Opinion filed June 30, 2020

In The

Eleventh Court of Appeals

No. 11-17-00261-CR

JUAN CARLOS LUCATERO, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 385th District Court
Midland County, Texas
Trial Court Cause No. CR47844

M E M O R A N D U M O P I N I O N

The jury convicted Juan Carlos Lucatero of murder and assessed his punishment at confinement for a term of ninety-nine years in the Institutional Division of the Texas Department of Criminal Justice. The jury also assessed a fine of $10,000. Appellant challenges his conviction in three issues. We affirm.

Background Facts

Appellant was convicted for the murder of Paul Cytulik. The indictment charged Appellant with murdering Cytulik by intentionally or knowingly causing

his death by stabbing him with a knife or by intending to cause serious bodily injury and committing an act clearly dangerous to human life by stabbing Cytulik. *See* TEX. PENAL CODE ANN. § 19.02(b)(1), (2) (West 2019).

Cytulik was a retiree that lived with his son in the Summerhill Apartments in Midland. His son, Paul Cytulik Jr., testified that, on the evening of June 28, 2016, he and Cytulik had dinner together. They had planned to watch "Shark Week" together later that evening. After dinner, Cytulik Jr. heard his father leave their apartment for his nightly walk. Cytulik did not return to their apartment. Instead, Cytulik Jr. was informed that his father had been found stabbed near the pool at the apartment complex.

Alejandra Villescaz Alvarez also lived in the Summerhill Apartments. She testified that she interacted with Cytulik every day, including the day that he was fatally stabbed. On that afternoon, Cytulik told her that he found a bicycle that someone was hiding at night in the bushes at the apartment complex. Cytulik told her that he was concerned that the bicycle belonged to someone that was not supposed to be there. He also told Alvarez that he was going to hide the bicycle near the office of the apartment complex in order to try to find out to whom it belonged.

Sergio Briseno was the maintenance supervisor at the Summerhill Apartments. Briseno and Cytulik were friends, and Cytulik would assist him around the apartment complex from time to time. Briseno testified that he and Cytulik had discussed the bicycle that Cytulik had seen hidden in the bushes at the apartment complex. Cytulik also told Briseno about his plan to hide the bicycle near the office in order to try to determine who rode it to the apartment complex.

Briseno also testified about confronting a person that rode a bicycle to the apartment complex. Briseno identified Appellant as the person on the bicycle. Briseno asked Appellant what he was doing at the apartment complex. Appellant told Briseno that he was waiting on his cousin.

Adrian Mendoza also lived in the Summerhill Apartments. He testified that he saw Appellant at the apartment complex on two occasions on the day that Cytulik was stabbed. The first time Mendoza saw Appellant, Appellant was on a bicycle. The second time he saw Appellant, Appellant was running away on foot from the apartment complex with something that looked like a cloth wrapped around his hand. Mendoza testified that he observed Appellant running away from the apartment complex no more than ten minutes before the police arrived to assist Cytulik.

Lorenzo Lucatero is Appellant's nephew.[1] Lucatero lived in the Summerhill Apartments, and Appellant lived in the nearby 4400 Apartments. Lucatero testified that Appellant traveled to the Summerhill Apartments to visit him on a bicycle that belonged to Appellant's mother. Lucatero denied seeing Appellant on the day that Cytulik was stabbed.

Nicholas Laff is a former law enforcement officer that lived near the two apartment complexes. On the day that Cytulik was stabbed, Laff observed Appellant running by his house with something tucked in his shirt. Laff testified that Appellant looked troubled or worried and that he was out of breath. Laff further testified that "there were a bunch of sirens going" when he observed Appellant running.

The State called several Midland police officers as witnesses at trial. Officer Jason Claire was the first police officer to reach Cytulik. He observed a stab wound on Cytulik's lower torso in the back area. Officer Claire testified that police officers began talking to residents of the apartment complex to come up with a suspect. The officers received a consistent description of a Hispanic male wearing shorts and a white shirt.

Officers focused their attention on apartment no. X1 at the Summerhill Apartments, which was Lucatero's apartment. Officer Garrett Forster testified that

[1]We will refer to Lorenzo Lucatero as "Lucatero."

the officers believed that the suspect or a family member of the suspect would be located at that apartment. While setting up a perimeter around apartment no. X1, officers found a bicycle in the bushes near the apartment. Officer Claire determined from dispatch that Appellant had recently received a trespass warning from the police from apartment no. X1 at the request of Lucatero. Lucatero's description of the bicycle that Appellant used was consistent with the bicycle found in the bushes near Lucatero's apartment. After officers spoke with Lucatero, they traveled to the 4400 Apartments to contact Appellant.

