Opinion issued June 18, 2020

In The

Court of Appeals

For The

First District of Texas

NO. 01-19-00619-CR

RICKIE SMITH, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 338th District Court
Harris County, Texas
Trial Court Case No. 1547795

MEMORANDUM OPINION

A jury convicted appellant, Rickie Smith, of the offense of aggravated robbery[1] and assessed his punishment at confinement for 40 years and a $5,000.00

[1] *See* TEX. PENAL CODE § 29.03.

fine. The trial court entered an affirmative finding that appellant used or exhibited a deadly weapon, namely, a firearm, in the commission of the offense. In two issues, appellant asserts that his trial counsel was ineffective during the guilt-innocence phase because he failed to call witnesses and that he was ineffective during the punishment phase because he failed to seek a mistrial.

We affirm.

Background

The complainant, Dominique Tate Bazile, testified that, at midnight on April 11, 2017, she left work and drove home to her apartment on West Bellfort Boulevard in southwest Houston. When she arrived, she retrieved her backpack from the front passenger seat and, holding her keys and cellular phone, opened her door and got out of her car. A man, whom she identified as appellant, came around the front of her car and, "as [her] car door was closing, a gun was in [her] face." Appellant told her to get back into her car. As she backed away from him, another man approached behind her with a firearm. The men forced the complainant back into her car and got in with her.

Appellant, who was in the front passenger seat, took the complainant's backpack and cell phone, "jammed" the firearm into her ribs, and told her to drive to an ATM. The complainant testified that she feared for her life and that she told the men that she did not have any money. Appellant responded, "Shut up and drive."

The complainant noted that she got a good look at appellant's face because he leaned forward as he spoke to her. While still in the parking lot of her apartment complex, the man in the back seat convinced appellant to release the complainant. Appellant pushed her out of the car and jumped into the driver's seat. The complainant ran to the door of her apartment and banged on it. Her husband came out and, together, they saw her car, a silver Kia Sorento, being driven away. She noted that a black car was following it. At the entrance gate to the complex, however, the cars were forced to turn around. They then left by another route, with the black car in the lead.

Houston Police Department ("HPD") Officer R. Michael testified that, shortly after midnight on April 11, 2017, he was dispatched to investigate the robbery. The complainant reported that two, possibly three, men stole her car, cell phone, and backpack and that a black firearm was used. She and her husband reported seeing a black car, which the husband thought might be a Nissan, leaving with her car.

HPD Officer A. Mayo testified that, the day after the robbery, he located the complainant's car at an apartment complex on Braeswood Boulevard. Based on video footage obtained from a private camera trained on the parking lot, Mayo saw the complainant's Kia being driven into the lot and parked, along with a black Acura. He noted that the Acura had a damaged front bumper and was missing a front license plate. Mayo saw "several" people get out of the Kia and get into the Acura. He also

saw appellant get out of the Acura, attempt to fix the sagging front bumper, get back into the Acura, and drive away.

On April 13, 2017, Officer Mayo saw the Acura and conducted a traffic stop. He noted that the paper license plate on the rear of the car was fictitious. Appellant was driving and his passenger was Trevor Gilstrap. During a search of the Acura, Mayo found a loaded pistol magazine, a mask, and the Acura's license plates, which returned with an owner who was not appellant. In the center console, Mayo found the complainant's keys and her disabled-parking placard.

HPD Sergeant J. Uribe testified that the complainant positively identified appellant in a photographic lineup as the person who robbed her with a firearm. Uribe noted that, contemporaneous with the complainant's identification, he wrote on the lineup sheet that the complainant stated: "This is the guy that got into my car and pointed the gun at me and then told me to exit the car, and they drove away."

After the jury found appellant guilty of the offense of aggravated robbery, the State, during punishment, presented evidence of extraneous aggravated robberies involving appellant.

