues that the attempted in-court identification was so prejudicial that the trial court erred by denying his motion for mistrial.

We review the trial court's denial of a motion for mistrial for an abuse of discretion. *Hawkins v. State*, 135 S.W.3d 72, 76-77 (Tex. Crim. App. 2004). We uphold the trial court's ruling if it was within the zone of reasonable disagreement. *Coble v. State*, 330 S.W.3d 253, 292 (Tex. Crim. App. 2010). "Only in extreme circumstances, where the prejudice is incurable, will a mistrial be required." *Hawkins*, 135 S.W.3d at 77. Granting a mistrial is appropriate when error is "so prejudicial that expenditure of further time and expense would be wasteful and futile." *Ladd v. State*, 3 S.W.3d 547, 567 (Tex. Crim. App. 1999).

"The asking of an improper question will seldom call for a mistrial, because, in most cases, any harm can be cured by an instruction to disregard." *Wood v. State*, 18 S.W.3d 642, 648 (Tex. Crim. App. 2000) (*quoting Ladd*, 3 S.W.3d at 567). "On appeal, we generally presume the jury follows the trial court's instructions in the manner presented. The presumption is refutable, but the appellant must rebut the presumption by pointing

to evidence that the jury failed to follow the trial court's instructions." *Thrift v. State*, 176 S.W.3d 221, 224 (Tex. Crim. App. 2005); *see also Wood*, 18 S.W.3d at 648 ("A mistrial is required only when the improper question is clearly prejudicial to the defendant and is of such character as to suggest the impossibility of withdrawing the impression produced on the minds of the jurors.") (internal citation omitted).

To determine whether a trial court abused its discretion by denying a mistrial, we balance three factors: (1) severity of the misconduct; (2) measures adopted to cure any harm from the misconduct; and (3) certainty of conviction absent the misconduct. *See Hawkins*, 135 S.W.3d at 77; *Mosley v. State*, 983 S.W.2d 249, 259 (Tex. Crim. App. 1998).

We do not find that, standing alone, the impact of the improper question was particularly severe. No answer was given that the victim actually identified Bell in court and other evidence was presented during the trial regarding the fact that the victim was unable to see Bell's face to identify him. The trial court gave a limiting instruction to the jury to disregard, which the jury was presumed to follow, and there is nothing in the record to overcome the presumption that the instruction was followed. We also find that the conviction was just as certain absent the improper question. The evidence established that the victim was able to identify Bell by his distinctive shoes, his voice, and the vehicle he drove. Balancing the above factors, we find that the trial court did not abuse its discretion by denying Bell's motion for mistrial. We overrule issue two.

ADMISSION OF EVIDENCE

In his third issue, Bell complains that the trial court abused its discretion by

admitting recordings of telephone conversations made while he was incarcerated awaiting trial because they were not relevant and their probative value was outweighed by the danger of unfair prejudice, confusion of the jury, and misleading the jury. In his argument on this issue, Bell makes no citations to the record and does not describe the content of the objected-to calls and how they were unfairly prejudicial or confusing to the jury except to say that the jury might have misunderstood which offense for which Bell was expressing his thoughts or feelings. Bell had previously been tried for this offense and for unauthorized use of a motor vehicle. The jury was unable to reach a unanimous verdict on the robbery and acquitted Bell on the unauthorized use of a motor vehicle offense. In his brief to this Court, Bell asserts that the calls were made prior to the first trial and could have been describing the unauthorized use offense.

In his brief, in addition to the failure to include any citations to the record, Bell does not cite to any authority in support of his contentions outside of a reference to the standard of review, one case that acknowledges that a defendant's conduct after the commission of an offense may be admissible to show a "consciousness of guilt," and a recitation of Rule 403 of the Rules of Evidence. The State argues that this issue was inadequately briefed and we agree.

In order to properly present an issue to this Court, an appellate brief must contain appropriate citations to authorities to support his argument and to the record. TEX. R. APP. P. 38.1(i). Because Bell's issue fails to provide any citations to the record or substantive analysis with authorities to support it, we conclude his issue is inadequately

briefed and we will not address it. *See id.*; *see also McCarthy v. State*, 65 S.W.3d 47, 49 n.2 (Tex. Crim. App. 2001) (stating inadequately briefed issue may be waived on appeal). We overrule issue three.

SUFFICIENCY OF THE EVIDENCE

In his fourth issue, Bell complains that the evidence was insufficient for any rational juror to have found beyond a reasonable doubt that he was the individual who committed the robbery.