Officers set up a perimeter around the apartment at the 4400 Apartments in which Appellant lived. They took Appellant into custody when he later exited the apartment. Officers later searched the apartment after obtaining a search warrant. Officer Claire found a pair of shoes that appeared to have blood splatter on them. Detective Djuan Goswick found a white T-shirt and a sock in a laundry basket at the foot of a bed in the apartment; the T-shirt and sock appeared to have blood on them. DPS forensic scientist Stephen Brent Hester testified that, for one of the spots of blood on the T-shirt, it was "338 quadrillion times more likely if the DNA came from victim Cytulik than if the DNA came from an unrelated, unknown individual."

Andre Patino is a firefighter paramedic with the Midland Fire Department. He treated Cytulik at the scene of the stabbing. Patino testified that Cytulik was barely breathing and that he had a faint pulse. Cytulik was unconscious and unresponsive. Patino observed three stab wounds on Cytulik's back.

Nizam Peerwani, M.D., a medical examiner from Tarrant County, testified that Cytulik suffered three penetrating stab wounds along his left back that were inflicted with a single-edged knife. Two stab wounds penetrated the chest cavity, and one of those two penetrated the left lung. Dr. Peerwani testified that Cytulik died from cardiorespiratory arrest caused by the stab wounds.

Sufficiency of the Evidence

In his first issue, Appellant challenges the sufficiency of the evidence supporting his conviction for murder. He generally asserts that the evidence was insufficient to identify him as the murderer.

We review a challenge to the sufficiency of the evidence under the standard of review set forth in *Jackson v. Virginia*, 443 U.S. 307 (1979). *Brooks v. State*, 323 S.W.3d 893, 912 (Tex. Crim. App. 2010); *Polk v. State*, 337 S.W.3d 286, 288–89 (Tex. App.–Eastland 2010, pet. ref'd). Under the *Jackson* standard, we review all of the evidence in the light most favorable to the verdict and determine whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Jackson*, 443 U.S. at 319; *Isassi v. State*, 330 S.W.3d 633, 638 (Tex. Crim. App. 2010).

When conducting a sufficiency review, we consider all the evidence admitted at trial, including pieces of evidence that may have been improperly admitted. *Winfrey v. State*, 393 S.W.3d 763, 767 (Tex. Crim. App. 2013); *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007). We defer to the factfinder's role as the sole judge of the witnesses' credibility and the weight their testimony is to be afforded. *Brooks*, 323 S.W.3d at 899. This standard accounts for the factfinder's duty to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. *Jackson*, 443 U.S. at 319; *Clayton*, 235 S.W.3d at 778. When the record supports conflicting inferences, we presume that the factfinder resolved the conflicts in favor of the verdict and defer to that determination. *Jackson*, 443 U.S. at 326; *Clayton*, 235 S.W.3d at 778.

It is not necessary that the evidence directly prove the defendant's guilt; circumstantial evidence is as probative as direct evidence in establishing a defendant's guilt, and circumstantial evidence can alone be sufficient to establish guilt. *Carrizales v. State*, 414 S.W.3d 737, 742 (Tex. Crim. App. 2013) (citing

Hooper v. State, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007)). Each fact need not point directly and independently to guilt if the cumulative force of all incriminating circumstances is sufficient to support the conviction. *Hooper*, 214 S.W.3d at 13. Because evidence must be considered cumulatively, appellate courts are not permitted to use a "divide and conquer" strategy for evaluating the sufficiency of the evidence. *Murray v. State*, 457 S.W.3d 446, 448 (Tex. Crim. App. 2015). Instead, appellate courts must consider the cumulative force of all the evidence. *Villa v. State*, 514 S.W.3d 227, 232 (Tex. Crim. App. 2017).

Appellant asserts that the evidence against him was sparse. He contends that the evidence that he was present at the Summerhill Apartments on the day that Cytulik was stabbed was conflicting. He also asserts that the descriptions provided by the residents of the apartment complex were conflicting.

With respect to the evidence that Appellant asserts was conflicting, the applicable standard of review requires us to presume that the jury resolved the conflicts in favor of the verdict, and we defer to that determination. *See Jackson*, 443 U.S. at 326; *Clayton*, 235 S.W.3d at 778. In this regard, it is the jury's duty to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. *Jackson*, 443 U.S. at 319; *Clayton*, 235 S.W.3d at 778.