Walter Blaylock testified that, at approximately 7:00 a.m. on February 20, 2017, he was robbed at gunpoint in the parking lot of an apartment complex on Holly Hall Street in Houston. As soon as he arrived and parked his red Toyota Tundra truck, he saw a white Range Rover pull in and park two spaces away. When

Blaylock got out and began walking to the apartment office, he heard someone say, "Get back in the truck." When Blaylock did not react, the person repeated it. Blaylock turned around and saw a man, identified as appellant's co-defendant Tyler Jenkins, about two feet away, with a firearm pointed "straight at [his] head." Blaylock, who feared that he would be shot, got back into his truck. Jenkins stole his wallet and cellular phone and forced him to drive to a bank, while the Range Rover followed. At the bank, Jenkins forced Blaylock to withdraw money from an ATM. He then forced Blaylock back into his truck and made him drive around, while the Range Rover followed. Eventually, Blaylock talked Jenkins into releasing him, and Jenkins made him get out. Jenkins then drove away in Blaylock's red truck, with the Range Rover following. Blaylock was unable to identify the man driving the Range Rover.

Luis Rodriquez testified that, at around midnight on February 20, 2017, when he returned to his house in the Sharpstown area and was waiting on the garage door to open, three men wearing hoodies and bandannas approached him with guns drawn. One or more of them told him to get out of his car, a silver BMW convertible. When Rodriguez told them to "'F' off" because he thought it was a joke, one of the men hit Rodriguez on the head with his weapon. Rodriguez then got out, told the men to take the car, and added that his wallet was in it. He noted that he was a single father and asked them to let him go. Two of the men forced Rodriguez back into the

driver's seat and told him to drive them to an ATM. The third man went to a red truck, waiting nearby with its engine running, and followed them to the bank. At the bank, they went to a walk-up ATM machine. And, one of the men got out of the car with Rodriguez and held a firearm in his "gut," while Rodriguez withdrew cash. The man forced Rodriguez back into his car, forced him to drive to a remote area, and told him to get out and walk. The men then left in his car, along with the man in the red truck. Rodriguez noted that, during the robbery, he had to drive around the red truck, and he memorized the license plate number. Rodriguez was unable to identify the masked men.

HPD Officer D. Gil testified that on February 21, 2017, while on patrol, he was dispatched to investigate a suspicious person with a weapon in the parking lot of North Forest Trails Apartments on North Wayside Drive in Houston. When he arrived, he saw Tyler Jenkins sitting in a red Toyota Tundra truck in front of Building 2, where Gil noted that Trevor Gilstrap lived. Gil ran the license plate and learned that the red truck had been reported stolen and belonged to Blaylock. During a search of the red truck, Gil found a Glock 19 pistol in the center console and a backpack containing a pistol, jewelry, cell phones, and wallets. The wallets contained identification from Blaylock, Rodriguez, and another aggravated-robbery complainant, Sherry Keller. Gil also found the keys to Keller's stolen white Range Rover, which was also parked at Gilstrap's apartment.

Julio Ayala testified that, at approximately 10:00 p.m. on February 26, 2017, when he returned home from a soccer game and pulled into his garage, two men came into his garage, pointed firearms at him, and ordered him back into his car, a red Lexus. The men forced Ayala at gunpoint to drive them to an ATM, where they demanded that he withdraw money from his account. When he was unable to withdraw the sum they demanded, they ordered him to drive them back to his house, where they followed him inside and forced him to gather his laptop computer, game consoles and games, and a television. After Ayala loaded everything in the trunk of his car, the men ordered him into the back seat. They drove him to an area unfamiliar to him, made him get of the car, and then drove away. Ayala was able to positively identify one of the men, a Lorenzo Bogany. He was unable to identify the other man, who wore a mask.

Hours after Ayala's car was stolen, Harris County Constable's Office, Precinct 3, Deputy G. Suarez saw a red Lexus run a stop sign. The driver of the car was appellant, and his passenger was Bogany. Suarez noted that appellant initially gave him a fictitious name. In the car, officers found two sets of gloves, two black ski masks, and a firearm.

