Opinion issued June 18, 2020

In The

Court of Appeals

For The

First District of Texas

NO. 01-18-00904-CR

MICHAEL DWAYNE FLEEKS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 179th District Court
Harris County, Texas
Trial Court Case No. 1514145

MEMORANDUM OPINION

A jury found appellant, Michael Dwayne Fleeks, guilty of aggravated robbery with a deadly weapon, enhanced with two prior felony convictions, and it assessed his punishment at fifty years' confinement. In five points of error, appellant

contends that (1) his written statement obtained by his co-defendant's private investigator violated (a) his Sixth Amendment right to counsel and (b) Texas Disciplinary Rules of Professional Conduct 3.08 and 4.02; (2) the prejudicial effect in admitting appellant's statement substantially outweighed its probative value; (3) the trial court erred in allowing a witness's out-of-court and in-court identification of appellant; (4) the trial court erred when it admitted letters purportedly written by appellant into evidence without sufficient authentication; and (5) the trial court erred when it improperly commented on the evidence. We affirm.

Background

On June 17, 2016, Irma Giron was working as a cook at a Wendy's restaurant when she left the kitchen area to take her break shortly after 8:00 p.m. As she opened the door between the kitchen and dining room, a black male approached her and pressed a gun against her stomach. When the assailant realized that Giron did not understand English, he pushed her against the grill and approached Lupe, the drive-thru cashier. Pointing his gun at Lupe, the assailant told him to open the cash register. Lupe complied and the man took money from the register.

The assailant then approached Yesenia Guevara, the shift manager, who was working the cash register in the dining room, pointed his gun at her face, and demanded money from the cash register. The robber pocketed the money and left the restaurant.

Meanwhile, Houston Police Department (HPD) motorcycle officers, Luis Vela and Floyd Hubbard, were getting gas at a nearby gas station when they were flagged down and told about a possible emergency at Wendy's. They arrived at the restaurant within minutes and a young woman ran out of the Wendy's toward the officers. After speaking with her, the officers went back to the south side of the gas station and observed an African-American male go around a building south of the gas station. The officers then spoke with an elderly man parked in the gas station parking lot. As they followed the direction the man had indicated, the officers noticed the brake lights of a dark-colored SUV, which was the only vehicle in the area and was driving away. The officers followed the SUV and initiated a felony stop. Roysetta Freeman was the driver and appellant was the front seat passenger. The officers discovered a pistol under the front passenger seat and a bag of money in the center console.

The officers transported appellant and Freeman to the Wendy's where Giron identified appellant as the man who robbed her. Appellant was arrested and charged with aggravated robbery with a deadly weapon. The indictment included two enhancement paragraphs: a 1987 conviction for burglary of a habitation and a 1999 conviction for robbery.

Outside the presence of the jury, the trial court held a hearing on appellant's pretrial motion to suppress the written statement he had given to Travis Lane

Johnson, a private investigator employed by co-defendant Freeman's trial counsel. Johnson testified that Freeman told him that appellant wanted to make a statement. Johnson visited appellant at the Harris County Jail and told him who he worked for and that appellant did not have to speak with him. Appellant indicated he wanted to give a statement about Freeman's involvement. Appellant wrote a statement and signed it. Johnson notarized it and gave it to Freeman's attorney. In his statement, appellant wrote, "To whom it may concern, I Michael D. Fleeks was the only one [involved] in the robbery on 6-18-2016. And Ms. R. Freeman had nothing to do with it and had no [knowledge] of the crim[e]." Appellant testified that he gave the statement to Johnson voluntarily and that Johnson told him he was an attorney. The trial court subsequently denied appellant's motion to suppress the written statement.