The State asserts that the circumstantial evidence in this case points to Appellant's guilt for Cytulik's murder. We agree. The most significant piece of evidence in this case is the T-shirt that was recovered from Appellant's apartment and that had a spot of blood that was consistent with Cytulik's DNA. Appellant attempts to discount this evidence by asserting that there was no evidence that the T-shirt belonged to Appellant. However, the shirt was recovered from Appellant's apartment soon after Cytulik was stabbed. Additionally, Mendoza testified that he saw Appellant running away from the apartment with something in his hands. Laff

also testified that he saw Appellant running with something tucked in his shirt at the same time that he heard a lot of sirens. These items of evidence minimize any conflicting descriptions of the suspect given by the residents at the apartment complex.

Furthermore, there was testimony from multiple witnesses that Cytulik was trying to determine who was riding a bicycle to the apartment complex. Lucatero described a bicycle that Appellant may have used to travel to the Summerhill Apartments to visit Lucatero, and a bicycle matching that description was found near Lucatero's apartment soon after Cytulik was stabbed. This evidence supports an inference of a confrontation occurring between Appellant and Cytulik. Based on all of the evidence offered at trial, it was logical for the jury to infer and to find beyond a reasonable doubt that Appellant fatally stabbed Cytulik. We overrule Appellant's first issue.

Use of Restraints at Trial

Appellant asserts in his second issue that the trial court erred by requiring Appellant to be shackled during trial. The trial court issued the order requiring Appellant to be shackled near the end of the second day of trial. After a recess and outside the jury's presence, the trial court stated on the record that it had been advised that Appellant "was not being cooperative" and that the court had been asked for permission to shackle Appellant with a belly chain and ankle chains. The trial court called on a bailiff to explain what had occurred during the recess. He stated as follows:

> When we were -- when you broke for a break -- when you broke for break, he attempted to -- when he walked past the counter, he attempted to hug his mother. And I wouldn't let him hug his mother. He's in custody, and you cannot have any contact with inmates. And he got frustrated and -- [Appellant interrupts] -- told me I better watch my back and several other things.

The bailiff additionally stated that Appellant physically resisted what the bailiffs had requested him to do. Another bailiff stated that he felt that the trial court would be risking the safety of others if Appellant was not restrained. While this exchange occurred, Appellant interrupted the trial court on multiple occasions, and the trial court instructed Appellant three times to "sit down." As the jury was coming into the courtroom, Appellant exclaimed: "They jumped me, f--k this s--t." He later exclaimed: "F--k you."

In *Deck v. Missouri*, the Supreme Court recognized the longstanding rule that the U.S. Constitution forbids the routine use of visible shackles on defendants during trial. 544 U.S. 622, 624, 626–35 (2005). The Supreme Court concluded that, "given their prejudicial effect, due process does not permit the use of visible restraints if the trial court has not taken account of the circumstances of the particular case." *Id.* at 632. We review a trial court's decision to shackle a defendant in two stages. *See Long v. State*, 823 S.W.2d 259, 282–83 (Tex. Crim. App. 1991). First, we determine whether the trial court abused its discretion by ordering the defendant shackled. *Id.* at 282. Next, if we conclude that the trial court abused its discretion, we determine whether the defendant suffered harm. *Id.* at 283.

The reasons for shackling a defendant must be "case specific," reflecting particular concerns about the defendant, such as any special security needs or escape risks posed by him. *Deck*, 544 U.S. at 633. Courts have held that some circumstances that justify the use of restraints during trial include situations where an accused expressed his intention to escape, made threats of physical violence, resisted being brought to court, repeatedly interrupted the court proceedings, attempted to leave the courtroom, or engaged in other egregious conduct. *Cedillos v. State*, 250 S.W.3d 145, 148–49 (Tex. App.—Eastland 2008, no pet.).

