



NUMBER 13-15-00129-CR

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI – EDINBURG

BRENDAN GAYTAN,

Appellant,

v.

THE STATE OF TEXAS,

Appellee.

On appeal from the 347th District Court
of Nueces County, Texas.

MEMORANDUM OPINION

**Before Chief Justice Valdez and Justices Rodriguez and Contreras
Memorandum Opinion by Chief Justice Valdez**

The jury found appellant Brendan Gaytan guilty of two counts of capital murder, and the trial court sentenced him to life in prison. See TEX. PENAL CODE ANN. § 19.03 (West, Westlaw through 2015 R.S.). By two issues, Gaytan contends: (1) his trial attorneys rendered ineffective assistance of counsel; and (2) the trial court erred in allowing the jury to view a demonstration video. We affirm.

I. BACKGROUND

In a two-count indictment, the State alleged that Gaytan fatally shot two children at a birthday party in a house on Cheryl Street in Corpus Christi, Texas. The State theorized that Gaytan committed the crime to get revenge on Arnold Valent, the father of one of the children at the party, after Valent burglarized Gaytan's truck days earlier. Valent attended the birthday party.

At trial, Valent positively identified Gaytan as the shooter. Valent testified that he came upon Gaytan and another individual when he stepped outside the house on Cheryl Street and that Gaytan began shooting at him. Valent testified that he sought cover inside the house and that Gaytan continued shooting. The evidence showed that bullets hit two children who were inside the house and that both children died as a result of gunshot wounds. Valent testified that when the shooting stopped, he ran towards the back of the house and saw a Malibu driving away.

Gaytan's friend testified that Gaytan borrowed a Malibu from her on the night of the shooting; that Gaytan left in the Malibu with two other individuals; and that approximately ninety minutes later, Gaytan returned the Malibu to her. Gaytan's friend further testified that the Malibu had been cleaned since Gaytan borrowed it and that Gaytan wiped the keys before giving them to a friend to pass on to her. The police seized the Malibu in connection with the murder investigation.

The State admitted, without objection, a surveillance video taken from a home located five blocks away from the house on Cheryl Street around the time of the shooting. The surveillance video shows a vehicle driving past the home. The State argued to the

jury that the vehicle depicted in the video was the same vehicle that Gaytan borrowed on the night of the shooting, thus placing Gaytan in the general vicinity of the shooting.

Gaytan's cousin testified that he and Gaytan were together on the night of the shooting. Gaytan's cousin testified that Gaytan stated that he "had gotten jacked" (meaning "robbed") and that he wanted to "handle up" (meaning "take care of business" or "get his stuff back"). Gaytan's cousin further testified that Gaytan left for about an hour and that when he returned, he stated that it had been "taken care of."

Eloy Silva, a self-admitted gang member, testified that Gaytan confessed to being involved in the shooting a couple of days after it occurred. According to Silva, Gaytan told him that "shit had gotten out of hand" and "it got fucked up."

Gaytan's defensive theory at trial was that the evidence connecting him to the shooting was weak. Gaytan argued that Valent's in-court identification was not credible; that Gaytan's statements to his cousin about "handling up" and "taking care of it" could have meant anything and did not necessarily tie him to the shooting; that the surveillance video does not show a Malibu several blocks away from the house on Cheryl Street; and that Silva had a motive to lie about an alleged confession because Silva received a favorable plea deal in an unrelated case in exchange for his testimony at trial.

At the close of the evidence, the jury found Gaytan guilty on both counts of capital murder. Thereafter, Gaytan moved for a new trial alleging ineffective assistance of counsel. At the hearing on the motion for new trial, Gaytan presented evidence that he claimed would have changed the outcome of the trial had his attorneys used it. The trial court denied Gaytan's motion for new trial. This appeal followed.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

By his first issue, Gaytan contends that the trial court erred in failing to grant his motion for new trial based on ineffective assistance of counsel.