Freeman testified that appellant was supposed to drive her to the hospital that evening because she was in pain. During the drive, Freeman fell asleep in appellant's SUV and, when she awoke, they were parked in front of a gas station. Appellant told Freeman that he was not feeling well and asked her to drive. Appellant then went into the gas station store to get something to drink and Freeman fell back to sleep. When appellant returned, Freeman drove until police pulled them over. Freeman testified that when the police removed appellant from the vehicle, appellant said "she don't have nothing to do with it." Appellant later apologized to Freeman for "getting [her] mixed up."

While appellant was in custody, he wrote letters to Freeman. In one letter, appellant wrote "if you do not want to go to jail you must take the gun case" and reminded Freeman that "you must be on the same page as I in order to stay free." In another letter, appellant wrote "the police lied and said that they found the gun on my side of the SUV behind the seat, this is why I need you to claim the gun and say it was on your side[.]" He told Freeman "it's so important for you to take the gun case" because "if they can't put the gun on me and they can't ID me we can beat this[.]" He further told her "if you take the gun case you will only do jail time and you already did that. It's only a misdemeanor case for you since you don't have a record[.]" The letters were addressed to "RoRo," which Freeman testified was her nickname, and they were signed "Fleet Wood," which Freeman testified is appellant's nickname. The letters were admitted at trial as State's Exhibits 15 and 28.

The jury found appellant guilty of aggravated robbery with a deadly weapon, enhanced with two prior convictions, and it assessed his punishment at fifty-years' confinement. This appeal followed.

Motion to Suppress

In his first point of error, appellant contends that the trial court erred when it denied his motion to suppress his written statement because it was taken in violation of his Sixth Amendment right to counsel and Texas Disciplinary Rules of

Professional Conduct 3.09 and 4.02. The State argues that appellant failed to preserve his complaints for our review.

A. Preservation of Error

A motion to suppress is a specialized objection to the admissibility of evidence. *Galitz v. State*, 617 S.W.2d 949, 952 n.10 (Tex. Crim. App. 1981); *Moreno v. State*, 409 S.W.3d 723, 727 (Tex. App.—Houston [1st Dist.] 2013, pet. ref'd). To preserve a complaint for appellate review, a party must have presented to the trial court a timely request, objection, or motion stating the specific grounds for the ruling desired. TEX. R. APP. P. 33.1(a)(1)(A). The Court of Criminal Appeals has "consistently held that the failure to object in a timely and specific manner during trial forfeits complaints about the admissibility of evidence[,] . . . even though the error may concern a constitutional right of the defendant." *Saldano v. State*, 70 S.W.3d 873, 889 (Tex. Crim. App. 2002) (footnotes omitted). Whether a party's particular complaint is preserved depends on whether the complaint on appeal comports with the complaint made at trial. *Pena v. State*, 285 S.W.3d 459, 464 (Tex. Crim. App. 2009); *Simmons v. State*, 288 S.W.3d 72, 78 (Tex. App.—Houston [1st Dist.] 2009, pet. ref'd). In making this determination, we consider the context in which the complaint was made and the parties' shared understanding at that time. *Pena*, 285 S.W.3d at 464.

The record shows that, following the witnesses' testimony at the suppression hearing, defense counsel argued that appellant's rights were violated because he was not given the opportunity to speak to his attorney before he gave his written statement to Johnson. The State responded, in part, that "the question as to whether or not [the letter is] admissible hinges on whether or not Mr. Johnson was working at the behest of law enforcement and it's clear that he was not." In its ruling on appellant's motion, the trial court stated: "[A]s to Defendant's Motion to Suppress evidence the Court finds that under the Fourth, Fifth and Sixth and Fourteenth Amendments to the Constitution of the United States and pursuant to the Texas Constitution and the Code of Criminal Procedure that there has been no violation of the Defendant's rights. The motion to suppress is denied." We conclude that appellant preserved his complaint of a Sixth Amendment right-to-counsel violation for our review. *See id*.