The Court of Criminal Appeals has expressed our standard of review of a sufficiency issue as follows:

> When addressing a challenge to the sufficiency of the evidence, we consider whether, after viewing all of the evidence in the light most favorable to the verdict, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); *Villa v. State*, 514 S.W.3d 227, 232 (Tex. Crim. App. 2017). This standard requires the appellate court to defer "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. We may not re-weigh the evidence or substitute our judgment for that of the factfinder. *Williams v. State*, 235 S.W.3d 742, 750 (Tex. Crim. App. 2007). The court conducting a sufficiency review must not engage in a "divide and conquer" strategy but must consider the cumulative force of all the evidence. *Villa*, 514 S.W.3d at 232. Although juries may not speculate about the meaning of facts or evidence, juries are permitted to draw any reasonable inferences from the facts so long as each inference is supported by the evidence presented at trial. *Cary v. State*, 507 S.W.3d 750, 757 (Tex. Crim. App. 2016) (*citing Jackson*, 443 U.S. at 319); *see also Hooper v. State*, 214 S.W.3d 9, 16-17 (Tex. Crim. App. 2007). We presume that the factfinder resolved any conflicting inferences from the evidence in favor of the verdict, and we defer to that resolution. *Merritt v. State*, 368 S.W.3d 516, 525 (Tex. Crim. App. 2012). This is because the jurors are the exclusive judges of the facts, the credibility of the witnesses, and the weight to be given to the testimony. *Brooks v. State*, 323 S.W.3d 893, 899 (Tex.

> Crim. App. 2010). Direct evidence and circumstantial evidence are equally probative, and circumstantial evidence alone may be sufficient to uphold a conviction so long as the cumulative force of all the incriminating circumstances is sufficient to support the conviction. *Ramsey v. State*, 473 S.W.3d 805, 809 (Tex. Crim. App. 2015); *Hooper*, 214 S.W.3d at 13.
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> We measure whether the evidence presented at trial was sufficient to support a conviction by comparing it to "the elements of the offense as defined by the hypothetically correct jury charge for the case." *Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997). The hypothetically correct jury charge is one that "accurately sets out the law, is authorized by the indictment, does not unnecessarily increase the State's burden of proof or unnecessarily restrict the State's theories of liability, and adequately describes the particular offense for which the defendant was tried." *Id*.; *see also Daugherty v. State*, 387 S.W.3d 654, 665 (Tex. Crim. App. 2013). The "law as authorized by the indictment" includes the statutory elements of the offense and those elements as modified by the indictment. *Daugherty*, 387 S.W.3d at 665.

Zuniga v. State, 551 S.W.3d 729, 732-33 (Tex. Crim. App. 2018).

A photograph was taken of Bell from the waist down while he was seated in a police car after he had been detained for the robbery. The photograph was shown to the victim of the robbery, who positively identified Bell by the pants and shoes he was wearing in the photograph. Bell argues that the victim's out-of-court identification of him was inadmissible because it was impermissibly suggestive and unreliable and therefore, should not be considered as evidence that he committed the offense. Further, Bell contends that without the impermissible identification, the evidence was insufficient to establish that he committed the offense. Bell does not argue or provide a citation to the record to establish that he objected to the admission of the pretrial identification of him before or during the trial by a motion to suppress or other objection. The case authority

to which Bell cites involves motions to suppress evidence or other complaints relating to the admission of evidence at trial, not as a complaint regarding the sufficiency of the evidence. Because Bell did not object to the admission of the identification based on unreliability during the trial, we will not consider the unreliability of the identification by the victim as argued on appeal.

To the degree that Bell's issue could be construed to include an argument that the evidence was insufficient even with the unreliable identification, we find that the evidence at trial was such that any rational trier of fact could have found that he was the perpetrator of the robbery beyond a reasonable doubt. The victim identified Bell's voice from the telephone calls as the individual who demanded money from him during the robbery. He identified specific articles of clothing and shoes which he saw on the perpetrator and which Bell was shown to be wearing in a photograph taken by law enforcement and shown to the victim approximately five hours after the robbery. The victim was able to identify the vehicle that was driven from the robbery and which was driven by Bell. An officer testified that he followed a LoJack signal[1] from a location not far from where the robbery occurred to the location where Bell was found and arrested. The jail calls arguably demonstrated that Bell had consciousness of guilt about committing a robbery and that the woman who was found with him when he was

[1] LoJack is a stolen vehicle locator that was equipped in the law enforcement officer's vehicle. The LoJack signal came from a stolen vehicle report from Waco involving a black Honda sedan with paper tags. The vehicle described to have been driven away from the robbery was a black sedan. The officer happened to start getting the signal and was able to track it to a black Honda with paper tags at the location where Bell was found.

arrested had nothing to do with his criminal activity. Because we find that the evidence was sufficient, we overrule issue four.

CONCLUSION

Having found no reversible error, we affirm the judgment of the trial court.

TOM GRAY
Chief Justice

Before Chief Justice Gray,
Justice Davis, and
Justice Neill
Affirmed
Opinion delivered and filed August 26, 2020
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