Affirmed and Opinion filed November 18, 1999.

In The

Fourteenth Court of Appeals

NO. 14-96-00554-CR

IVEY VERNON MYERS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 338th District Court
Harris County, Texas
Trial Court Cause No. 460,339

O P I N I O N

Appellant, Ivey Vernon Myers, was found guilty by a jury of aggravated robbery and sentenced by the court to twenty-five years in prison. On direct appeal, this court affirmed his conviction with an unpublished opinion, *Myers v. State*, No. 14-87-211-CR (Tex. App.–Houston [14th Dist.] Oct. 15, 1997, pet. ref'd). After Appellant successfully sought habeas corpus relief on grounds that he should have been permitted to represent himself on appeal, he now appeals *pro se*. We affirm.

I. Background

The complainant, Samuel Ybarra, testified that on March 30, 1986, Easter Sunday, he was walking along Selma Street in Houston between the hours of noon and 2:30 p.m. At the time, his wife was in a nearby hospital giving birth to their child. While walking, he saw a silver, rusted, four-door Ford pass him and come to a stop about two or three feet in front of him. He approached the car, thinking the driver wanted to ask directions. Instead, the driver pointed a gun at him and said, "[L]et me have your money and your necklace."

Ybarra testified that the robber took about $35, a gold chain, a promise ring, an engagement ring, and a heart-shaped diamond ring. As the robber drove off, he told Ybarra that if Ybarra told the police he would "do something" to him. Ybarra further testified that he memorized the license plate number; that he had ample time to look at the robber; and that he was able to identify Appellant from a photo spread about a week after the robbery.

Using the license plate number, the police traced the car, a 1976 Ford four door, to the home of Ms. Hilda Broussard, Appellant's mother, with whom Appellant lived. Witnesses testified that the car often was parked behind Broussard's house and that Appellant often drove the car.

Ybarra described the robber as about thirty years old, between five-six and six feet tall, medium to thin build, with a little hair on his chin, a thin mustache, and wearing dark eyeglasses, a red baseball cap, and a blue-and-white Hawaiian-style shirt. Appellant, whom Ybarra identified at trial as the robber, was black, five-eleven, about thirty-four years old the day of the robbery, and wore eyeglasses.

II. Discussion

A. Sufficiency of the Evidence

In his fourth appellate ground, Appellant complains of the sufficiency of the evidence. Although he does not specify whether he complains of legal or factual

sufficiency, in the interest of justice, we will address both issues.

When reviewing the legal sufficiency of the evidence, we view the evidence in the light most favorable to the State to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 319 (1979). We apply this standard whether the case involves direct or circumstantial evidence. *See Geesa v. State*, 820 S.W.2d 154, 159 n.6 (Tex. Crim. App. 1991). If we find there is evidence that establishes guilt beyond a reasonable doubt and if the fact finder could have believed the evidence, we may not reverse the judgment on legal sufficiency grounds. *See Moreno v. State*, 755 S.W.2d 866, 867 (Tex. Crim. App. 1988). When reviewing the factual sufficiency, we view all of the evidence but not in the light most favorable to the State. We set aside the verdict only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *See Clewis v. State*, 922 S.W.2d 126, 129 (Tex. Crim. App. 1996). We defer to the jury's decision to avoid substituting our judgment for that of the jury, *see id.* at 133, reversing only to prevent a manifestly unjust result, *see id.* at 135.

Appellant argues that three alibi witnesses placed him elsewhere at the time of the robbery. This assertion is not supported by the record. The witnesses testified that during the afternoon in question, Appellant was at his mother's house, within three to five miles of the robbery scene. One witness testified he saw Appellant between 2 and 3 p.m. Another witness put the time at "about 1:30, between 1:30, 2 o'clock." A third, Appellant's mother, stated that at the time in question, her son was in and out of her house. The robbery occurred, according to Ybarra, at roughly between 12:30 and 2:30 p.m. Even if we take the witnesses' statements as true, their testimony does not contradict Ybarra's account of the event. Appellant could have been seen at his mother's house at the times mentioned and still have been at the robbery scene at sometime between 12:30 and 2:30. Moreover, any evidentiary conflicts must be resolved by the jury, not by the reviewing court.