B. Sixth Amendment Right to Counsel

In evaluating a Sixth Amendment right-to-counsel question, we use a bifurcated standard of review. *See Manns v. State*, 122 S.W.3d 171, 178 (Tex. Crim. App. 2003). "An appellate court should afford 'almost total deference' to a trial court's determination of the historical facts and to its determination of mixed questions of law and fact that turn on an evaluation of credibility and demeanor." *Id*. (citing *Guzman v. State*, 955 S.W.3d 85, 89 (Tex. Crim. App. 1997)).

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." *Holloway v. State*, 780 S.W.2d 787, 791–92 (Tex. Crim. App. 1989). When an accused's Sixth Amendment right to counsel attaches to an offense for which adversarial proceedings have begun, he is entitled to the assistance of counsel at each "critical stage" of the prosecution, absent a valid waiver. *Upton v. State*, 853 S.W.2d 548, 553 (Tex. Crim. App. 1993). Governmental attempts to secure incriminating statements from an accused are among the pretrial phases to which the Supreme Court has extended Sixth Amendment protection. *Holloway*, 780 S.W.2d at 793.

The two threshold elements of the right to counsel in a confession context are (1) deliberate governmental elicitation, (2) after the initiation of formal judicial proceedings. *See Holloway*, 780 S.W.2d at 793 (citing *United States v. Henry*, 447 U.S. 264, 290 (1980) and *Kirby v. Illinois*, 406 U.S. 682, 689 (1972) (plurality opinion)). The inquiry is "whether, after the Sixth Amendment right to counsel has attached, the government has knowingly circumvented the defendant's right to counsel by using an undisclosed government agent to deliberately elicit incriminating information." *Rubalcado v. State*, 424 S.W.3d 560, 570 (Tex. Crim. App. 2014) (*citing Massiah v. United States*, 377 U.S. 201 (1964)). The rule in *Massiah* applies only "if the person who elicited statements from the defendant was a government agent." *Id*. at 575; *see Manns*, 122 S.W.3d at 178–79. Although the

Court of Criminal Appeals has declined to create a bright-line rule identifying what constitutes a government agent, *see Rubalcado*, 424 S.W.3d at 576, it has held that one who "act[s] entirely on his own volition, without any promises, encouragement, or instructions from the government" is not a government agent. *Id.* at 575 (citing *Manns*, 122 S.W.3d at 188–89).

Here, the record shows that Johnson was a private investigator employed by Freeman's trial counsel and was not acting as an agent of the state when he obtained appellant's written statement. At the suppression hearing, Johnson testified that he visited appellant in jail after he learned from Freeman that appellant wanted to make a statement, and that no one from law enforcement or the district attorney's office asked him to get the statement. Johnson told appellant who he worked for and that appellant did not have to speak with him. Appellant testified that Johnson told him he was an attorney and that he would give him ten years if he wrote the statement. Johnson also testified that he gave the statement to Johnson voluntarily and Johnson did not say that he was working for the State or law enforcement. *See Hailey v. State*, 413 S.W.3d 457 (Tex. App.—Fort Worth 2012, pet. ref'd) (concluding evidence was insufficient to support finding that defendant's girlfriend was acting as government agent when she obtained confession from defendant where girlfriend denied acting as government agent and nothing in recording of her interview with police officer indicated implied request by police for her to act as government agent).

Based on the facts before us, we conclude that Johnson was not acting as a government agent and his actions did not violate appellant's Sixth Amendment right to counsel.

Appellant also argues that his right to counsel was violated when Freeman's trial counsel, through Johnson, communicated with appellant in violation of Texas Disciplinary Rule of Professional Conduct 4.02(a).[1] He further argues that the State, while not responsible for obtaining the written statement, was prohibited under Rule 3.09 from exploiting the violation of his right to counsel.[2] Appellant did not present

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[1] Rule 4.02(a) provides:

> In representing a client, a lawyer shall not communicate or cause or encourage another to communicate about the subject of the representation with a person, organization or entity of government the lawyer knows to be represented by another lawyer regarding that subject, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

TEX. DISCIPLINARY R. PROF'L CONDUCT 4.02, *reprinted in* TEX. GOV'T CODE, tit. 2, subtit. G app. A, art. 10, § 9.

