Affirmed and Opinion filed April 20, 2000.

In The

Fourteenth Court of Appeals

NO. 14-98-01118-CR

KEVIN GERARD GRICE, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 23rd Judicial District
Brazoria County, Texas
Trial Court Cause No. 34, 230

O P I N I O N

The appellant, Kevin Gerard Grice, was convicted of aggravated robbery and sentenced to fifteen years' imprisonment. Appealing on four points of error, he asserts: (1-2) the evidence is factually and legally insufficient to support his conviction; (3) his trial counsel was ineffective; and (4) the trial court committed fundamental error in its charge to the jury.

FACTUAL BACKGROUND

The appellant and his girlfriend, Katrina Wright and their friend, Tonya Trotter, attended a wedding reception in Brazoria County, in August 1997. When the reception was over, they gave Dana Williams a ride to West Columbia in Tonya's car. On the way to West Columbia, Dana saw Larry Daniels walking along the road. They stopped the car and Dana offered Larry a ride. Larry then joined the group.[1] Dana, who claimed Larry owed her money, asked the appellant to take Larry to East Columbia so that he could get some money from his girlfriend, whom Larry believed might be at the home of Marvin Honeycutt. Before the group reached East Columbia, Dana cut or threatened to cut Larry with a razor box-cutter, telling him, "You better give me the money when we get to . . . [the Honeycutt house]." There are several versions of what happened once the group arrived at the Honeycutt home.

Marvin, one of the complainants, testified that he received a middle of the night knock on the door of his trailer home in East Columbia. When he turned on his porch light, he recognized Larry, but not the man and two women who were with him. According to Marvin, he unlocked the door and allowed the group to come into his home. As soon as they were inside, one of the women tried to put a box-cutter to Marvin's throat while the man tried to take Marvin's television set. Marvin yelled for his son, Toby Honeycutt, and then dashed to his bedroom to retrieve a gun.

Meanwhile, Toby had been awakened by the knock on the door. Toby testified that when he heard the commotion, he headed down the hallway with a closed pocket knife in his hand. Suddenly, the appellant ran toward Toby, delivering several blows that knocked Toby unconscious for a brief time. Toby testified that when he regained consciousness, the appellant was on top of him, shouting vulgarities and threatening to cut his throat.

According to Tonya, initially only Larry and Dana went into the Honeycutt home, and it was not until later that the appellant and Katrina entered. Katrina testified that Larry summoned her and the appellant to go inside and get Dana because she was arguing with "old man Honeycutt." According to Katrina, once she and the appellant were inside the Honeycutt home, either Dana or the appellant told

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[1] Larry first claimed that the appellant was the only one in the group he knew, but later stated that he did not know any of the individuals in the car.

Marvin he was being "jacked," which is street lingo for “robbed.” Katrina testified that Dana threatened Marvin with a razor box-cutter, and either Dana or the appellant tried to take Marvin’s television set. According to Katrina, when Marvin yelled for help, Toby came at the appellant from the back of the trailer home with an open pocket knife. According to Larry, Katrina said the appellant and Toby had been hitting each other when the appellant punched Toby, knocking him down. Katrina saw Dana "kicking" and "stomping" Toby in the face. Dana then jumped on top of Toby and, according to Katrina, Toby was screaming during the attack.

As suddenly as they had appeared, the unwelcomed intruders abruptly departed the Honeycutt trailer home, leaving behind the television set they had tried to steal. Toby, bleeding and wounded from the struggle, got up and crawled out a nearby window. After about twenty minutes, he drove off in his truck, still bleeding from his wounds. Fearing the loss of too much blood, Toby stopped his truck at a neighbor’s house to call an ambulance to transport him to a hospital.

Back at the Honeycutt home, Marvin found Toby’s room bespattered with blood. A Brazoria County Sheriff’s office investigator, Chris Kincheloe arrived shortly thereafter to find the trailer home in disarray, and blood in the hall and in the back bedroom. Officer Kincheloe interviewed Toby at the hospital and later interviewed Larry, Dana and Katrina. As part of his investigation, the officer recovered a razor box-cutter from Dana’s home.

