Affirmed and Opinion filed April 19, 2001.

In The

Fourteenth Court of Appeals

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NO. 14-99-01132-CR

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CHARLES RAY STAFFORD, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 337th District Court
Harris County, Texas
Trial Court Cause No. 795,504

O P I N I O N

Charles Ray Stafford appeals a conviction for aggravated robbery on the grounds that the evidence was factually insufficient and that the trial court erred in overruling his objections to the State's demonstration before the jury with a gun that was not identified as the one used in the offense. We affirm.

Background

In October of 1998, appellant and Delante Bloomer exited from the vehicle in which they were traveling and began chasing the 68-year old complainant. Upon catching him, appellant and Bloomer forcibly robbed the complainant of his wallet containing $400 cash

and credit cards. Thomas Low, a bystander, yelled at appellant and Bloomer in an attempt to stop the incident. Bloomer yelled at Low to back away and then fired shots at the complainant and Low. Bloomer and appellant then drove away. Appellant was charged by indictment with aggravated robbery, found guilty by a jury, and sentenced by the jury to twenty-two years confinement.

Factual Sufficiency

Standard of Review

In reviewing factual sufficiency, we ask whether a neutral review of all the evidence, both for and against the finding, demonstrates that the proof of guilt is either so obviously weak as to undermine confidence in the jury's determination, or, although adequate if taken alone, is greatly outweighed by contrary proof. *Johnson v. State*, 23 S.W.3d 1, 11 (Tex. Crim. App. 2000). We will set aside the verdict only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *Wesbrook v. State*, 29 S.W.3d 103, 112 (Tex. Crim. App. 2000).

Use of Deadly Weapon

Appellant's first issue challenges the factual sufficiency of the evidence to prove that he used or exhibited a deadly weapon, should have anticipated the use of a deadly weapon, or had the intent to promote or assist in intentionally or knowingly threatening or placing the complainant in fear of imminent bodily injury or death. In support of this contention, appellant claims: (1) he was sitting in the car when Bloomer made threats and exhibited the weapon; (2) at the time of the arrest, no weapons were found in the car or on appellant; (3) there was no evidence offered at trial to show that he had a weapon, knew that Bloomer had a weapon, or should have anticipated the use of a weapon; and (4) the only evidence that the complainant was in fear for his life was in response to the gun held by Bloomer.

A person commits aggravated robbery if, "in the course of committing theft" and with intent to obtain or maintain control of the property, he intentionally or knowingly threatens or places another in fear of imminent bodily injury or death by using or exhibiting a deadly

weapon. TEX. PEN. CODE ANN. §§ 29.02(a)(2); 29.03(a)(2) (Vernon 1994). "In the course of committing theft" means conduct that occurs in an attempt to commit, during the commission, or in immediate flight after the attempt or commission of theft. *Id*. at § 29.01(1).

A person is criminally responsible as a party to an offense if the offense is committed by his own conduct, the conduct of another for which he is criminally responsible, or both. *Id*. at § 7.01(a). A person is criminally responsible for an offense committed by the conduct of another if, acting with intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense. *Id*. at § 7.02(a)(2).

In this case, the indictment alleged that appellant used and exhibited a deadly weapon,[1] during the robbery, and the jury charge instructed the jury that it could convict appellant individually or as a party to the offense.[2] Accordingly, the jury could convict appellant if it found by direct or circumstantial evidence that he not only participated in the aggravated robbery, but did so knowing that Bloomer was, or had been, using or exhibiting a gun during the offense.[3]

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[1] A firearm is defined as a deadly weapon. TEX. PEN. CODE ANN. § 1.07(a)(17)(A) (Vernon 1994).

[2] *See* TEX. PEN. CODE ANN. § 7.01(b) (Vernon 1994).

[3] *See Escobar v. State*, 28 S.W.3d 767, 774 (Tex. App.—Corpus Christi 2000, pet. ref'd) (holding evidence legally sufficient to prove the defendant guilty of aggravated robbery where he entered the getaway vehicle with stolen merchandise while a third-party pointed a gun at the complainant); *Brewer v. State*, 852 S.W.2d 643, 647 (Tex. App.—Dallas 1993, pet. ref'd) (holding evidence legally sufficient to prove the defendant guilty of aggravated robbery where he dropped off and picked up the person committing the armed robbery); *Johnson v. State*, 6 S.W.3d 709, 711 (Tex. App.—Houston [1st Dist.] 1999, pet. ref'd) (holding evidence legally sufficient to prove the defendant guilty of aggravated robbery where she performed a reconnaissance of the robbery location and drove the getaway car, but was not present at the robbery when the gun was displayed).

According to the evidence, appellant waited in the vehicle for Bloomer to finish shooting and then drove Bloomer away. Even though appellant did not himself use or exhibit a deadly weapon, this evidence is sufficient to prove he was guilty as a party to the aggravated robbery by continuing to participate in it after the gun was exhibited and shots were fired to fend off Low and thereby facilitate the offense. Moreover, the matters asserted by appellant to show factual insufficiency do not even controvert his guilt as a party, let alone render the verdict so against the overwhelming weight of the evidence as to be clearly wrong and unjust. Accordingly, appellant's first point of error is overruled.

