Affirmed and Opinion filed April 26, 2001.

In The

Fourteenth Court of Appeals

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NO. 14-98-01290-CR

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MARCUS ANTHONY GREEN, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 182nd District Court
Harris County, Texas
Trial Court Cause No. 755,913

O P I N I O N

Marcus Anthony Green appeals his jury conviction for aggravated robbery. The jury assessed his punishment at 22-1/2 years imprisonment, enhanced by one prior felony conviction. In two issues, appellant contends: (1) the evidence is legally and factually insufficient to sustain his conviction, and (2) his in-court identification was tainted by an impermissibly suggestive pretrial identification procedure. We affirm.

FACTS

On June 19, 1997, Ernest Harper was using a pay telephone when Puriel McGowan drove up and stopped in front of him in his red Pontiac Grand AM. Appellant got out of the passenger side of McGowan's car, walked up to Harper, pointed his .45 caliber automatic to Harper's head, and said: "Give me what you got, Little Dog. I ain't going to kill you, just cooperate." Fearing for his life, Harper gave appellant his beeper, radio "boom box," and some audio-cassettes. Although appellant covered the lower part of his face with his free arm, Harper stated he got a close look at appellant and instantly recognized him in court as the man sitting next to his trial counsel.

After robbing Harper, appellant got back in McGowan's Pontiac Grand AM, and McGowan accelerated away from the scene with his tires spinning, squealing, and "burning rubber." Officer Erik ter Muelen heard the squealing tires, and observed McGowan driving away at high speed. Officer ter Muelen followed McGowan and observed someone throw a black box out of the passenger window. Officer Eric Crawford was also patrolling the area, and he heard the squealing tires. Officer Crawford observed McGowan coming toward him at a high rate of speed. After observing McGowan violate several traffic laws, Officer Crawford stopped McGowan, and ter Muelen drove up and assisted Crawford.

After being robbed by appellant, Harper walked down the street a short distance and met Kenneth Davis. Harper told Davis he had been "jacked," and Davis told Harper he had seen the robbery. Davis saw McGowan's car drive off with the police chasing him. Davis drove Harper a short distance and saw the police standing by the red Pontiac. After Davis stopped, Harper got out and walked up to the officers and told them he had been robbed and identified appellant as the man that robbed him at gunpoint. Thereafter, ter Muelen recovered the black box he saw thrown out of McGowan's car, and Harper positively identified it as the "boom box" taken from him by appellant. Officer ter Muelen called a police helicopter for assistance in locating the gun. The helicopter was able to find the gun with a heat-seeking device, then notified ter Muelen exactly where it was. Officer ter Muelen found a .45 automatic pistol, and Harper

identified the gun as being the same type gun used by appellant in the robbery.

SUFFICIENCY OF THE EVIDENCE

In his first issue, Appellant challenges the legal and factual sufficiency of the evidence to sustain his conviction. Essentially, he argues that Harper and Davis were not credible, and the police officers did not adequately link appellant to the crime.

Standard of Review

In reviewing the legal sufficiency of the evidence, we consider all the evidence, both State and defense, in the light most favorable to the verdict. *Houston v. State*, 663 S.W.2d 455, 456 (Tex.Crim.App.1984); *Garrett v. State*, 851 S.W.2d 853, 857 (Tex.Crim.App. 1993). In reviewing the sufficiency of the evidence in the light most favorable to the verdict or judgment, the appellate court is to determine whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *Ransom v. State*, 789 S.W.2d 572, 577 (Tex.Crim.App. 1989), *cert. denied*, 110 S.Ct. 3255 (1990). This standard is applied to both direct and circumstantial evidence cases. *Chambers v. State*, 711 S.W.2d 240, 245 (Tex.Crim.App. 1986). The jury is the exclusive judge of the facts, credibility of the witnesses, and the weight to be given to the evidence. *Chambers v. State*, 805 S.W.2d 459, 462 (Tex.Crim. App. 1991). In conducting this review, the appellate court is not to re-evaluate the weight and credibility of the evidence, but act only to ensure the jury reached a rational decision. *Muniz v. State*, 851 S.W.2d 238, 246 (Tex.Crim.App.1993); *Moreno v. State*, 755 S.W.2d 866, 867 (Tex.Crim.App1988). In making this determination, the jury can infer knowledge and intent from the acts, words, and conduct of the accused. *Dues v. State*, 634 S.W.2d 304, 305 (Tex.Crim.App.1982).

