Affirmed and Opinion filed April 19, 2001.

In The

Fourteenth Court of Appeals

———————————

NO. 14-99-00944-CR

———————————

QUINN ANTHONY GREEN, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 176th District Court
Harris County, Texas
Trial Court Cause No. 800,952

O P I N I O N

The State charged Quinn Anthony Green ("appellant") with the felony offense of burglary of a building with intent to commit theft. In addition, through two enhancement paragraphs the State alleged that appellant previously committed two offenses of burglary of a habitation. Appellant pled not guilty to the offense, and pled true to the allegations in the two enhancement paragraphs. Over his plea of not guilty, a jury found appellant guilty of the charged offense. The trial court made findings of true as to the two enhancement paragraphs and assessed appellant's punishment at 20 years' confinement in the Institutional Division of

the Texas Department of Criminal Justice.

Appellant appeals his conviction on three points of error. We affirm the trial court's judgment because both legally and factually sufficient evidence support the conviction, and appellant's trial attorney did not render ineffective assistance of counsel.

F A C T U A L B A C K G R O U N D

Early on the morning of December 20, 1998, Houston Police Officers Rubio, Sanderson, and Rambo (the "Officers"), were dispatched to a Stop-N-Go convenience store in southeast Houston in response to a burglar alarm at that location. When they arrived on the scene, the Officers noted that the glass door of the store had been broken and a rock lay just outside the broken glass. A witness gave the Officers a description of the suspect. One of the Officers broadcast this description over the police radio. Shortly thereafter, the Officers entered the store, observed that some cigarettes had been placed on the counter, and obtained the video tape which had recorded the burglary. They watched this video tape recording, which revealed that a black male, wearing a red cap and a dark jacket, entered the store, stole some cigarettes, and put them into a white bag. At trial, the jurors watched this video tape.

Officer Rambo left the convenience store to search for the suspect. Thirty minutes after he left the store, and ten blocks away from the store, he observed appellant sitting at a bus stop, holding a white bag, and wearing a red cap and a dark jacket. The Officer also noticed that appellant had broken glass on his clothes and on his person. Officer Rambo drove up to appellant and asked him what he had in the bag. Appellant responded that the bag contained cigarettes. The Officer asked appellant where he had obtained these cigarettes, and appellant replied that a man had given them to him. When asked whether he knew who had given the cigarettes to him, he replied that he did not. The cigarettes in the bag had a tag on them from the Stop-N-Go store.

Officer Rambo then arrested appellant and took him and the bag of cigarettes back to the convenience store.

DISCUSSION AND HOLDINGS

I. SUFFICIENCY OF THE EVIDENCE

In his first two points of error, appellant argues that the evidence at trial was legally and factually insufficient to support his conviction. We do not agree.

When both legal and factual sufficiency points of error are raised, this Court must first examine the legal sufficiency of the evidence. *Clewis v. State*, 922 S.W.2d 126, 133 (Tex. Crim. App. 1996). When reviewing the legal sufficiency of the evidence, we must view the evidence in the light most favorable to the prosecution and determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 433 U.S. 307, 319 (1979); *Garrett v. State*, 851 S.W.2d 853, 857 (Tex. Crim. App. 1993). This same standard of review applies to cases involving both direct and circumstantial evidence. *King v. State*, 895 S.W.2d 701, 703 (Tex. Crim. App. 1995). On appeal, we do not reevaluate the weight and credibility of the evidence, but rather, we consider only whether the jury reached a rational decision. *Muniz v. State*, 851 S.W.2d 238, 246 (Tex. Crim. App. 1993).

When conducting a factual sufficiency review, we do not view the evidence in the light most favorable to the verdict, but 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." *Clewis*, 922 S.W.2d at 129. To do this, "[t]he court reviews the evidence weighed by the jury that tends to prove the existence of the elemental fact in dispute and compares it with the evidence that tends to disprove that fact." *Johnson v. State*, 23 S.W.3d 1, 7 (Tex. Crim. App. 2000). Since the State bears the burden of proving each element of a criminal offense at trial, an appellant may challenge the sufficiency of the evidence used to establish an element of the offense by claiming that evidence supporting the adverse finding is "so weak as to be factually insufficient." *Id*. at 11. We are mindful, however, that we must give appropriate deference to the fact finder so as not to supplant the fact finder's function as the exclusive judge of the

weight and credibility given to witness testimony. *Id*. at 7.