Identification

Appellant's second issue challenges the factual sufficiency of the evidence to prove his identification because it was tainted, subject to suggestiveness by the circumstances of the arrest, and therefore, unreliable. Appellant contends that the identification of him as the assailant is unreliable because the complainant and Low had little opportunity to view him and could not give descriptive details to officers at the scene.[4]

According to the complainant's testimony, his opportunity to view appellant was limited to appellant's exit from the vehicle and time sitting in the vehicle while Bloomer was shooting the gun. The complainant testified that because he was grabbed from behind, and appellant returned to the vehicle with his back to him, he did not see appellant during the robbery or while he walked back to the vehicle. Further, the complainant testified that it was fairly dark in the area where he was grabbed so he could not distinguish features such as a beard, moustache, scars, or tattoos. Moreover, Low testified that while Bloomer was shooting, he was not focused on the driver (appellant), but on the gun, and conceded

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[4] Further, appellant contends that the facts do not preclude the possibility that he could have been driving the car thirty to forty-five minutes after the robbery, but still not have been driving at the time of the robbery, and that someone else could have taken the gun, wallet, and half the cash out of the vehicle before appellant drove it. However, even if this contention is correct, it does not bear on whether the evidence was factually sufficient to prove appellant's identification as the assailant.

that he could not tell what length of pants the driver was wearing because he was paying attention to the pistol.

Conversely, although it was dark in the area where the complainant was robbed, the complainant and Low testified there was a bright light across the street from where appellant stopped the vehicle. Low testified that he witnessed appellant exit the vehicle and chase the complainant, and that the light also enabled him to see appellant walk to and enter the vehicle after robbing the complainant. Further, the complainant testified that he got a good look at appellant and observed that he had a very large head. The complainant also testified that he got a good look at appellant when he first exited the car. When questioned by officers at the scene of the incident, the complainant described appellant as a black male wearing long shorts and a dark shirt, and having a large head. Low described appellant as a black male and as taller than Bloomer.

In addition, thirty to forty-five minutes after the robbery, officers pulled appellant over based on an identification from Low that this was the car because of the color, speaker holes, license plate numbers, and the complainant's identification of the occupants as the two men who robbed him. When the police removed appellant from the vehicle, Low and the complainant both identified Bloomer and appellant as the robbers, appellant was wearing the same type of clothing as had been described by the complainant, the vehicle contained the complainant's credit cards, and Bloomer was in possession of $230 in cash. Further, both the complainant and Low positively identified appellant at trial.

Because there was no evidence in the case that appellant was not one of the people who robbed the complainant, the identification evidence is not greatly outweighed by contrary proof. Moreover, although the evidence supporting appellant's identification was impeached to some degree, we are not persuaded that it is so obviously weak as to undermine confidence in the jury's determination of appellant's identification. Accordingly, appellant's second point of error is overruled.

Demonstrative Evidence

Appellant's third issue contends that the trial courted erred in overruling defense objections and permitting the State to present a demonstration before the jury using a gun that was not identified as the weapon used in the offense.[5] Further, appellant argues that this demonstration failed to prove or resolve any issue in this case as required by law and that the gun was not necessary to show the distance between Bloomer and Low or how the gun was held.

A trial court's ruling on demonstrative evidence is reviewed for abuse of discretion. *Simmons v. State* 622 S.W.2d 111, 113-14 (Tex. Crim. App. 1981). A replica or duplicate item of demonstrative evidence is admissible if it tends to solve some issue in the case, is relevant, and the original weapon would have been admissible. *Id*. at 113. A demonstrative weapon, described by a witness as "like," or "similar to," the original weapon or words to that effect, is admissible as an aid to the jury in interpreting and understanding the oral testimony adduced at trial. *Id*. at 113-14.

In this case, Low identified the demonstrative firearm as basically the same kind of revolver as used by Bloomer. Upon identifying the weapon, the State asked Low to demonstrate the distance he was from appellant and Bloomer and how Bloomer held and fired the weapon. The demonstrative evidence showed the jury what the gun looked like and how Bloomer used it in the offense. Because the demonstration thus evidenced the aggravating element of the offense, it was not an abuse of discretion for the trial court to overrule appellant's objection to the State's use of the gun. Accordingly, appellant's third point of error is overruled, and the judgment of the trial court is affirmed.

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Richard H. Edelman

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[5] Although appellant also complains on appeal that the purpose of the demonstration was to prejudice and inflame the jury, he did not object at trial on that basis and thus did not preserve that complaint for appeal.

Justice

Judgment rendered and Opinion filed April 19, 2001.

Panel consists of Justices Edelman and Frost and Senior Chief Justice Murphy.[6]

Do not publish — TEX. R. APP. P. 47.3(b).

[6] Senior Chief Justice Paul C. Murphy sitting by assignment.