LEGAL AND FACTUAL SUFFICIENCY

In his first and second points of error, the appellant asserts the evidence was factually and legally insufficient to support his conviction for aggravated robbery. Specifically, he claims: (1) the State did not prove the appellant was armed or an active participant in the robbery; (2) there was no evidence that Toby was threatened or cut with a razor box-cutter; (3) the State did not enter the razor box-cutter into evidence; and (4) the State did not prove Toby suffered serious bodily injury.

When an appellant challenges both the legal and factual sufficiency of the evidence, we must first determine whether the evidence introduced at trial was legally sufficient. *See Clewis v. State*, 922 S.W.2d 126, 133 (Tex. Crim. App. 1996). In making this determination, we must decide "whether, after

viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *King v. State*, 895 S.W.2d 701, 703 (Tex. Crim. App. 1995) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). This standard of review applies to both direct and circumstantial evidence cases. *See Geesa v. State*, 820 S.W.2d 154, 156-61 (Tex. Crim. App. 1991). In our review we do not re-evaluate the weight and credibility of the evidence but assess only whether the jury reached a rational decision. *See Muniz v. State*, 851 S.W.2d 238, 246 (Tex. Crim. App. 1993).

When reviewing the factual sufficiency of the evidence, we consider all of the evidence "without the prism of 'in the light most favorable to the prosecution'" and "set aside the verdict only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust." *Clewis*, 922 S.W.2d at 129. In conducting a factual sufficiency review, we are guided by three main principles. *See Cain v. State*, 958 S.W.2d 404, 407 (Tex. Crim. App. 1997) (construing *Clewis*, 922 S.W.2d at 129). First, we give deference to the jury's findings. *See id*. Appellate courts "'are not free to reweigh the evidence and set aside a jury verdict merely because the judges feel that a different result is more reasonable.'" *Clewis*, 922 S.W.2d at 135 (quoting *Pool v. Ford Motor Co.*, 715 S.W.2d 629, 634 (Tex. 1986)). Second, we give a detailed explanation of a finding of factual insufficiency. *See Cain*, 958 S.W.2d at 407. Third, we review all the evidence. *See id*.

We are required to measure the sufficiency of the evidence by the elements as defined by the hypothetically correct jury charge. *See Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997). At issue in this case is the felony offense of aggravated robbery. A person commits aggravated robbery if he (1) commits the offense of robbery and (2) uses or exhibits a deadly weapon. *See* TEX. PEN. CODE ANN. § 29.03(A)(2) (Vernon 1994). Robbery occurs when in the course of committing theft, as defined in Chapter 31, and with intent to obtain or maintain control of the property, a person:

(1) intentionally, knowingly, or recklessly causes bodily injury to another;

(2) intentionally or knowingly threatens or places another in fear of imminent bodily injury or death.

TEX. PEN. CODE ANN. § 29.02 (Vernon 1994). An individual does not have to successfully commit theft in order to commit robbery. *See Crawford v. State*, 889 S.W.2d 582, 584 (Tex. App.—Houston [14th Dist.] 1994, no pet.).

The law of parties provides:

> (A) A person is criminally responsible for an offense committed by the conduct of another if: . . .
>
> (2) 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.

TEX. PEN. CODE ANN. § 7.02 (Vernon 1974). Under the law of parties, the evidence supports a conviction when the actor was physically present at the commission of the offense and encouraged the commission of the offense either by words or other agreement. *See Ransom v. State*, 920 S.W.2d 288, 302 (Tex. Crim. App. 1994). "'[T]he evidence must show that at the time of the offense, the parties were acting together, each contributing some part towards the execution of their common purpose.'" *Marvis v. State*, 3 S.W.3d 68, 73 (Tex. App.—Houston [14th Dist.] 1999, pet. granted) (quoting *Burdine v. State*, 719 S.W.2d 309, 315 (Tex. Crim. App. 1986) (en banc)). To determine whether the defendant was a party, we may examine the events occurring before, during, and after the commission of the offense and rely on the actions of the defendant which show an understanding of a common design to commit the offense. *See Ransom*, 920 S.W.2d at 302.