Appellant further argues that Ybarra was an unreliable witness because his testimony was contradictory. According to Appellant, Ybarra testified the robbery weapon was a revolver and he could see bullets in the pistol, and elsewhere he testified the handgun was an automatic. Appellant misstates the record. Ybarra, who was not familiar with firearms, never testified he could see bullets in the pistol. Nevertheless, even if there were inconsistencies in Ybarra's testimony, questions about Ybarra's credibility are for the jury to resolve. *See Bonham v. State*, 680 S.W.2d 815, 819 (Tex. Crim. App. 1984) (jury the exclusive judge of witnesses' credibility and of weight to be given their testimony). We may not second-guess the fact finder.

Appellant contends the State coached Ybarra on his testimony. However, Appellant fails to cite any evidence in the record showing that the State induced false testimony. *See* TEX. R. APP. P. 38.1(h) (brief must contain appropriate citations to record); *Lape v. State*, 893 S.W.2d 949, 953-54 (Tex. App.–Houston [14th Dist.] 1994, pet. ref'd) (nothing preserved for review if defendant fails to cite to record showing complained-of error). Appellant also alleges that the police officer who wrote the offense report operated out of the Park Place Substation, where officers purportedly had been indicted for making false arrest reports and for tampering with evidence. Again, however, these allegations find no support in the trial record. *See* TEX. R. APP. P. 38.1(h); *Lape*, 893 S.W.2d at 953-54.

After viewing all of the evidence, we find it legally and factually sufficient to support Appellant's conviction. Ybarra had sufficient time to see the robber during the holdup, was able to give police the license number of the robber's car, and was able to identify Appellant as the robber. Police traced the robber's car to Appellant's mother, with whom Appellant lived. Witnesses placed Appellant within three to five miles of the holdup scene the afternoon of the robbery. Moreover, Appellant's general physical description matched that of the robber. We overrule Appellant's fourth ground of error.

B. Due Process Complaints

Appellant, in his first ground of error, complains of the following: "Denial of Due Process Rights, Rights of the Accused, and Tried under Unfair, Partial and Prejudiced Trial Proceedings." Under this ground, Appellant takes issue with several aspects of his trial which he considers improper.

First, Appellant complains he was indicted initially by the State in a fundamentally sound indictment and that the State reindicted him a second time merely to add aliases and thus to prejudice the jury against him. A party waives a complaint about an indictment by not complaining before trial. *See* TEX. CODE CRIM. PROC. ANN. art. 1.14 (Vernon Supp. 1999); *Ex parte Gibson*, 800 S.W.2d 548, 551 (Tex. Crim. App. 1990). Appellant filed a motion to dismiss the indictment but failed to raise the issue of the aliases. He thus waived any complaint.

Even if we were to review Appellant's substantive complaint about the reindictment, we would not find harmful error. The State's use of an alias in court records is improper where there is no showing that the accused ever went by the alleged alias and where the alias has no apparent relevance other than to create prejudice. *See Blackmon v. State*, 783 S.W.2d 11, 13 (Tex. App.–Houston [14th Dist.] 1989, pet. ref'd). No harm results, however, where the alias does not prejudice the jury and where the State does not act in bad faith. *See Toler v. State*, 546 S.W.2d 290, 293 (Tex. Crim. App. 1977).

Here, the State failed to establish that Appellant used the aliases–Curtis Philips, Jason Roberts, and Peabody Myers. The aliases arguably had no relevance apart from creating prejudice. Except for the indictment, however, the aliases were not mentioned by the State. Appellant has, thus, failed to demonstrate harm.

Appellant also complains that he was reindicted without his permission. He cites no authority, and we know of no authority, that requires the State to seek the accused's permission for an additional indictment.

Appellant next alleges that while he was being detained in a holding cell awaiting a

court appearance, a bailiff called him forward to allow a prosecutor to view Appellant so the prosecutor could pass on to a witness a physical description of Appellant. Appellant cites nothing in the record to substantiate his allegations.