HPD Detective Sergeant R. Gray testified that, through his investigations, he determined that a "crew" of five men—Jenkins, appellant, Gilstrap, Bogany, and CJ Spears—were living at Gilstrap's North Forest Trails apartment and using it as a

"trap house," i.e., "home base." Clay Davis, a Houston Forensic Science Center DNA analyst, testified that appellant's DNA was consistent with the "major component" of the DNA recovered from the Glock 19 pistol and from inside Rodriguez's BMW.

Appellant's mother testified that appellant was a good student, worked several jobs, and was deeply affected by his father's mental health issues. Appellant's girlfriend of six years testified that she believed that appellant could be rehabilitated.

Ineffective Assistance of Counsel

In his first issue, appellant argues that his trial counsel was ineffective during the guilt-innocence phase because he failed to call witnesses. In his second issue, appellant argues that his counsel was ineffective during the punishment phase because he failed to seek a mistrial.

A. *Standard of Review and Governing Legal Principles*

The United States and Texas Constitutions guarantee an accused the right to assistance of counsel. U.S. CONST. amend. VI; TEX. CONST. art. I, § 10; *see also* TEX. CODE CRIM. PROC. art. 1.051. This right necessarily includes the right to reasonably effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Garcia v. State*, 57 S.W.3d 436, 440 (Tex. Crim. App. 2001). To prevail on his claim of ineffective assistance of counsel, appellant must prove (1) that his trial counsel's performance fell below an objective standard of reasonableness and

(2) that there is a reasonable probability that, but for counsel's deficiency, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 687–88, 694; *Lopez v. State*, 343 S.W.3d 137, 142 (Tex. Crim. App. 2011).

Under the first prong of *Strickland*, in reviewing counsel's performance, we look to the totality of the representation to determine the effectiveness of counsel, indulging a strong presumption that counsel's performance fell within the wide range of reasonable professional assistance and was motivated by sound trial strategy. 466 U.S. at 688–89; *Lopez*, 343 S.W.3d at 142 ("[A]ppellant must prove, by a preponderance of the evidence, that trial counsel's performance fell below an objective standard of reasonableness under the prevailing professional norms."). To defeat this presumption, any allegation of ineffectiveness must be firmly grounded in the record so that the record affirmatively shows the alleged ineffectiveness. *Prine v. State*, 537 S.W.3d 113, 117 (Tex. Crim. App. 2017).

Under the second prong of *Strickland*, in reviewing whether there is a reasonable probability that, but for counsel's deficiency, the result of the proceeding would have been different, "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome." 466 U.S. at 694. With respect to claims of ineffective assistance during the punishment phase, appellant must show a reasonable probability that the jury's assessment of punishment would have been less severe in the absence of counsel's deficient performance. *Bazan v. State*, 403

S.W.3d 8, 13 (Tex. App.—Houston [1st Dist.] 2012, pet. ref'd). It is not sufficient to show that counsel's errors had some conceivable effect on the outcome of the punishment assessed; rather, the likelihood of a different result must be "substantial." *Id*.

Appellant has the burden to establish both prongs by a preponderance of the evidence. *Jackson v. State*, 973 S.W.2d 954, 956 (Tex. Crim. App. 1998). Appellant's "failure to satisfy one prong of the *Strickland* test negates a court's need to consider the other prong." *Williams v. State*, 301 S.W.3d 675, 687 (Tex. Crim. App. 2009); *see Strickland*, 466 U.S. at 697.