[2] Rule 3.09 provides:

> The prosecutor in a criminal case shall:
>
> (a) refrain from prosecuting or threatening to prosecute a charge that the prosecutor knows is not supported by probable cause;
>
> (b) refrain from conducting or assisting in a custodial interrogation of an accused unless the prosecutor has made reasonable efforts to be assured that the accused has been advised of any right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

this complaint to the trial court and has not preserved it for our review. *See Pena*, 285 S.W.3d at 464. Moreover, even if he had, "violation of one of the[] disciplinary rules in obtaining evidence for a criminal proceeding will not bar the introduction of that evidence at trial." *Pannell v. State*¸ 66 S.W.2d 96, 98 (Tex. Crim. App. 1984) (noting that disciplinary rules do not have same force and effect as laws because they are not legislatively enacted); *see also Armstrong v. State*, 897 S.W.2d 361, 366 n.5 (Tex. Crim. App. 1995) (en banc) (noting that "violations of disciplinary rules are to be dealt with by means of the administrative mechanisms set forth within those rules").

The trial court did not err in denying appellant's motion to suppress his written statement. Accordingly, we overrule appellant's first point of error.

> (c) not initiate or encourage efforts to obtain from an unrepresented accused a waiver of important pre-trial, trial or post-trial rights;
>
> (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal; and
>
> (e) exercise reasonable care to prevent persons employed or controlled by the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.07.

TEX. DISCIPLINARY R. PROF'L CONDUCT 3.09.

Admission of Incriminating Statement

In his second point of error, appellant contends that the trial court erred in admitting his incriminating statement because the prejudicial effect of the evidence substantially outweighed its probative value.

A. Applicable Law

As a general rule, all relevant evidence is admissible. *See* TEX. R. EVID. 402. Evidence is generally admissible if has "any tendency" to make a fact of consequence to the case "more or less probable than it would be without the evidence." TEX. R. EVID. 401.

Under Rule 403, even if evidence is relevant, it may be excluded if the danger of unfair prejudice substantially outweighs its probative value. TEX. R. EVID. 403; *Montgomery v. State*, 810 S.W.2d 372, 389 (Tex. Crim. App. 1990). By its express terms, evidence is not excludable under Rule 403 for merely being prejudicial—the rule applies to evidence that is *unfairly* prejudicial. Evidence is unfairly prejudicial when it has an undue tendency to suggest a decision on an improper basis, commonly, but not always, an emotional one. *Gigliobianco v. State*, 210 S.W.3d 637, 641 (Tex. Crim. App. 2006); *Montgomery*, 810 S.W.2d at 389. In making this determination, a trial court must balance (1) the inherent probative value of the evidence and (2) the State's need for that evidence against (3) any tendency of the evidence to suggest a decision on an improper basis, (4) any tendency to confuse or

distract the jury from the main issues, (5) any tendency to be given undue weight by a jury that has not been equipped to evaluate the probative force of the evidence, and (6) the likelihood that presentation of the evidence will consume an inordinate amount of time or be needlessly cumulative. *See Gigliobianco*, 210 S.W.3d at 641–42. Under Rule 403, there is a presumption that the probative value of relevant evidence exceeds any danger of unfair prejudice. *Hammer v. State*, 296 S.W.3d 555, 568 (Tex. Crim. App. 2009).

B. Analysis

Appellant's written statement was highly probative because he essentially confessed to having committed the charged offense. *See Martin v. State*, 570 S.W.3d 426, 437 (Tex. App.—Eastland 2019, pet. ref'd) (determining that photograph of defendant's tattoo, which depicted circumstances surrounding shooting and could be viewed as confession, was highly probative). While the statement was prejudicial, it was not unfairly prejudicial because there is nothing to suggest that the statement had a tendency to confuse or distract the jurors as appellant's statement went directly to the main issue, i.e., appellant's guilt, nor did it have a tendency to be given undue weight by a jury unequipped to evaluate its probative force. Finally, the admission of the statement and related testimony did not take much time to develop and did not suggest that the jury's decision should be made on an improper basis. The testimony

related to appellant's statement comprised approximately 28 pages of the 228 pages of trial testimony.