Active Participation in the Aggravated Robbery

First, the appellant contends that the evidence is insufficient to show that he was an active participant in the aggravated robbery. After reviewing the record, we find the evidence is sufficient to show that the appellant actively participated as a party in the offense.[2]

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[2] When a general verdict is returned, the conviction may stand upon any theory properly presented to the jury in the charge. *See McDuff v. State*, 939 S.W.2d 607, 614 (Tex. Crim. App. 1997). The charge contained the definition of the law of parties as well as the application on the law of parties.

It is clear from the complainants' testimony alone that the appellant took an active role in the robbery, taking affirmative steps to remove the television set from the Honeycutt home and even commenting on his intention to do so. Marvin testified that the appellant said, "Well, we're going to take the t.v." Marvin stated that he saw the appellant trying to unplug and lift the television set. According to Marvin, the appellant took these actions while a woman in the group held a box-cutter to Marvin's throat. The appellant's active participation in the offense is also supported by Toby's testimony. According to Toby, the appellant punched him four or five times, knocking him out. When Toby regained consciousness, the appellant was on top of him. Toby testified that the appellant threatened to cut his throat, stating "I'm a crazy motherfucker. I don't give a fuck; *I'll kill you.*" This evidence plainly shows that the appellant was contributing to the execution of a common purpose at the time of the offense by (1) attempting to take the television set while Dana threatened Marvin and (2) repeatedly striking Toby and threatening to kill him.

The appellant relies on the lack of any discussion of taking a television set among the occupants of the car as they were *en route* to the Honeycutt home to argue that there is no evidence of a prior plan to commit aggravated robbery. Although we may examine the events occurring before, during, and after the commission of the offense in determining whether the appellant was a party, the only period for which we *must* have evidence of the parties acting together is at the time of the offense. *See Marvis*, 3 S.W.3d at 73. For this reason, the appellant's reliance on the lack of evidence of a prior plan as the determinative factor in deciding if the appellant was a participant is seriously misplaced. Given the clear testimony of the complaining witnesses (Marvin and Toby), we find there is sufficient evidence to show that the appellant was an active participant in the aggravated robbery.

Evidence of Threats and Injury

Second, we address whether there was sufficient evidence that Toby was threatened or cut with a razor box-cutter. Having found the evidence was sufficient to show the appellant was a party in the offense, we look to whether the evidence is sufficient to show either the appellant or the other party, Dana, used or exhibited a razor box-cutter to cut or threaten Toby.

Our review of the record demonstrates there is some evidence that the appellant may have used or exhibited a razor box-cutter to cut or threaten Toby. Toby testified that the appellant knocked him unconscious, and when he regained consciousness , the appellant was on top of him and threatened to cut his throat. The evidence showing Dana threatened Toby with a razor box-cutter is even stronger. Larry testified that (1) Dana threatened Marvin with a razor box-cutter, (2) Dana jumped on top of Toby, and (3) Larry heard Toby scream. There is evidence Dana had a razor box-cutter before and after the aggravated robbery. Tonya and Larry testified that Dana threatened Larry on the way to the Honeycutt home. Katrina and Larry testified that after the group left the Honeycutt home, Dana threatened Larry on the way back to West Columbia. The jury could deduce from this evidence that Dana still had the razor box-cutter in her hand when she jumped on Toby and that he screamed because she cut him. Both Marvin and the Sheriff's office investigator testified that they saw blood in Toby's bedroom. The Sheriff's investigator also testified that he later recovered a razor box-cutter from Dana's house. Although it is not clear whether the appellant or Dana threatened Toby, there is sufficient evidence to show one of them cut or threatened to cut Toby with a razor box-cutter. Based on this evidence, we find the appellant's contention that there was insufficient evidence to show that Toby was threatened or cut with a razor box-cutter to be without merit.

Use of Deadly Weapon

Third, we address whether the evidence is insufficient to show a deadly weapon was used or exhibited because the State did not enter the razor box-cutter into evidence. To meet its burden, the State is not required to offer the deadly weapon into evidence. *See Jackson v. State*, 913 S.W.2d 695, 698 (Tex. App.—Texarkana 1995, no pet.) (citing *Victor v. State*, 874 S.W.2d 748, 751 (Tex. App.—Houston [1st Dist.] 1994, pet. ref'd)). To prove a razor box-cutter was used as a deadly weapon, the State must show it was intended to be used or was used to cause serious bodily injury or death. *See Hill v. State*, 913 S.W.2d 581, 583 (Tex. Crim. App. 1996) (citing *Thomas v. State*, 821 S.W.2d 616, 620 (Tex. Crim. App. 1991)). The testimony from Larry, Marvin, and Katrina describing the manner in which Dana used the razor box-cutter is enough to show it was used as a deadly weapon. Therefore, we find the appellant's contention that the evidence is insufficient to show a deadly weapon was used is

without merit.