B. *Motion for New Trial*

As a threshold matter, we note that appellant did not move for a new trial, which would have provided the trial court with an opportunity to hold a hearing on counsel's performance and to develop a record for appeal. As such, the record is silent with respect to the complained-of matters. Again, for an appellate court to find on direct appeal that counsel was ineffective, counsel's deficiency must be affirmatively demonstrated in the trial record. *See Lopez*, 343 S.W.3d at 142. In most cases, direct appeal is an inadequate vehicle for raising an ineffective-assistance claim because the record is undeveloped and cannot adequately reflect the motives behind trial counsel's actions. *Rylander v. State*, 101 S.W.3d 107, 110–11 (Tex. Crim. App. 2003). Otherwise, a petition for writ of habeas corpus is generally

the appropriate vehicle to investigate ineffective-assistance claims. *See Mitchell v. State*, 68 S.W.3d 640, 642 (Tex. Crim. App. 2002).

Because the reasonableness of trial counsel's choices often involves facts that do not appear in the appellate record, trial counsel should ordinarily be given an opportunity to explain his actions before being deemed ineffective. *See Bone v. State*, 77 S.W.3d 828, 836 (Tex. Crim. App. 2002). When, as here, the record is silent as to counsel's reasons for his conduct, finding counsel ineffective would call for speculation. *Stults v. State*, 23 S.W.3d 198, 208 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd). We cannot speculate beyond the record provided; rather, a reviewing court must presume that the actions were taken as part of a strategic plan for representing the client. *See Bone*, 77 S.W.3d at 833–35; *Broussard v. State*, 68 S.W.3d 197, 199–200 (Tex. App.—Houston [1st Dist.] 2002, pet. ref'd) ("The Court of Criminal Appeals has repeatedly held that without a sufficient record, an appellant cannot overcome this presumption, and we cannot conclude counsel was ineffective.").

Thus, in the face of a silent record, we will not find deficient performance unless the challenged conduct was "so outrageous that no competent attorney would have engaged in it." *Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005). Appellant argues that this is a case in which the record is sufficient to

demonstrate beyond a preponderance of the evidence that his trial counsel was ineffective. *See id.*

C. *Guilt-Innocence Phase*

The record shows that, just before the State called its final witness, the following exchange occurred:

> [Defense counsel]: . . . . At this moment, Judge—this is their—the State's last witness. I didn't think we were going to get this far today. There's one more witness on the witness list that they haven't called, so taking that assertion, I thought 20, 30 minutes would go by with her—with him, Officer Campbell. At this junction—juncture, Judge, there were witnesses on call for us—right?—who haven't been subpoenaed, are not under subpoena, but they're going to come in on their own, but I thought we were going to get to them Wednesday. You see what I'm saying?
>
> THE COURT: Looks like we got to them today, doesn't it?
>
> [Defense Counsel]: Right, Judge. But that's my concern. That's why I want to put it on the record, in the sense of—
>
> THE COURT: Where are they?
>
> [Defense Counsel]: That's what I'm saying. They're like—they're— that's what they were saying, that they were an hour away, so—I didn't think we were going to get that far, Judge, so—
>
> THE COURT: They're on—they're on their way?
>
> [Defense Counsel]: No. They're an hour away. They're on call.
>
> THE COURT: Well, it sounds like they need to be in a car headed this way rather than just—
>
> [Defense Counsel]: Right.
>
> THE COURT: —sitting somewhere on call.

[Defense Counsel]: And that's why I just brought it up to [the State].

THE COURT: This is where the trial's going on.

[Defense Counsel]: Yes, Judge. Yes, sir. I just wanted to bring it to the Court's attention, just in case.

THE COURT: Well—

[Defense Counsel]: Sure. I'll get on it, if I may. Two, three—two, three minutes. Is that okay?

THE COURT: You may.

After the State rested, appellant moved for a directed verdict, which the trial court denied. The following exchange then occurred:

THE COURT: Are you ready to proceed? . . . .

[Defense Counsel]: Yes, Judge.

THE COURT: Do you have your witnesses to proceed?

[Defense Counsel]: No, Judge.

THE COURT: Then how are you going to proceed without your witnesses?

[Defense Counsel]: No. In a sense of moving forward.

THE COURT: You're confusing me.

[Defense Counsel]: Rest. We're going to rest, Judge.