Appellant next complains that the in-court identification by Ybarra was tainted by impermissibly suggestive pretrial identification procedures. When reviewing a complaint that a pretrial identification procedure was impermissibly suggestive, we determine whether the in-court identification was so tainted by impermissible pretrial procedures as to give rise to a very substantial likelihood of irreparable misidentification. *See Madden v. State*, 799 S.W.2d 683, 695 (Tex. Crim. App. 1990) (citing *Simmons v. United States*, 390 U.S. 377, 384 (1968)). The appellant must show by clear and convincing evidence that the witness's in-court identification was so tainted. *See Madden v. State*, 799 S.W.2d at 695. If we find that the totality of circumstances shows no substantial likelihood of misidentification despite the suggestive pretrial identification procedure, we will deem the identification testimony reliable, and therefore admissible. *See id.* In weighing the corrupting effect of suggestive identification procedures, we use five nonexclusive factors, including (1) the witness's opportunity to view the criminal at the time of the crime, (2) the witness's degree of attention, (3) the accuracy of his prior description of the criminal, (4) the level of certainty demonstrated at the trial confrontation, and (5) the time between the crime and the confrontation. *See id.*

In this case, the complainant testified that he saw the robber's face for about two minutes during the incident and that the robber was seated in the car close enough to allow the complainant to hand over his wallet and jewelry. The complainant further testified that about a week after the holdup, he picked Appellant out of a photo spread, recognizing Appellant as the robber even though the robber wore eyeglasses and the photo showed Appellant without eyeglasses. Both the complainant and the police officer conducting the photo spread testified that the officer did not suggest which photo was Appellant's and that the complainant was certain that Appellant was the robber. Appellant nevertheless

complains the State "coached" Ybarra on his trial identification. While Ybarra acknowledged on cross-examination that he had discussed his testimony with the prosecutors, he denied he had been "coached." We find that Appellant has failed to meet his burden of showing that the pretrial identification was impermissibly suggestive or that the pretrial procedure tainted the in-court identification.

Appellant also complains of the in-court identification, saying that only he and his attorney were at the defense table and that this fact made the in-court identification too suggestive. He cites no authority, and we know of none, holding that this procedure is overly suggestive or requiring the State to have an in-court lineup.

As an additional due-process complaint, Appellant alleges that the evidence contains several inconsistencies. For example, he complains Ybarra testified he was robbed of one amount of money and jewelry, but told the officer taking the report that he was robbed of another amount of money and jewelry, while the presentence report listed yet another amount of jewelry. In another example, Appellant contends Ybarra testified he gave the police the complete license number of the robber's car, while other evidence suggests Ybarra gave only a partial license number. Appellant does not provide record references with his complaints. Taking his allegations as true, however, we find these complaints about witness credibility and conflicts in the evidence are within the province of the jury, and we will not reevaluate the evidence. Because Appellant raises no issue demonstrating reversible error, we overrule his first ground of error.

C. Denial of Self Representation

We need not address Appellant's second ground of error, a complaint that he was denied his right to self-representation on appeal. This issue was addressed as part of his habeas corpus review, resulting in this new appeal.[1]

[1] The issue is briefed only because we granted Appellant permission to use his habeas corpus petition (continued...)

D. Ineffective Assistance of Counsel

In his third ground of error, Appellant complains he received ineffective assistance of counsel. To demonstrate ineffective assistance of counsel, a defendant must show (1) counsel's performance fell below an objective standard of reasonableness and (2) the deficient performance prejudiced the defendant's case. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). The defendant must identify the acts or omissions of counsel that are alleged to constitute ineffective assistance and affirmatively prove that they fall below the professional norm for reasonableness. *See Garcia v. State*, 887 S.W.2d 862, 880 (Tex. Crim. App. 1994). Under the first prong of *Strickland*, the defendant must overcome the strong presumption that the counsel's conduct fell within the wide range of reasonable professional assistance. *See Strickland v. U.S.*, 466 U.S. at 689. We should not speculate in determining why a trial counsel took certain actions. *See Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994). Under the second prong of the test, the defendant, after proving error, must affirmatively prove prejudice. *See Garcia v. State*, 887 S.W.2d at 880. The *Strickland* standard now applies both to the guilt-innocence phase and to the penalty phase of a non-capital trial. *See Hernandez v. State*, 988 S.W.2d 770 (Tex. Crim. App. 1999).