A. Legal Sufficiency

In his first point of error, appellant alleges that the evidence at trial was legally insufficient to support the jury's verdict in that the evidence failed to prove that appellant, rather than another person, committed the crime. Specifically, he argues that "this case was obviously a circumstantial evidence case . . . ." The video tape which the jury viewed did not show the facial features of the person who broke into the store. It merely showed the clothes worn by the suspect and the items that the suspect stole. Further, appellant argues, though the video tape reveals the perpetrator touching the counter and other things inside the store, as Officer Rubio admitted, no fingerprints were taken.

Unquestionably, the State must prove beyond a reasonable doubt that the accused is the person who committed the crime charged. *Johnson v. State*, 673 S.W.2d 190, 196 (Tex. Crim. App. 1984); *Rice v. State*, 801 S.W.2d 16, 17 (Tex. App.—Fort Worth 1990, pet. ref'd). Identity may be proven through direct or circumstantial evidence, and through inferences. *United States v. Quimby*, 636 F.2d 86, 90 (5th Cir. 1981); *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); *Couchman v. State*, 3 S.W.3d 155, 162 (Tex. App.—Fort Worth 1999, pet. filed); *Creech v. State*, 718 S.W.2d 89, 90 (Tex. App.—El Paso 1986, no pet.).

Where, as here, no direct evidence of the perpetrator's identity was elicited from trial witnesses, no formalized procedure is required for the State to prove the identity of the accused. *Sepulveda v. State*, 729 S.W.2d 954, 957 (Tex. App.—Corpus Christi 1987, pet. ref'd). Proof of the accused's identity through circumstantial evidence is not subject to a more rigorous standard than is proof by direct evidence, as both are equally probative. *McGee v. State*, 774 S.W.2d 229, 238 (Tex. Crim. App. 1989).

Here, while the perpetrator's face is not clearly shown on the film, both the perpetrator and appellant wore a dark jacket, wore a red cap, and carried a white bag full of cigarettes. In

short, appellant matched the description of the perpetrator. Moreover, when Officer Rambo found appellant, he was still within 10 blocks of the crime and had broken glass on his clothing and his person, and gave an implausible explanation for how he had obtained the cigarettes.

Viewing the evidence in the light most favorable to the jury's verdict, we conclude that a rational trier of fact could have found beyond a reasonable doubt all the essential elements of the offense charged. Appellant's first point of error is overruled.

B. Factual Sufficiency

In his second point of error, appellant claims that the evidence was factually insufficient to support the jury's verdict, in that the evidence does not prove that appellant, rather than some other person, committed the crime. Other than presenting this Court with case law supporting the standard of review for factual sufficiency, appellant's brief on his second point of error is a mere carbon copy of the arguments set out in support of the legal insufficiency claim.

Reviewing the evidence with appropriate deference to the jury's verdict, we find that the evidence is not so weak as to be factually insufficient. After comparing the evidence that proves appellant's identity to the evidence that disproves it, we hold that this evidence was factually sufficient to support the jury's verdict. Accordingly, point of error two is overruled.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

In appellant's third point of error, he contends that he received ineffective assistance of counsel at trial. Specifically, appellant argues that trial counsel failed to file and pursue a motion to suppress the oral statements of the defendant and a written motion to suppress the physical evidence.

For counsel to be ineffective at trial, the attorney's actions must meet the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), and adopted by Texas in *Hernandez v. State*. 726 S.W.2d 53, 57 (Tex. Crim. App. 1986). To meet this standard, appellant must

show that his counsel's representation fell below an objective standard of reasonableness, and but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id*. at 55.