A. Standard of Review and Applicable Law

We review a trial court's ruling on a motion for new trial under an abuse-of-discretion standard of review. *Webb v. State*, 232 S.W.3d 109, 112 (Tex. Crim. App. 2007). This standard requires that we review the evidence "in the light most favorable to the trial court's ruling and uphold the trial court's ruling if it was within the zone of reasonable disagreement." *Id.* We do not "substitute our judgment for that of the trial court, but rather we decide whether the trial court's decision was arbitrary or unreasonable." *Id.* Thus, a trial court abuses its discretion in denying a motion for new trial only when "no reasonable view of the record could support the trial court's ruling." *Id.*

As the movant on a motion for new trial alleging ineffective assistance, Gaytan shouldered the burden to establish by a preponderance of the evidence that: (1) trial counsel performed deficiently; and (2) counsel's deficient performance prejudiced his defense. *See Strickland v. Washington*, 466 U.S. 664, 668 (1984); *see also Pina v. State*, 127 S.W.3d 68, 72 (Tex. App.—Houston [1st Dist.] 2003, no pet.). Judicial review of counsel's performance is highly deferential, and ineffective assistance will be found only if Gaytan was able to overcome the strong presumption that his counsel's conduct fell within the wide range of reasonable professional assistance. *See Strickland*, 466 U.S. at 668. We also apply a presumption that counsel's choices in representing Gaytan were the result of sound trial strategy. *See Mata v. State*, 226 S.W.3d 425, 431 (Tex. Crim. App. 2007) (citing *Strickland*). An allegation of ineffective assistance will be sustained

only if it is firmly founded in the record. See *Owens v. State*, 916 S.W.2d 713, 717 (Tex. App.—Waco 1996, no pet.). “The fact that another attorney might have pursued a different course of action or tried the case differently will not support a finding of ineffective assistance of counsel.” *Id.*

As noted above, if Gaytan met his burden to prove that trial counsel performed deficiently, the next inquiry for the trial court would be whether counsel’s deficient performance prejudiced Gaytan’s defense. See *Strickland*, 466 U.S. at 668. Prejudice occurs when there is a “reasonable probability” that, but for counsel’s deficient performance, the outcome of Gaytan’s trial would have been different. See *id.*

B. Analysis

On appeal, Gaytan argues that trial counsel performed deficiently by: (1) failing to adequately impeach Valent; (2) failing to adequately impeach Silva; (3) failing to adequately refute the State’s theory that Gaytan committed the shooting to get revenge on Valent; and (3) failing to object to the admission of the home surveillance video. We address each alleged omission separately below.

1. Failing to Adequately Impeach Valent

Gaytan contends that trial counsel failed to impeach Valent with certain statements he made to the police in the days following the shooting.

i. Valent’s Statements Regarding the Identity of the Shooter

At the new-trial hearing, Gaytan presented evidence that Valent could not identify Gaytan as the shooter when the police interviewed him the day after the shooting. Gaytan argues that trial counsel was ineffective for failing to show the jury the police interview as a means of discrediting the reliability of Valent’s in-court identification. However, the

record shows that, although the police interview was not played for the jury, trial counsel cross-examined Valent with the substance of what he said during that interview. Specifically, Valent admitted on cross-examination that he did not identify Gaytan as the shooter during his initial police interview because he was afraid of what might happen to him and his family if he identified Gaytan. Thus, the jury heard Valent admit to making a prior inconsistent statement regarding the identity of the shooter. Furthermore, trial counsel testified at the new-trial hearing that he did not play the police interview “because Mr. Valent had, basically, admitted to having made prior inconsistent statements” regarding the identity of the shooter.¹ Trial counsel further testified that he believed that Valent had been adequately impeached and had already lost credibility with the jury to such extent that playing the police interview was not necessary. Gaytan provides no authority that playing the police interview itself was the only effective means to discredit Valent’s in-court identification, and we find none. *Cf. Ex parte Saenz*, 491 S.W.3d 819, 827 (Tex. Crim. App. 2016) (finding deficient performance when trial counsel completely failed to impeach the witness’s in-court identification of the defendant with his prior inconsistent statement to the police that he would not be able to identify the perpetrator of the crime). We therefore hold that the trial court did not abuse its discretion in rejecting Gaytan’s claim that trial counsel performed deficiently by failing to play Valent’s police interview as a means of discrediting Valent’s in-court identification.