We begin by noting that no evidentiary hearing was held to develop a record substantiating Appellant's allegations. Further, many of the actions alleged could be considered sound trial strategy. *See Jackson*, 877 S.W.2d at 771 (holding that reviewing court must presume trial counsel's decision might be considered sound trial strategy). We will, nevertheless, address Appellant's specific complaints.

Appellant complains that counsel made no independent investigation of the witnesses. One witness was found and brought to court by Appellant's mother. Another

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[1] (...continued)
as his appellate brief.

witness complained of counsel's "attitude." Yet another complained that counsel gave him incorrect information about the trial date and time and thus made him late to court. Appellant further complained that counsel "on numerous occasions" told Appellant he saw no need to call all of Appellant's witnesses.

These allegations are not supported by the trial record. Counsel did, in fact, call several alibi witnesses. As for possible additional alibi witnesses, without knowing what testimony these unnamed additional witnesses would have offered, we cannot say the trial counsel erred. Also, the trial record does not support Appellant's complaints about counsel's "attitude" and misdirection. *See* TEX. R. APP. P. 38.1(h); *Lape*, 893 S.W.2d at 953-54.

Appellant alleges that during a pretrial motion hearing, counsel presented no evidence from the Texas Southern University registration office and the parole board that "supported [Appellant's] where abouts [sic] for speedy trial motion hearing." Appellant has made no offer of proof about what evidence the university or parole board officials would have given. We thus cannot say counsel erred by not offering any additional evidence. Indeed, the record before us does not show what evidence, if any, counsel offered in connection with Appellant's speedy-trial complaint.

Appellant next contends that counsel filed no written motion to dismiss the second indictment after moving orally to dismiss. This allegation is not supported by the record. The second indictment was filed October 8, 1986. On October 13, 1986, the defense counsel filed a written motion to dismiss the indictment. On October 20, 1986, the parties began voir dire. Thus, it appears counsel timely filed a motion to dismiss. Moreover, as mentioned above, the second indictment led to no reversible error.

Appellant next complains that counsel filed an untimely motion to shuffle the jury after first filing a motion not to exclude blacks from the panel. Appellant alleged that the jury had a single black and that "she was from another state and not one of [Appellant's]

local peers." The trial record fails to demonstrate what occurred with respect to any jury shuffle request. If trial counsel indeed failed to request a shuffle, however, Appellant offers nothing to overcome the presumption that counsel's conduct fell within the range of reasonable professional conduct. *See Strickland*, 466 U.S. at 689.

Appellant further contends that counsel filed no objection after Appellant told him of the above-mentioned holding-cell incident in which a bailiff allegedly allowed a prosecutor to view Appellant before a court appearance. Again, nothing in the record supports Appellant's allegations.

Appellant lastly complains that counsel filed no objection to the tainted in-court identification. We have discussed the in-court identification issue above. The identification issue was contested at trial and resolved by the jury. The record before us does not demonstrate that the trial counsel's actions fell below an objective standard of reasonableness. *See Strickland*, 466 U.S. at 687.

Overall, the conduct of Appellant's trial counsel did not fall below the *Strickland* standard. Even had counsel's behavior fallen below the standard, Appellant failed in each of the complained-of instances to prove prejudice affirmatively. We overrule Appellant's third ground of error.

III. Conclusion

Having overruled all of Appellant's grounds of error, we affirm the trial court's judgment.

/s/ Leslie Brock Yates
Justice

Judgment rendered and Opinion filed November 18, 1999.

Panel consists of Justices Yates, Fowler, and Frost.

Do Not Publish — TEX. R. APP. P. 47.3(b).