Evidence of Bodily Injury

Finally, we address whether there was sufficient evidence that Toby suffered bodily injury. Larry testified that the appellant hit Toby in the face, causing Toby to fall to the ground and that Dana then jumped on Toby. Although Larry could not see what Dana was doing, he testified that he could hear Toby screaming. Blood was spattered in the hall and bedroom of the Honeycutt home. Toby testified that he was still bleeding more than twenty minutes after the assault. He had to be taken by ambulance to the hospital. Photographs admitted into evidence showed the extent of his wounds. The Sheriff's investigator who interviewed Toby at the hospital testified that based on his experience in investigating assaults, the injuries Toby sustained were serious. We find the evidence is sufficient to show bodily injury.

The appellant contends that there was no expert evidence that Toby suffered serious bodily injury. Investigator Kincheloe's testimony was admitted as the testimony of a layperson, not an expert. However, the aggravating element in this case was the use or display of a deadly weapon, not serious bodily injury. The offense of robbery only requires proof that the accused caused bodily injury or placed another in fear of imminent bodily injury or death. *See* TEX. PEN. CODE ANN. § 29.02 (Vernon 1994). Therefore, the State did not have to prove *serious* bodily injury.

Viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Therefore, the evidence is legally sufficient to support the appellant's conviction for the offense of aggravated robbery. Accordingly, we overrule the second point of error.

The defense did not call any witnesses. Considering all the evidence, we do not find that the jury's findings are so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. For this reason, we find the evidence is factually sufficient to support the appellant's conviction. Accordingly, we overrule the first point of error.

JURY CHARGE

In his fourth point of error, the appellant contends the trial court committed fundamental error in its charge to the jury because two of the application paragraphs in the jury charge do not include the element of theft, as charged in the indictment. We find all four parts of the application paragraph include the element of theft as charged in the indictment, i.e., they all have a section stating "in the course of committing theft of property owned by Marvin Honeycutt and with intent to obtain or maintain control of said property." Accordingly, we find no merit in the appellant's contention that the application paragraphs in the charge fail to include the element of theft.

Additionally, the appellant contends that the definition of aggravated robbery in the jury charge includes the element of robbery instead of theft, and therefore, the jury could not have considered the application paragraphs which contained the element of theft. The definition of aggravated robbery given in the charge mirrors the language of section 29.03 of the Texas Penal Code, which provides that the person charged with aggravated robbery must commit the offense of robbery. Immediately after the definition of aggravated robbery, appears the definition of robbery, which includes the element "in the course of committing theft." The robbery definition reflects the language found in section 29.02 of the Texas Penal Code. The definition of theft is provided, i.e., when a person "unlawfully appropriates property with intent to deprive the owner of property," and mirrors the language of section 31.03 of the Texas Penal Code. Additionally, the jury charge contained definitions of several other key words and phrases — "appropriate," "deprive," "in the course of committing theft," "attempt," "property," "consent," "effective consent," "owner", and "possession." We find the definition section of the jury charge included all of the necessary elements and definitions for the offense of aggravated robbery, including the element of theft. Therefore, we overrule the fourth point of error.

INEFFECTIVE ASSISTANCE OF COUNSEL

In his third point of error, the appellant asserts his trial counsel was ineffective for eight different reasons: (1) asking Katrina on cross-examination if Toby and the appellant were actually fighting because there was no testimony before the jury regarding the assault; (2) allowing evidence of an extraneous offense

to come in without objection; (3) allowing evidence from Larry's written statement to be heard by the jury without objection; (4) allowing the prosecutor to ask leading questions of Toby and Officer Kincheloe without objecting; (5) waiting to object until damaging information was before the jury; (6) failing to object to the jury charge; (7) failing to request an instruction or move for a mistrial after an objection was sustained; and (8) allowing the prosecutor to show the razor box-cutter to the jury even though it was not in evidence.