¹ We note that Gaytan does not address whether Valent’s police interview was admissible in light of the fact that Valent was cross-examined about his prior inconsistent statement and admitted to making it. See TEX. R. EVID. 613(4) (providing that extrinsic evidence of a witness’s prior inconsistent statement is not admissible unless the witness is first examined about the statement and fails to unequivocally admit making the statement); see also *Alvarez-Mason v. State*, 801 S.W.2d 592, 595 (Tex. App.—Corpus Christi 1990, no pet.).

ii. Valent's Statements Regarding the Details of the Shooting

Evidence presented at the new-trial hearing showed that Valent eventually identified Gaytan as the shooter at a subsequent interview with the police in the days following the shooting.² During this interview, Valent recounted certain details about the shooting that varied from what he told the jury. Specifically, Valent told the police: (i) that he saw one shooter (whereas he told the jury he saw two shooters); (ii) that he did not see a "gun" (whereas he told the jury he saw the shooters carrying "military style" weapons); and (iii) that the get-away car was a silver "Mercedes Benz," which he identified as Gaytan's vehicle based on previous meetings between the two (whereas he told the jury the get-away car was a silver "Malibu"). Gaytan argues that his trial counsel was ineffective in failing to bring out these discrepancies as a means of discrediting the reliability of Valent's identification.

Ostensibly, these discrepancies discredit the reliability of Valent's identification. However, trial counsel testified that he made a strategic decision to limit the extent of Valent's cross-examination because he believed that Valent had already been adequately impeached when he admitted that he initially told the police that he could not identify the shooter, among other things. Trial counsel testified that he "didn't think a jury was going to base a decision on what [Valent] said." The fact that another attorney might have pursued a different impeachment strategy will not support a finding of ineffective assistance of counsel unless trial counsel's strategy was shown to be unreasonable. See *Owens*, 916 S.W.2d at 717. Based on the testimony adduced at the new-trial hearing,

² During the second interview, Valent identified Gaytan as the shooter with seventy-five percent certainty but then increased his level of certainty to one-hundred percent after the police told him that he had to be "100 percent sure."

we hold that the trial court did not abuse its discretion in finding that Gaytan failed to meet his burden of overcoming the strong presumption that trial counsel's cross-examination of Valent fell within the wide range of reasonable professional assistance and was part of a reasoned trial strategy. See *Strickland*, 466 U.S. at 668.

2. Impeaching Silva

At the new-trial hearing, witnesses testified about a statement that Silva made at a court setting prior to trial. Gaytan argues that trial counsel performed deficiently by failing to impeach Silva with that statement. However, the record shows that the content and context of Silva's statement was heavily disputed at the new-trial hearing. The trial court heard the following testimony regarding Silva's statement:

- One of Gaytan's co-defendant's attorneys testified that Silva told him, "Your clients are innocent," and that he (Silva) was being pressured to lie.
- Another of Gaytan's co-defendant's attorneys testified that Silva told his co-counsel that Gaytan's co-defendant was not guilty and that he was being pressured to testify to a lie in order to frame the co-defendant. The attorney testified that he passed this information to Gaytan's trial counsel a few days later.
- Gaytan's mother testified that she was present in the courtroom when Silva said that Gaytan and his co-defendant were being framed and were innocent, and that Gaytan's trial counsel heard this as well.
- A former prosecutor who was in the courtroom when Silva made the statement testified that he heard Silva say, "I'm just gonna call it like I saw it, or, I'm just gonna tell it like I saw it."
- A court coordinator testified that he heard Silva say to Gaytan's co-defendant, "They're gonna try to get me to rat on you. I'm familia. I'm not gonna rat on you."

Gaytan's trial counsel testified that he did not present evidence concerning Silva's statement because he knew, based on his investigation of the statement, that Silva would

attempt to explain it by alleging that Gaytan accidentally shot the children, which ultimately would not have helped the defense.