Appellant carries the burden to prove by a preponderance of the evidence the ineffectiveness of his trial counsel. *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999). Counsel's conduct is strongly presumed to fall within the wide range of reasonable professional assistance, and appellant must overcome the presumption that the challenged action might be considered sound trial strategy. *Strickland*, 466 U.S. at 688-89; *Thompson*, 9 S.W.3d at 813. To overcome this presumption, a claim for ineffective assistance of counsel must be firmly founded and affirmatively demonstrated in the record. *Thompson*, 9 S.W.3d at 813-14. The record is best developed by a collateral attack, such as an application for a writ of habeas corpus or a motion for new trial. *Jackson v. State*, 973 S.W.2d 954, 957 (Tex. Crim. App. 1998); *Kemp v. State*, 892 S.W.2d 112, 115 (Tex. App.—Houston [1st Dist.] 1994, pet. ref'd). Where, as here, there is no hearing on ineffective assistance of counsel, an affidavit is the cornerstone to the success of an ineffective assistance claim. *Stults v. State*, 23 S.W.3d 198, 208 (Tex. App.—Houston [14th Dist.] 2000, no pet. h.); *Howard v. State*, 894 S.W.2d 104, 107 (Tex. App.—Beaumont 1995, pet. ref'd). As we explain below, appellant has not met his burden.

Appellant did not file a motion for new trial, so he failed to develop evidence of trial counsel's strategy. *Kemp*, 892 S.W.2d at 115. Further, he did not produce any affidavits or other evidence in support of his ineffective assistance claim. As a result, the record is silent as to counsel's reasons for his conduct. Finding appellant's trial counsel ineffective would call for speculation by this Court. *Stults*, 23 S.W.3d at 208. We will not speculate about the reasons underlying defense counsel's decisions. *Id*.

Appellant claims that the statements made to Officer Rambo when the Officer found appellant with the bag of cigarettes were inadmissible because his *Miranda* rights were

implicated, but not read to him. In connection with this, appellant argues that the physical evidence introduced at trial was inadmissible as a fruit of an illegal arrest.

Had appellant's trial counsel moved to suppress them, neither the oral testimony nor the physical evidence should have been suppressed by the trial court. As for the oral testimony, in *Berkemer v. McCarty*, the United States Supreme Court rejected an argument analogous to appellant's. 468 U.S. 423, 435-42 (1984). In *Berkemer*, the Supreme Court recognized that a roadside stop is not custody under *Miranda*. Texas recognizes that a roadside encounter can become custodial based on the circumstances of the encounter. *State v. Stevenson*, 958 S.W.2d 824, 829 (Tex. Crim. App. 1997). However, here, as in *Berkemer*, and *Stevenson*, appellant was not in custody for *Miranda* purposes until the formal arrest. *Berkemer*, 486 U.S. at 435-42 (holding that where suspect was not questioned about whether he had been using intoxicants until after he failed a sobriety test, he was not in custody for *Miranda* purposes); *Stevenson*, 958 S.W.2d at 829 (holding that "the mere fact that a suspect becomes the focus of a criminal investigation does not convert a roadside stop into an arrest"). Accordingly, the statements appellant made to Officer Rambo before the arrest should not have been suppressed.

With respect to the physical evidence, because *Miranda* was not implicated, the arrest, based on appellant's appearance and statements, was not illegal. The physical evidence, therefore, was not a fruit of an illegal arrest. *See Wong Sun v. United States*, 371 U.SW.471 (1963); *Mapp v. Ohio*, 367 U.S. 643 (1961); *Smith v. State*, 524 S.W.2d 420, 421 (Tex. Crim. App. 1976).

Appellant did not meet his burden to overcome the strong presumption that trial counsel's conduct fell within the broad range of professional assistance. As a result, we overrule appellants third point of error.

The judgment of the trial court is affirmed.

/s/ Wanda McKee Fowler
Justice

Judgment rendered and Opinion filed April 19, 2000.

Panel consists of Justices Fowler, Anderson, and Edelman.

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