The trial court did not abuse its discretion in determining that the probative value of the evidence was not substantially outweighed by a danger of unfair prejudice. We overrule appellant's second point of error.

Admissibility of In-Court and Out-of-Court Identifications

In his third point of error, appellant contends that the trial court erred in allowing Giron's out-of-court and in-court identification of him because the show-up identification of him was impermissibly suggestive and gave rise to a substantial likelihood of irreparable misidentification.

A. Standard of Review and Applicable Law

"[A] pre-trial identification procedure may be so suggestive and conducive to mistaken identification that subsequent use of that identification at trial would deny the accused due process of law." *Barley v. State*, 906 S.W.2d 27, 32–33 (Tex. Crim. App. 1995) (citing *Stovall v. Denno*, 388 U.S. 293 (1967)); *Nunez-Marquez v. State*, 501 S.W.3d 226, 235 (Tex. App.—Houston [1st Dist.] 2016, pet. ref'd). Although "on-the-scene" confrontations, also referred to as "show-up" identifications, have some degree of suggestiveness, their use is proper "in cases where time is of the essence in catching a suspect and an early identification is aided by the fresh memory of the victim." *Mendoza v. State*, 443 S.W.3d 360, 363 (Tex. App.—Houston [14th

Dist.] 2014, no pet.); *see also Santiago v. State*, 425 S.W.3d 437, 442 (Tex. App.—Houston [1st Dist.] 2011, pet. ref'd) ("The initial show-up procedure at the crime scene was not shown to be impermissibly suggestive, as such confrontations have been acknowledged as being necessary in many cases.").

We utilize a two-step analysis to determine the admissibility of an in-court identification when a defendant contends that suggestive pretrial identification procedures tainted the in-court identification. *Loserth v. State*, 963 S.W.2d 770, 772 (Tex. Crim. App. 1998); *Santos v. State*, 116 S.W.3d 447, 451 (Tex. App.—Houston [14th Dist.] 2003, pet. ref'd). First, we determine if the pretrial identification procedure was impermissibly suggestive. *Loserth*, 963 S.W.2d at 772; *Santiago*, 425 S.W.3d at 440. Second, if we conclude that the procedure was impermissibly suggestive, we then determine if the impermissibly suggestive procedure gave rise to a very substantial likelihood of irreparable misidentification. *See Santiago*, 425 S.W.3d at 440. If the totality of the circumstances indicates a substantial likelihood of irreparable misidentification exists, admission of the identification of the defendant amounts to a denial of due process. *See Neil v. Biggers*, 409 U.S. 188, 198 (1972). On the other hand, if the pretrial procedure is found to be impermissibly suggestive, identification testimony would nevertheless be admissible where the totality of the circumstances shows no substantial likelihood of misidentification. *Ibarra v. State*, 11 S.W.3d 189, 195 (Tex. Crim. App. 1999). "It is the appellant's

burden to prove the in-court identification is unreliable by proving both of these elements by clear and convincing evidence." *Santos*, 116 S.W.3d at 451.

B. Analysis

Appellant argues that the show-up identification was impermissibly suggestive because he was the only male passenger in the patrol car and his face was illuminated by the car's interior light, Giron was not provided with any witness admonishments,[3] and Giron testified that the officers told her that they had "caught the man" before asking her to identify him.