The sufficiency of the evidence to support a conviction should no longer be measured by the jury charge actually given but rather measured by the elements of the offense as defined by a hypothetically correct charge. *See Curry v. State*, 975 S.W.2d 629, 630 (Tex.Crim.App.1998). "Such a charge would be one that accurately sets out the law, is authorized by the indictment, does not unnecessarily increase the State's burden of proof or

unnecessarily restrict the State's theories of liability and adequately describes the particular offense for which the defendant was tried." *Malik v. State*, 953 S.W.2d 234, 240 (Tex.Crim.App.1992).

Under *Clewis v. State*, 922 S.W.2d 126, 133 (Tex.Crim.App.1996), a court of appeals reviews the factual sufficiency of the evidence when properly raised after a determination that the evidence is legally sufficient. *Id*. In conducting a factual sufficiency review, the court of appeals views all the evidence without the prism of "in the light most favorable to the prosecution" and sets aside the verdict only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *Id*. In conducting a factual sufficiency review, the court of appeals reviews the fact finder's weighing of the evidence and is authorized to disagree with the fact finder's determination. This review, however, must be appropriately deferential so as to avoid an appellate court's substituting its judgment for that of the jury. If the court of appeals reverses on factual sufficiency grounds, it must detail the evidence relevant to the issue in consideration and clearly state why the jury's finding is factually insufficient. The appropriate remedy on reversal is a remand for a new trial. *Id.*

A factual sufficiency review must be appropriately deferential so as to avoid the appellate court's substituting its own judgment for that of the fact finder. *Santellan v. State*, 939 S.W.2d 155, 164 (Tex.Crim.App.1997). This court's evaluation should not substantially intrude upon the fact finder's role as the sole judge of the weight and credibility of witness testimony. *Id.* The appellate court maintains this deference to the fact findings, by finding fault only when "the verdict is against the great weight of the evidence presented at trial so as to be clearly wrong and unjust." *Id.*

The court of criminal appeals has recently clarified *Clewis* addressing the factual sufficiency standard of review. *See Johnson v. State*, 23 S.W.3d 1, 42 (Tex.Crim.App. 2000). The court of criminal appeals held, in pertinent part:

> We hold, therefore, that our opinion in *Clewis* is to be read as adopting the complete civil factual sufficiency formulation. Borrowing in part from Justice Vance's concurring opinion in *Mata v. State*, 939 S.W.2d 719, 729

> (Tex.App.--Waco 1997, no pet.), the complete and correct standard a reviewing court must follow to conduct a *Clewis* factual sufficiency review of the elements of a criminal offense asks whether a neutral review of all the evidence, both for and against the finding, demonstrates that the proof of guilt is so obviously weak as to undermine confidence in the jury's determination, or the proof of guilt, although adequate if taken alone, is greatly outweighed by contrary proof.

Johnson, 23 S.W.3d at 42.

Discussion

Appellant argues that the credibility of Harper and Davis was impeached by their prior convictions. He further asserts that because Harper testified that he had an "anxiety" condition, he was mentally impaired and his ability to observe was not reliable. Appellant also asserts that Davis was too far away from the robbery to make an accurate observation of the robbery. He also argues that the officers did not sufficiently link appellant to the crime.

The State had the burden to prove that appellant, while in the course of committing theft of property owned by Ernest Harper and with the intent to obtain or maintain control of the property, intentionally or knowingly threatened or placed Ernest Harper in fear of imminent bodily injury or death, and the appellant used or exhibited a deadly weapon, to-wit: a firearm. TEX. PEN. CODE ANN. § 29.03(a)(2) (Vernon 1994 & Supp. 2000).

The evidence shows that appellant pointed a .45 automatic pistol at Ernest Harper, demanded his property, that he intentionally and knowingly threatened Ernest Harper, that Ernest Harper was in fear of his life, that appellant took Harper's radio "boom box," a "beeper," and some audio-cassettes. Appellant's defense consisted of re-examination of Davis and Harper. Davis said he was at the location selling drugs; that he had been convicted for a conspiracy to distribute cocaine; that he drove Harper to the arrest scene; that Harper told the officers that appellant and McGowan were the "guys that robbed" him; and that appellant and McGowan were sitting in the rear of the police car when Harper identified them. Davis stated he could not personally identify appellant from his observations of the robbery.