Appellant argues on appeal that his counsel had a constitutional duty to present available evidence and arguments to support his defense, that counsel admitted on the record that he had spoken with these witnesses and decided that they would be beneficial. Thus, nothing justified "failing to bring his planned witnesses to court." Appellant asserts that there "is no reasonable trial strategy for seeking out witnesses, speaking with them, gaining their agreement to testify, stating the

intention to call those witnesses to the trial court, and then failing to secure their appearance to do so."

The State argues that it is unclear from the record in this case why trial counsel decided not to subpoena witnesses and why the witnesses who were "on call" ultimately did not testify. The State asserts that appellant invites this Court to speculate that, but for trial counsel's failure to subpoena witnesses, witnesses would have testified at trial and that their testimony would have been beneficial.

It is well-established that an appellant, to successfully demonstrate that his trial counsel was ineffective for failing to subpoena witnesses on his behalf, must show that a particular witness was available to testify and that his testimony "would have been of some benefit to the defense." *Ex parte Ramirez*, 280 S.W.3d 848, 853 (Tex. Crim. App. 2007); *see also Jordan v. State*, 883 S.W.2d 664, 665 (Tex. Crim. App. 1994) (holding that bare allegation that trial counsel failed to subpoena two witnesses without stating what they would have said to exculpate defendant was insufficient); *King v. State*, 649 S.W.2d 42, 44 (Tex. Crim. App. 1983) ("Counsel's failure to call witnesses at the guilt-innocence and punishment stages is irrelevant absent a showing that such witnesses were available and appellant would benefit from their testimony."); *Brown v. State*, 866 S.W.2d 675, 678 (Tex. App.—Houston [1st Dist.] 1993, pet. ref'd) ("The decision whether to call a witness is clearly trial strategy and, as such, is a prerogative of trial counsel.").

Here, appellant has neither identified any particular witness nor stated how such witness would have testified. *See Ex parte Ramirez*, 280 S.W.3d at 853; *Blackwell v. State*, No. 01-12-00519-CR, 2013 WL 5604742, at *6–7 (Tex. App.—Houston [1st Dist.] Oct. 10, 2013, pet. ref'd) (mem. op., not designated for publication) (stating that merely alleging that particular witness could have presented exculpatory testimony was insufficient). Accordingly, we hold that appellant has not demonstrated that his trial counsel was ineffective for failing to subpoena witnesses during the guilt-innocence phase of trial. Appellant's failure to satisfy the first prong of the *Strickland* standard negates our need to consider the second prong. *See Williams*, 301 S.W.3d at 687.

We overrule appellant's first issue.

D. *Punishment Phase*

In his second issue, appellant argues that his trial counsel was ineffective during the punishment phase for failing to seek a mistrial following the improper admission of hearsay testimony.

Hearsay is a statement, other than one made by the declarant while testifying at trial, offered in evidence to prove the truth of the matter asserted. TEX. R. EVID. 801(d). Generally, hearsay is not admissible, except as provided by statute or the rules of evidence. TEX. R. EVID. 802. Ordinarily, to preserve error, a defendant must contemporaneously object to the statement and, if sustained, request that the jury be

instructed to disregard the statement. *Young v. State*, 137 S.W.3d 65, 69 (Tex. Crim. App. 2004). Ordinarily, an instruction to disregard is sufficient to cure error. *Wesbrook v. State*, 29 S.W.3d 103, 115 (Tex. Crim. App. 2000). However, if the "objectionable events are so emotionally inflammatory that curative instructions are not likely to prevent the jury from being unfairly prejudiced against the defendant," then the defendant should request a mistrial. *Archie v. State*, 340 S.W.3d 734, 739 (Tex. Crim. App. 2011) (internal quotations omitted); *see also Hawkins v. State*, 135 S.W.3d 72, 77 (Tex. Crim. App. 2004) ("Only in extreme circumstances, where the prejudice is incurable, will a mistrial be required.").