However, we need not address whether appellant has demonstrated that the show-up identification was impermissibly suggestive because we conclude that he has not established that the show-up identification procedure "gave rise to a very substantial likelihood of irreparable misidentification." *See Santos*, 116 S.W.3d at 451 (recognizing appellant's burden to demonstrate both that out-of-court identification procedure was unduly suggestive and likely caused a misidentification). "The non-exclusive factors that we consider include: (1) the witness's opportunity to view the defendant at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the

[3] On cross-examination, Giron testified that the officers did not tell her that (1) the person in the patrol car may or may not be the person who robbed the restaurant, (2) she was not required to identify anyone if she was not sure, and (3) the investigation would continue even if she could not make an identification.

criminal; (4) the witness's level of certainty at the time of confrontation; and (5) the length of time between the offense and the confrontation." *Nunez–Marquez*, 501 S.W.3d at 235. Application of these factors does not demonstrate a likelihood of misidentification of the appellant.

The record reflects that appellant was close enough to Giron that he was able to press his gun against her stomach. Giron testified that she was able to get a good look at the assailant's face during the offense which lasted approximately ten minutes and took place inside a lighted restaurant. Giron observed the assailant to be a black male wearing dark glasses, black jeans, and a gray or white t-shirt. After the assailant left the restaurant, Giron watched him walk away toward the gas station where police later observed appellant's vehicle driving away. Giron testified that when the police returned to the restaurant, she saw "[t]he one who had held us up the one who had come in with a pistol." Giron testified that approximately twenty minutes elapsed between the robbery and her identification of appellant as the robber. At trial, Giron identified appellant as the person she saw in the kitchen who committed the robbery.

The totality of the circumstances demonstrates that the show-up identification procedure did not give rise to a "substantial likelihood of irreparable misidentification." *Gamboa v. State*, 296 S.W.3d 574, 581–82 (Tex. Crim. App. 2009). The trial court therefore did not err in denying appellant's motion to suppress

the show-up identification and the subsequent in-court identification. Accordingly, we overrule appellant's third point of error.

Authentication of Evidence

In his fourth point of error, appellant contends that the trial court erroneously admitted letters that he purportedly wrote to Freeman because the letters were not properly authenticated under Texas Rule of Evidence 901(a).

A. Standard of Review and Applicable Law

A trial court's ruling on an authentication issue is reviewed for abuse of discretion. *Druery v. State*, 225 S.W.3d 491, 502 (Tex. Crim. App. 2007). The trial court does not abuse its discretion in admitting evidence when it reasonably believes that a reasonable juror could find that the evidence has been authenticated or identified. *Id.* We affirm the trial court's decision as long as its ruling is within the zone of reasonable disagreement. *Id.*

The authentication requirement is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims. TEX. R. EVID. 901(a). The authentication requirement can be satisfied by, among other things, "a nonexpert's opinion that the handwriting is genuine, based on a familiarity with it that was not acquired for the current litigation" and "[t]he appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances." *Id.* 901(b)(1)–(2), (4).

B. Analysis

The State offered, and the trial court admitted, two letters addressed to "RoRo" and signed by "Fleet Wood." (State's Exhibits 15 and 28). The first letter stated "if you do not want to go to jail you must take the gun case" and "you must be on the same page as I in order to stay free." The second letter stated that "the police lied and said that they found the gun on my side of the SUV behind the seat, this is why I need you to claim the gun and say it was on your side[.]" It further stated that "it's so important for you to take the gun case" because "if they can't put the gun on me and they can't ID me we can beat this" and "if you take the gun case you will only do jail time and you already did that. It's only a misdemeanor case for you since you don't have a record[.]"

Appellant argues that the letters in question were not sufficiently authenticated because they were signed "Fleet Wood" and not "Michael Fleeks," there was no corroborating evidence such as mailing envelopes, and there was no forensic evidence linking appellant to the letters.