Considering the uncertainty as to what Silva actually said and trial counsel's testimony that he did not believe it would help the defense, as well as the fact that trial counsel effectively impeached Silva at trial by referencing his favorable plea deal, we conclude that the trial court did not abuse its discretion in rejecting Gaytan's claim that trial counsel performed deficiently by failing to impeach Silva with a statement he made at a court setting prior to trial. *See id.*

3. Failing to Refute the State's Revenge Theory

As previously mentioned, the prosecution's theory of the case was that Gaytan committed the crime to get revenge on Valent for burglarizing his truck days earlier. At the new-trial hearing, Gaytan's father testified that he believed the person who burglarized Gaytan's truck was Gaytan's ten-year-old nephew—not Valent. Gaytan's father also testified that he thought Gaytan shared his belief regarding the identity of the burglar and that he told trial counsel about this before trial. Gaytan asserts that trial counsel performed deficiently by failing to present a nephew-as-burglar theory to counter the State's theory that Gaytan committed the crime believing that Valent burglarized his truck.

However, trial counsel testified at the new-trial hearing that his pretrial investigation into the matter revealed that the nephew-as-burglar theory lacked evidentiary support. Furthermore, Gaytan's father admitted on cross-examination that he only had a "feeling" that Gaytan's nephew was the burglar, but he had no evidence to back up that feeling. Moreover, other than calling his father, Gaytan presented no evidence at the new-trial hearing to substantiate his nephew-as-burglar theory, and the nephew was not called to

testify. Finally, at trial, Valent and other witnesses testified to their involvement in burglarizing Gaytan's truck.

Based on the evidence presented at the new-trial hearing, we hold that the trial court did not abuse its discretion in rejecting Gaytan's claim that trial counsel performed deficiently by failing to present an unsubstantiated defensive theory. *See id.*; *see also Ex parte Ramirez*, 280 S.W.3d 848, 853 (Tex. Crim. App. 2007).

4. Failing to Object to the Home Surveillance Video (State's Exhibit 196)

As previously mentioned, the Stated introduced a home surveillance video, which purports to capture a vehicle driving past a house located five blocks away from the house on Cheryl Street around the time of the shooting. The video was admitted as State's Exhibit 196. At trial, the State argued that the vehicle shown in the home surveillance video was the same vehicle that Gaytan borrowed from his friend on the night of the shooting—thus providing circumstantial evidence that Gaytan was near the scene of the crime around the time it happened. Gaytan contends that his trial counsel was ineffective for failing to challenge the admission of the video. To prevail on this claim, Gaytan had the burden to show that the trial court would have erred in overruling trial counsel's objection to the admission of the video had one been made. *See Ex parte Martinez*, 330 S.W.3d 891, 901 (Tex. Crim. App. 2011).

On appeal, Gaytan does not identify any specific rule of evidence that barred the admission of the video. Nevertheless, Gaytan argues that a "proper predicate" was not laid because Gaytan's friend did not testify that the vehicle shown in the video was the same vehicle that she loaned to Gaytan. However, Gaytan does not adequately explain, with argument and citation to legal authority, why this kind of testimony was a necessary

predicate to the admissibility of the video—particularly when the State elicited testimony from the owner of the surveillance camera and the police officer who received the video that the video was what the State claimed it to be. See TEX. R. EVID. 901(b) (providing that testimony from a witness with knowledge that an item is what the proponent claims it to be satisfies the requirement of authenticating or identifying an item of evidence); see also *S.D.G. v. State*, 936 S.W.2d 371, 382 (Tex. App.—Houston [14th Dist.] 1996, writ denied) (concluding that a proper predicate was laid for the admission of a videotape taken at a convenience store during a robbery with testimony from the convenience store clerk and a police officer, confirming that the videotape was what the State claimed it to be). We conclude that the trial court would not have erred in overruling an objection to the admission of the surveillance video on the basis that the State failed to lay the proper predicate for its admissibility.

Next, Gaytan argues that the surveillance video was inadmissible because a neighbor to the house on Cheryl Street testified that she saw what appeared to be the get-away vehicle fleeing down a street, which would not have been in view of the surveillance camera. Gaytan also argues that there was some testimony indicating that the time-stamp on the surveillance video was off by a few minutes. However, Gaytan provides no law or rule of evidence that could apply to bar admission of the video on this basis, and he does not adequately explain how these arguments relate to the video's admissibility rather than to its weight as evidence before the jury.