A failure by counsel to move for a mistrial does not constitute ineffective assistance unless a mistrial should have been granted. *Thomas v. State*, 445 S.W.3d 201, 210 (Tex. App.—Houston [1st Dist.] 2013, pet. ref'd). In evaluating the propriety of a mistrial during punishment, we consider: (1) the severity of the misconduct, (2) the curative measures, and (3) the certainty of the punishment assessed absent the error. *Hawkins*, 135 S.W.3d at 77. In assessing the severity of the misconduct, we consider, in light of the entire record, whether there appeared to be a willful and calculated effort by the State to deprive the appellant of a fair and impartial trial. *Brown v. State*, 270 S.W.3d 564, 573 (Tex. Crim. App. 2008).

During punishment, the State introduced evidence of several extraneous robberies involving appellant. Appellant complains of the following exchange,

during which the State elicited testimony from Ayala about the identity of the robber in his case:

[Ayala]:	When I started to get out—that's when I heard a gun cock and somebody telling me to get back in the car, if I remember correctly.
[The State]:	Who was the person that told you to get back in the car?
[Ayala]:	*Well, I've been told it's the defendant in this case*.
[The State]:	You're not sure?
[Ayala]:	No.
[The State]:	Okay. Could you identify that person in any kind of lineup?
[Ayala]:	No.
[The State]:	*Okay. And so I've asked you to come here today and testify against this particular defendant, right?*
[Ayala]:	*Yes.*
. . .	
THE COURT:	All right. The jury has been removed from the courtroom. [Defense Counsel,] did you have something you wanted to address—
. . . .	
[Defense Counsel]:	Yes, Judge. In their last line of questioning, the DA—the—[the State] has just elicited testimony from this complaining witness that essentially states what they told him in terms of, like, this is [appellant].
THE COURT:	Do you have an objection?
[Defense Counsel]:	It's prejudicing the jury, Judge. I mean, that was never in the report or anything along those lines. He never ID'd him.
THE COURT:	Do you have a hearsay objection?

[Defense Counsel]: Hearsay, Judge.

THE COURT: The objection is sustained.

[Defense Counsel]: And in regards to—and can you tell the jury to disregard that?

THE COURT: The Court will.

[Defense Counsel]: Yes, Judge.

THE COURT: Anything further?

[Defense Counsel]: Nothing further, Judge.

THE COURT: All right. Bring in the jury.

. . . .

THE COURT: Ladies and gentlemen, the last response that you heard from this witness – do not consider it for any purpose whatsoever during your deliberations on this case.

(Emphasis added.) Thus, after Ayala testified that he was unable to identify the person who robbed him, the State elicited testimony from him that it told him to come to trial and testify against appellant. The trial court sustained appellant's objection and instructed the jury to disregard Ayala's testimony about what the State told him. Appellant's counsel did not seek a mistrial.

On appeal, appellant argues that there is no reasonable trial strategy for not seeking a mistrial because the jury heard damaging testimony—a complainant stating that appellant had participated in a "violent and shocking aggravated robbery and kidnapping." Appellant asserts that such testimony "cannot be unheard, even after a limiting instruction from the judge." The State argues that a mistrial was not

necessary because other properly admitted evidence established appellant's involvement in the robbery of Ayala, namely, the testimony of Deputy Suarez.

The record shows that Ayala testified that he was able to positively identify only one of the men, who was Bogany, and that Ayala clearly testified that he was unable to identify the other man, who wore a mask. Thus, the jury was not misled. *See Livingston v. State*, 739 S.W.2d 311, 333–34 (Tex. Crim. App. 1987) (holding that jury was not misled by complainant's testimony, which made clear that complainant did not see gunman's face and could not positively identify defendant). And, the trial court immediately instructed the jury to disregard Ayala's testimony that the State asked him to testify against appellant. Because jurors are presumed to follow a trial court's instructions, an appropriate instruction is generally sufficient to cure improprieties that occur during a trial. *Gamboa v. State*, 296 S.W.3d 574, 580 (Tex. Crim. App. 2009).