The record shows that appellant and Freeman had known each other for twenty-four years at the time of trial. Freeman testified that she recognized Exhibits 15 and 28 as appellant's letters "because it's [appellant's] handwriting," they were addressed to "RoRo" which is her nickname, and they were signed "Fleet Wood" which is appellant's nickname. *See* TEX. R. EVID. 901(b)(2), (4); *Druery*, 225

S.W.3d at 502 (finding jailhouse letter authenticated by evidence showing, among other things, writer identified himself by defendant's nickname, letter was sent to defendant's cousin, a witness in the case, and letter discussed facts known to defendant about his case). Further, the letters focused on legal matters related to the status of appellant's and Freeman's legal predicaments. *See Hunter v. State*, 513 S.W.3d 638, 641 (Tex. App.—Houston [14th Dist.] 2016, no pet.) (concluding defendant's handwritten letters were properly authenticated where complainant testified she was familiar with defendant's handwriting, letters contained unique identifiers such as nicknames, and letters focused on legal matters consistent with status of defendant's legal predicament); *see also Druery*, 225 S.W.3d at 502–03 (holding letter purported to be from inmate contained information that inmate likely would have possessed and was sufficient to authenticate letter absent tampering or other fraud).

The trial court did not abuse its discretion by impliedly concluding that the State had supplied facts sufficient to support a reasonable jury's determination that the evidence was authentic. *See Barfield v. State*, 416 S.W.3d 743, 749–50 (Tex. App.—Houston [14th Dist.] 2013, no pet.). We therefore overrule appellant's fourth point of error.

Comment on Weight of Evidence

In his fifth point of error, appellant contends that the trial court violated Code of Criminal Procedure article 38.05 by improperly commenting on the evidence.

A. Applicable Law

Article 38.05 provides:

> In ruling upon the admissibility of evidence, the judge shall not discuss or comment upon the weight of the same or its bearing in the case, but shall simply decide whether or not it is admissible; nor shall he, at any stage of the proceeding previous to the return of the verdict, make any remark calculated to convey to the jury his opinion of the case.

TEX. CODE CRIM. PROC. art. 38.05. The trial court improperly comments on the weight of the evidence if it makes a statement that implies approval of the State's argument, indicates disbelief in the defense's position, or diminishes the credibility of the defense's approach to the case. *Simon v. State*, 203 S.W.3d 581, 590 (Tex. App.—Houston [14th Dist.] 2006, no pet.).

B. Analysis

During the punishment phase, the State presented testimony from William Cowles, a retired investigator with HPD's Robbery Division, regarding several previous robberies of fast food restaurants. When the State attempted to elicit Cowles's testimony as to whether appellant had been identified as the perpetrator in some of the robberies, defense counsel objected several times on hearsay grounds. The trial court sustained the objections.

In closing argument, the prosecutor discussed appellant's criminal history and the escalation of appellant's crimes, telling the jury that there were "[t]hree robberies where they didn't see a gun." When defense counsel objected that the testimony regarding those robberies had not been admitted, the trial judge told the jury:

> Ladies and Gentlemen you have heard the evidence and you will be guided thereby. And if there's been any statement that has been made by the prosecutor in this case that does not reflect the evidence it is merely an inadvertent statement and you're not to consider it but you're to consider all the evidence that's been admitted before you.

Appellant argues that the trial court's characterization of the prosecutor's remark as an "inadvertent statement" was an improper comment on the weight of the evidence because it endorsed the State's presentation. To the contrary, the trial judge's comment at most reminded the jury they should consider only the evidence that was before it and disregard any statements unsupported by the evidence. The trial judge's statement was a correct statement of the law and did not reflect the trial court's opinion of the case, nor meet any of the standards for improper comments by a trial judge on the evidence. *Cf. Morgan v. State*, 365 S.W.3d 706, 711 (Tex. App.—Texarkana 2012, no pet.) ("The comment was neutral, was a substantially correct statement of the law, and explained that while competency to testify was an issue for the court, it also emphasized to the jury that credibility decisions were the province of the jury."). We overrule appellant's fifth point of error.

Conclusion

We affirm the trial court's judgment.

Russell Lloyd
Justice

Panel consists of Justices Lloyd, Kelly, and Countiss.

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