We hold that the trial court did not abuse its discretion in rejecting Gaytan's claim that trial counsel performed deficiently by failing to object to the admission of the surveillance video. We overrule Gaytan's first issue.³

III. DEMONSTRATION VIDEO

By his second issue, Gaytan contends that the trial court erred in allowing the jury to see a demonstration video, which the police prepared three weeks after the shooting and which the State offered for demonstrative purposes at trial. Although the demonstration video does not appear to have been made a part of the appellate record, the parties describe it as featuring a police officer driving past the same surveillance camera that captured the image of the vehicle depicted in State's Exhibit 196, this time driving the Malibu that Gaytan borrowed from his friend on the night of the shooting. According to the State, the video was offered to show the degree of similarity between the vehicle depicted in State's Exhibit 196 and the Malibu.

We review the trial court's ruling for an abuse of discretion, reversing only if the trial court's decision to allow the jury to see the demonstration video fell outside the zone of reasonable disagreement. See *Orrick v. State*, 36 S.W.3d 622, 625 (Tex. App.—Fort Worth 2000, no pet.).

Gaytan asserts that the video was "highly suggestive and prejudicial," warranting a new trial. To support this argument, Gaytan principally relies on *Lopez v. State*—a case in which the Fort Worth court of appeals found that the trial court reversibly erred in allowing the jury to view a police-created video that reenacted the crime itself. 651

³ Because Gaytan has not shown that trial counsel performed deficiently, we need not address *Strickland's* prejudice prong.

S.W.2d 413 (Tex. App.—Fort Worth 1983), *remanded on other grounds*, 664 S.W.2d 85 (Tex. Crim. App. 1983). The Fort Worth court observed that

[T]he concept of recreating human events with the use of actors is a course of conduct that is fraught with danger. The general appearance of an actor, his facial expression or slightest gesture whether intended or not may sway a juror who has listened to lengthy testimony. The danger of jurors branded with television images of actors, not testimony, is too great to ascertain.

Id. at 415–16. After noting these dangers, the court stated: “any staged, re-enacted criminal acts . . . involving human beings are impossible to duplicate in every minute detail and are therefore inherently dangerous, offer little in substance and the impact of re-enactments is too highly prejudicial to insure the State or the defendant a fair trial.” *Id.* at 416.

In *Marras v. State*, the Texas Court of Criminal Appeals agreed with the *Lopez* court concerning the potential danger of reenactment videos. 741 S.W.2d 395, 404 (Tex. Crim. App. 1987), *overruled on other grounds by Garrett v. State*, 851 S.W.2d 853 (Tex. Crim. App. 1993). However, the *Marras* court distinguished *Lopez*’s reenactment video from the one under review in that case. *Id.* In *Marras*, the video showed a reenactment of the route taken by a witness who followed the defendant from the scene of the murder. *Id.* In the video, a man portrayed the defendant fleeing the crime scene while the witness (playing herself) followed behind to illustrate the distance between them, among other things. *Id.* Distinguishing *Lopez*, the *Marras* court stated: “[t]he videotape in this instance was merely a series of pictures of the route taken by [the defendant] and [the witness] after the shooting of the [victim]. The videotape does not depict any staged, re-enacted criminal acts.” *Id.*

In this case, the parties' description of the video shows that it is more similar to the video in *Marras* than the one in *Lopez*. The video showed the jury the degree of similarity between the Malibu that Gaytan borrowed on the night of shooting and the vehicle seen in State's Exhibit 196. Gaytan does not argue that the video depicted any "staged, re-enacted criminal acts," as in *Lopez*. See *id.* Instead, he argues that the "time sequence [on the videos] was off" and "the lighting could not be verified." However, Gaytan has not adequately explained how these dissimilarities, if they exist, demonstrate error under *Lopez* and *Marras*. We conclude that the trial court did not abuse its discretion in allowing the jury to see the video for demonstrative purposes. We overrule Gaytan's second issue.

IV. CONCLUSION

We affirm the trial court's judgment.

/s/ Rogelio Valdez
ROGELIO VALDEZ
Chief Justice

Do not publish.
TEX. R. APP. P. 47.2(b).

Delivered and filed the
4th day of May, 2017.