No constitutional violation occurs if the shackles are not visible to the jury. *Bell v. State*, 415 S.W.3d 278, 279 (Tex. Crim. App. 2013). Shackles are considered

visible for constitutional purposes if "the record reflects a reasonable probability that the jury was aware of the defendant's shackles." *Id.* at 283. Even when shackles are not visible to the jury, however, shackling a defendant during trial is nonconstitutional error in violation of the common law unless it is necessary for a particular defendant in a particular proceeding. *Id.* at 281. For shackling to be justified, "the record must manifest the trial judge's reasons for restraining a defendant," and a trial judge errs in ordering shackles if "the record fails to detail the grounds for restraint." *Id.* And even when shackles are justified, "the trial judge should make all efforts to prevent the jury from seeing the defendant in shackles." *Id.*

Appellant asserts that the trial court erred by ordering Appellant to be shackled because it did so based on his attitude and courtroom demeanor. He contends that he was harmed because the jury was able to see him shackled and because he was shackeled immediately after the damaging DNA evidence was offered at trial, which permitted the jury to infer that he was shackled because of the DNA evidence. We disagree with Appellant's assertions.

The State filed a pretrial motion seeking to have Appellant shackled at trial. At the pretrial hearing on the State's motion, the State called several police officers and jailers to testify about Appellant's violent nature. The Midland County detention center classified Appellant as a "supermax" prisoner because he frequently was combative with officers. Appellant was often belligerent with officers and frequently spat on them. As a supermax prisoner, he was transported alone to court wearing leg irons, handcuffs, and a waist chain and was escorted by two officers. At times, officers were required to use a spit mask and a restraint chair to deal with Appellant.

The trial court denied the State's pretrial motion on the basis that Appellant had conducted himself in an acceptable manner when in court. However, the trial

court warned Appellant that, if he did not "act right in court," it would change its ruling.

We disagree with Appellant's assertion that the trial court made the decision to shackle him solely because of his attitude and demeanor. The record from the pretrial hearing establishes that Appellant had been violent in the past, including incidents occurring while being transported to court. Additionally, the bailiffs advised the court that Appellant had become combative at the recess and that he had threatened them. A video taken of the holding area indicated that officers had to use force to apply the shackles to Appellant. We conclude that the trial court did not abuse its discretion by finding that Appellant presented a valid safety concern requiring that he be shackled for the remainder of trial. Appellant's outbursts after the trial court's ruling are further evidence showing that the trial court did not abuse its discretion in requiring that Appellant be restrained.

The record does not reflect that the jury was permitted to see Appellant in visible restraints. To the contrary, an "incident report" from one of the bailiffs reflects that Appellant was seated so that the jury would not notice that he was cuffed. A defendant must object to the use of restraints in the jury's presence to preserve error on appeal. *Cedillos*, 250 S.W.3d at 149–50. Appellant did not make such an objection to the trial court and, therefore, has not preserved this issue. We overrule Appellant's second issue.

Ineffective Assistance of Counsel

In his third issue, Appellant asserts that he received ineffective assistance of counsel at trial. To establish that trial counsel rendered ineffective assistance at trial, Appellant must show that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that the result would have been different but for counsel's errors. *Thompson v. State*, 9 S.W.3d 808, 812 (Tex. Crim. App. 1999) (citing *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984)).

A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. *Strickland*, 466 U.S. at 694. There is a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance, and the defendant must overcome the presumption that the challenged action could be considered sound trial strategy. *Id.* at 689.

A claim of ineffective assistance of counsel "must be firmly founded in the record, and the record must affirmatively demonstrate the alleged ineffectiveness." *Thompson*, 9 S.W.3d at 814 (quoting *McFarland v. State*, 928 S.W.2d 482, 500 (Tex. Crim. App. 1996)). Direct appeal is usually an inadequate vehicle to raise such a claim because the record is generally undeveloped. *Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005). Direct appeal is especially inadequate when counsel's strategy does not appear in the record. *Id.* Trial counsel should ordinarily have an opportunity to explain his actions before an appellate court denounces counsel's actions as ineffective. *Id.* Without this opportunity, an appellate court should not find deficient performance unless the challenged conduct was "so outrageous that no competent attorney would have engaged in it." *Id.* (quoting *Garcia v. State*, 57 S.W.3d 436, 440 (Tex. Crim App. 2001)).

Appellant filed a motion for new trial. However, the motion for new trial did not allege ineffective assistance of counsel, and no hearing on the motion occurred. Accordingly, trial counsel has not had an opportunity to explain his trial strategy in response to the matters that Appellant now contends were deficient.