Harper testified that appellant and McGowan were sitting in the police car when he identified them. Appellant did not testify.

Appellant's defense is an attack on the credibility of the witnesses and the weight to be given their testimony. The jury is the exclusive judge of the facts, credibility of the witnesses, and the weight to be given to the evidence. *Chambers,* 805 S.W.2d at 462. We hold that the evidence was legally sufficient to sustain appellant's conviction.

Appellant asserts the same evidence is factually insufficient to sustain his conviction. Appellant's argument goes to the weight and credibility of the evidence. What weight to give contradictory testimonial evidence is within the sole province of the trier of the fact, because it turns on an evaluation of credibility and demeanor. *Cain v. State,* 958 S.W.2d 404, 408-09 (Tex.Crim.App.1997). Accordingly, we must show deference to the jury's findings. *Id.* at 409. A decision is not manifestly unjust merely because the jury resolved conflicting views of the evidence in favor of the State. *Id.* at 410. In performing a factual sufficiency review, the courts of appeals are required to give deference to the jury verdict, examine *all* of the evidence impartially, and set aside the jury verdict "only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust." *Cain*, 958 S.W.2d at 410; *Clewis,* 922 S.W.2d at 129. We have examined all of the evidence impartially, a neutral review, and do not find that proof of aggravated robbery is so "obviously weak as to undermine confidence in the jury's determination." *Johnson,* 23 S.W.3d at 42. Under the new *Clewis-Johnson* test, we further find that the proof of guilt is not greatly outweighed by appellant's contrary proof. *Id.* Considering all of the evidence, measuring it against the charge, and giving due deference to the role of the jury as fact finder, we cannot say that the finding of guilt, beyond a reasonable doubt, and the implied finding against the defensive issues, beyond a reasonable doubt, are so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *See Reaves v. State*, 970 S.W.2d 111, 118 (Tex.App.-Dallas 1998, no pet.). We overrule appellant's contentions in issue one that the evidence is legally and factually insufficient to sustain his conviction.

THE PRETRIAL IDENTIFICATION PROCEDURE

In his second issue, appellant contends he has been denied due process of law because his in-court identification by Harper was tainted by an impermissibly suggestive pretrial identification procedure. Appellant did not file a motion to suppress his in-court identification on these grounds, nor did he object to his identification by the State's witnesses at trial.

The evidence shows that Harper went up to the officers while they were detaining appellant and McGowan and immediately told them that appellant and McGowan robbed him. The record does not show any involvement by the police in appellant's identification. Harper's identification was spontaneous and without any action by the police. By failing to object to the identification testimony, the State contends that appellant has waived any error as to the admission of the identification testimony.

In *Archie v. State*, the defendant was charged with the offense of aggravated rape, which event allegedly occurred on April 4, 1977. 615 S.W.2d 762, 764 (Tex.Crim.App.1981). On April 19, 1977, the prosecutrix saw the defendant in the security office of the university police. *Id*. The facts there reflect that the prosecutrix had an adequate opportunity to view the defendant at the time of the offense and that her identification was not tainted by any confrontation. *Id*. The court of criminal appeals stated that there was no objection offered as to the identification and therefore, nothing was presented for review, citing *Johnson v. State*, 504 S.W.2d 493, 495 (Tex.Crim.App.1974); Ashford v. State, 502 S.W.2d 27, 28 (Tex.Crim.App.1973); and *Pete v. State,* 501 S.W.2d 683, 687 (Tex.Crim.App.1973). *Id*.

Because appellant in this case failed to object to his in-court identification by the State's witnesses, he has preserved nothing for our review. *Archie,* 615 S.W.2d at 764; *see also Paez v. State*, 995 S.W.2d 163, 172-173 (Tex.App.-San Antonio 1999, pet. ref'd). We overrule appellant's contentions the his in-court identification was tainted by an impermissibly suggestive pretrial identification procedure.

We affirm the judgment of the trial court.

/s/ Maurice Amidei
Justice

Judgment rendered and Opinion filed April 26, 2001.

Panel consists of Justices Sears, Lee, and Amidei.*

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*Senior Justices Ross A. Sears and Norman Lee, Former Justice Maurice Amidei sitting by assignment