The record further shows that Deputy Suarez testified that, just hours after Ayala's car was stolen, he conducted a traffic stop and found appellant driving Ayala's Lexus, with Bogany as his passenger. And, Suarez noted that appellant falsely identified himself. In the car, officers found two sets of gloves, two black ski masks, and a firearm. Thus, through Suarez's testimony, the jury heard other evidence linking appellant to the robbery of Ayala. *See Brooks v. State*, 990 S.W.2d 278, 287 (Tex. Crim. App. 1999) ("[A]ny error in admitting [hearsay] evidence was

harmless in light of other properly admitted evidence proving the same fact."); *Livingston*, 739 S.W.2d at 334 (noting that jury heard other similar identification testimony); *Estrada v. State*, 945 S.W.2d 271, 274 (Tex. App.—Houston [1st Dist. 1997, pet. ref'd) (holding that any error in admitting hearsay establishing defendant as suspect was cured by trial court's instruction to disregard and by admission of other evidence showing defendant's involvement in commission of offense); *see also Parker v. State*, 792 S.W.2d 795, 799 (Tex. App.—Houston [14th Dist.] 1990, pet. ref'd) (holding that any error in denying mistrial was harmless as "properly introduced evidence of other robberies came in later").

Accordingly, the trial court would not have abused its discretion in denying a motion for mistrial. *See Archie*, 340 S.W.3d at 739; *Thomas*, 445 S.W.3d at 210; *see also Hawkins*, 135 S.W.3d at 77 ("Only in extreme circumstances, where the prejudice is incurable, will a mistrial be required.").

Further, in assessing punishment, the jury was entitled to consider all of the evidence adduced. *See Duffy v. State*, 567 S.W.2d 197, 208 (Tex. Crim. App. 1978). The jury could consider Sergeant Uribe's testimony that the complainant in the instant case positively identified appellant in a photographic lineup as the person who robbed her with a firearm. In addition, Officer Mayo testified that he saw video of the complainant's Kia being driven into the parking lot of an apartment complex and parked, along with a black Acura, on the night of the robbery. Mayo saw

appellant on video getting out of the Acura, attempting to fix the sagging front bumper, getting back into the Acura, and driving away. The next day, Officer Mayo stopped the Acura, which had a fictitious license plate, found appellant driving it, and found the keys to the complainant's car and her disabled-parking placard in the center console.

In addition, Rodriquez testified that three men wearing hoodies and bandannas approached him with guns drawn and stole his silver BMW. Clay Davis, a Houston Forensic Science Center DNA analyst, testified that appellant's DNA was consistent with the "major component" of the DNA recovered from the Glock 19 pistol and from inside Rodriguez's BMW. Officer Gil testified that the Glock 19 and Rodriguez's wallet were recovered from the console of the red Toyota Tundra, which was stolen from Blaylock.

Appellant was convicted of the first-degree-felony offense of aggravated robbery with a deadly weapon. *See* TEX. PENAL CODE § 29.03(b). The applicable range of punishment is confinement for 5 to 99 years, or life, and a fine of up to $10,000.00. *See id.* § 12.32. The jury assessed appellant's punishment mid-range, at confinement for 40 years and a fine of $5,000.00. We hold that appellant has not established that his trial counsel's performance was deficient or that appellant established a reasonable probability that, but for the alleged error, the result of the proceeding would have been different. *See Strickland*, 466 U.S. at 466 U.S. at 688–

89, 694; *Bazan*, 403 S.W.3d at 13 (holding that, with respect to claim of ineffective assistance of counsel during punishment, appellant must show reasonable probability that jury's assessment of punishment would have been less severe in the absence of counsel's deficient performance).

We overrule appellant's second issue.

Conclusion

We affirm the trial court's judgment.

Sherry Radack
Chief Justice

Panel consists of Chief Justice Radack and Justices Lloyd and Countiss.

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