Appellant contends that his trial counsel was ineffective in two respects. First, Appellant contends that trial counsel failed to object to testimony from the physician that examined him for competency to stand trial. The State called the physician as a witness at the pretrial hearing for Appellant to be restrained at trial. To show ineffective assistance of counsel for a failure to object, an appellant must show that the trial court would have committed error in overruling the objection. *Ex*

parte White, 160 S.W.3d 46, 53 (Tex. Crim. App. 2004). Appellant asserts that evidence about his competency examination was inadmissible under Article 46B.007 at the hearing on the State's motion to restrain him at trial. *See* TEX. CODE CRIM. PROC. ANN. art. 46B.007 (West 2018). Under this provision, statements made by a defendant during a competency evaluation are only admissible in limited circumstances that were not applicable to this case.

Roddy Strobel, M.D., examined Appellant in two capacities. First, she is the psychiatrist for the Midland County jail. Dr. Strobel initially treated Appellant for a medication evaluation in her capacity as the jail's psychiatrist. She later performed a competency evaluation. With one exception, the record is not clear in which of her dual capacities that Dr. Strobel was testifying from when she testified at the pretrial hearing. The exception was her description of Appellant's conduct during the two visits in which she performed a competency examination. She testified that, during the first visit, Appellant "seemed to be logical, reasonable, [and] rational in his thoughts." However, he appeared to have his hand inside of his pants during this encounter. Dr. Strobel testified that, during the second visit, Appellant exposed his penis to her.

We note that Appellant prevailed at the pretrial hearing wherein he contends that trial counsel was ineffective for failing to object. Appellant contends that trial counsel's failure to object to Dr. Strobel's testimony permitted the trial court to later use the testimony in reaching the decision to restrain Appellant at trial. We disagree with this proposition. The more compelling testimony from the pretrial hearing was Appellant's violent, combative nature that was established through several other witnesses. Additionally, Appellant's conduct at trial was another consideration leading to the trial court's decision for him to be shackled. The record does not establish that the trial court would not have decided to shackle Appellant at trial had

trial counsel objected to Dr. Strobel's description of his conduct during the competency examination.

Appellant's second allegation of ineffective assistance involves his claim that his trial counsel revealed confidential communications that led to Appellant being shackled at trial. At the end of trial, the trial court admitted reports from two bailiffs about the incident that led to Appellant being shackled. These reports were admitted as court's exhibits only. The first report was entitled "Incident Report." It contained a description of the incident involving Appellant attempting to hug his mother. It also contained a statement that defense counsel had informed the bailiff afterwards that "[w]e are going to have problems." The second report also stated that defense counsel advised the bailiffs that "we were going to have problems with [Appellant] because [the deputy] wouldn't let him hug his mother."

We disagree with Appellant's assertion that trial counsel revealed confidential communications. Trial counsel's statement that "[w]e are going to have problems" does not necessarily reveal any communications between Appellant and counsel. The statement may have been based solely upon trial counsel's observation of the confrontation and Appellant's demeanor. Furthermore, the reports from the bailiffs contain more details about the incident involving Appellant's mother. Deputy John Reese stated as follows in his report:

> [Appellant] got upset when I told him he couldn't hug his mother. [Appellant] looked at me and began to make aggressive moves towards me. I told [Appellant] to keep walking to the holding cell when he turned around and asked me "or f--king what." Once [Appellant] got inside the holding cell he began to tell me that he was going to get me. He told me that I wasn't safe that he was going to get me because I wouldn't let his mother hug him.

Thus, the statement from Appellant's trial counsel was not the sole basis for the bailiffs to report a problem with Appellant to the trial court. To the contrary, the bailiffs reported their own observations of Appellant's combative behavior and his

threats against them. Accordingly, we disagree with Appellant's contention that his trial counsel's statement to the bailiffs was the reason why the trial court decided that he needed to be restrained.

In the absence of an inquiry into the basis for trial counsel's statement to the bailiffs that they were going to have problems, the record does not establish that trial counsel's conduct fell below an objective standard of reasonableness. Furthermore, the record does not demonstrate a reasonable probability that the result would have been different but for the challenged conduct. We overrule Appellant's third issue.

This Court's Ruling

We affirm the judgment of the trial court.

JOHN M. BAILEY
CHIEF JUSTICE

June 30, 2020

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

Panel consists of: Bailey, C.J.,
Wright, S.C.J.,[2] and Judge Trotter[3]

Stretcher, J., and Willson, J., not participating.

[2]Jim R. Wright, Senior Chief Justice (Retired), Court of Appeals, 11th District of Texas at Eastland, sitting by assignment.

[3]The Honorable W. Stacy Trotter, 358th District Court, Ector County, Texas, sitting by assignment.