Claims of ineffective assistance of counsel are evaluated under the two prong analysis articulated in *Strickland v. Washington*, 466 U.S. 668 (1984). *See Thompson v. State*, 9 S.W.3d 808, 812 (Tex. Crim. App. 1999). The first prong of *Strickland* requires the appellant to demonstrate that trial counsel's representation fell below an objective standard of reasonableness under prevailing professional norms. *See Strickland*, 466 U.S. at 688. To satisfy this prong, the appellant must (1) rebut the presumption that counsel is competent by identifying the acts or omissions of counsel that are alleged as ineffective assistance and (2) affirmatively prove that such acts and omissions fell below the professional norm of reasonableness. *See McFarland v. State*, 928 S.W.2d 482, 500 (Tex. Crim. App. 1996). The reviewing court will not find ineffectiveness by isolating any portion of trial counsel's representation, but will judge the claim based on the totality of the representation. *See Thompson*, 9 S.W.3d at 813.

The second prong of *Strickland* requires the appellant to show prejudice from the deficient performance of his attorney. *See Hernandez v. State*, 988 S.W.2d 770, 772 (Tex. Crim. App. 1999). To establish prejudice, the appellant must prove there is a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. *See Jackson v. State*, 973 S.W.2d 954, 956 (Tex. Crim. App. 1998). A reasonable probability is "a probability sufficient to undermine confidence in the outcome of the proceedings." *Id*. The appellant must prove his claims by a preponderance of the evidence. *See id*.

In any case analyzing the effective assistance of counsel, we begin with the strong presumption that counsel was effective. *See Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994) (en banc). We presume counsel's actions and decisions were reasonably professional and were motivated by sound

trial strategy. *See id.* The appellant has the burden of rebutting this presumption by presenting evidence illustrating why trial counsel did what he did. *See id.* The appellant cannot meet this burden if the record does not affirmatively support the claim. *See Jackson*, 973 S.W.2d at 957 (finding inadequate record on direct appeal to evaluate whether trial counsel provided ineffective assistance); *Phetvongkham v. State*, 841 S.W.2d 928, 932 (Tex. App.—Corpus Christi 1992, pet. ref'd, untimely filed) (finding inadequate record to evaluate ineffective assistance claim). *See also Beck v. State*, 976 S.W.2d 265, 266 (Tex. App.—Amarillo 1998, pet. ref'd) (finding inadequate record for ineffective assistance claim, citing numerous other cases with inadequate records to support ineffective assistance claim). A record that specifically focuses on the conduct of trial counsel is necessary for a proper evaluation of an ineffectiveness claim. *See Kemp v. State*, 892 S.W.2d 112, 115 (Tex. App.—Houston [1st Dist.] 1994, pet. ref'd). This kind of record is best developed in a hearing on an application for a writ of habeas corpus or a motion for new trial. *See id*; *see also Thompson*, 9 S.W.3d at 814 (quoting *Jackson*, 973 S.W.2d at 957 (stating that when counsel is allegedly ineffective because of errors of omission, collateral attack is the better vehicle for developing an ineffectiveness claim)).

In this case, the record is silent as to the reasons the appellant's trial counsel chose the course he did. The appellant did not file a motion for a new trial or a habeas corpus petition and therefore failed to develop evidence of trial counsel's strategy. Because we are unable to conclude that the appellant's trial counsel's performance fell below an objective standard of reasonableness without evidence in the record, the first prong of *Strickland* is not met. Because the first prong of *Strickland* is not met, it is not necessary to reach the second prong. While the appellant may still pursue his ineffective assistance of counsel claim through an application for writ of habeas corpus,[3] he is not entitled to any relief by this direct appeal. Accordingly, we overrule the third point of error.

Having overruled all of the appellant's points of error, we affirm the judgment of the trial court.

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[3] *See Thompson*, 9 S.W.3d at 814.

/s/ Kem Thompson Frost
Justice

Judgment rendered and Opinion filed April 20, 2000.

Panel consists of Justices Yates, Fowler and Frost.

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