Affirmed and Opinion filed August 23, 2001.

In The

Fourteenth Court of Appeals

NO. 14-99-01123-CR

CORY AVERY TALBERT, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 230th District Court
Harris County, Texas
Trial Court Cause No. 818,978

O P I N I O N

Appellant, Cory Avery Talbert, appeals his conviction for aggravated kidnapping. We affirm.

I. BACKGROUND

After returning from a trip to Galveston, Texas, Adonis Abbott heard someone was looking for him and went with his friend, Kentrell Thurman, between 10:30 and 11:00 p.m, to a tire shop at the intersection of Crane and Falls streets to investigate. Abbott and Thurman began to walk toward a house behind the shop when Abbott heard Thurman say "Why he got that shotgun?" Seven or eight people gathered and began yelling at Abbott.

Someone known to Abbott as "West" was pointing a shotgun at Abbott and prevented him from getting back to his car. Abbott was forced, at gunpoint, to sit and wait for ten to fifteen minutes until appellant arrived.

When appellant arrived, he began asking Abbott the whereabouts of his stolen items. Abbott responded that he did not know "what [appellant] was talking about." Appellant then hit Abbott in the jaw with his hand and knocked him to the ground. The group of people gathered began to pistol whip Abbott, and he passed out. When Abbott came to, he was handcuffed and appellant blindfolded him. Abbott was placed, blindfolded and handcuffed, into a car with appellant and driven to a house. Inside the house, the blindfold was removed and appellant poured rubbing alcohol on Abbott and set him on fire. Abbott broke the handcuffs and fled after hitting appellant. He suffered first through third degree burns and trauma to this head.

Appellant was charged by indictment with the felony offense of aggravated kidnapping. The indictment was enhanced with a 1997 conviction for delivery of a simulated controlled substance. Appellant pled true to the enhancement paragraph and pled not guilty to the charged offense. A jury convicted appellant of the charged offense. The court found the enhancement paragraph true and sentenced appellant to thirty years' confinement in the Institutional Division of the Texas Department of Criminal Justice. Appellant now challenges his conviction raising three points of error.

II. ISSUES PRESENTED FOR REVIEW

In his first point of error, appellant contends that the trial court abused its discretion in failing to grant appellant's motion for a directed verdict. In his second point of error, appellant contends that the trial court forced appellant to proceed to trial without the benefit of twelve capable jurors, in violation of section 36.29 of the Texas Code of Criminal Procedure. In his third point of error, appellant contends the trial court committed fundamental error in refusing to apply the law of the parties to the facts of the case.

III. LEGAL SUFFICIENCY

In his first point of error, appellant contends the trial court erred in failing to grant appellant's motion for an instructed verdict. An appeal from denial of an instructed verdict challenges the legal sufficiency of the evidence to support a conviction. *McDuff v. State*, 939 S.W.2d 607, 613 (Tex. Crim. App. 1997).

In reviewing the legal sufficiency of the evidence, we view the evidence in the light most favorable to the verdict and decide whether a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *See Wilson v. State*, 7 S.W.3d 136, 141 (Tex. Crim. App. 1999) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). We accord great deference "'to the responsibility of the trier of fact [to fairly] resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.'" *Clewis v. State*, 922 S.W.2d 126, 133 (Tex. Crim. App. 1996) (quoting *Jackson*, 443 U.S. at 319). We presume that any conflicting inferences from the evidence were resolved by the jury in favor of the prosecution, and we defer to that resolution. *Id.* at n.13 (citing *Jackson*, 443 U.S. at 326). In our review, we determine only whether "'*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *King v. State*, 29 S.W.3d 556, 562 (Tex. Crim. App. 2000) (citing *Jackson*, 443 U.S. at 319).

The essential elements of aggravated kidnapping are (1) a person; (2) intentionally or knowingly; (3) abducts;[1] (4) another person with the intent to inflict bodily injury on him or to violate or abuse him sexually. TEX. PEN. CODE ANN. § 20.04(a)(4) (Vernon 1994 & Supp. 2001). A kidnapping becomes a completed offense when a restraint[2] is effected

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[1] "Abduct" means to restrain a person with the intent to prevent his liberation by secreting or holding him in a place where he is not likely to be found or by using or threatening deadly force. TEX. PEN. CODE ANN. § 20.01(2)(A)–(B) (Vernon 1994 & Supp. 2001).

[2] Restraint means to restrict a person's movements without consent, so as to interfere substantially with the person's liberty, by moving the person from one place to another or by confining the person. *Id.* § 20.01(1). A restraint is without consent when accomplished by force, intimidation, or deception. *Id.* §

and there is evidence the actor intended to prevent liberation, and that he intended to do so by either secretion or deadly force. *Brimage v. State*, 918 S.W.2d 466, 475 (Tex. Crim. App. 1996). An aggravated kidnapping takes place where, *inter alia*, the person commits the offense with the intent to inflict bodily injury or to terrorize or where the person uses or exhibits a deadly weapon during the commission of the offense. TEX. PEN. CODE. ANN. § 20.04.

Abbott testified he was forced to sit for ten to fifteen minutes until appellant arrived. When appellant arrived, he hit Abbott with his hand in the jaw, causing Abbott to fall. Abbott did not feel free to leave. Several of the people gathered pistol whipped Abbott about the head. He was knocked unconscious and when he came to, appellant blindfolded Abbott. Abbott was forced into a house while blindfolded and handcuffed. While in the house, the blindfold was removed and appellant doused Abbott, still handcuffed, with rubbing alcohol and set him on fire. Abbott managed to break the handcuffs and escape after appellant left the room. Abbott testified that he was afraid, did not want to be there with appellant, and did not feel free to leave. Thurman testified that he heard appellant, referring to Abbott, state that he "was burning . . . [him] and he got away." When Thurman asked appellant not to kill him, appellant said "if I was going to kill you I would have put you in there with [Abbott]".

From this testimony, a rational jury could have concluded that appellant intentionally abducted Abbott by blindfolding him, walking him into the house, and keeping him in the house while he was handcuffed. Moreover, a rational jury could have concluded that appellant intended to cause bodily injury to Abbott when he doused him with alcohol and set him on fire. Finally, a rational jury could have found that appellant used a deadly weapon in committing the offense by dousing Abbott with a flammable liquid and using a lighter to set Abbott on fire. Thus, viewing the evidence under our

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20.01(1)(A).

deferential standard, we conclude that a rational trier of fact could have found, beyond a reasonable doubt, that appellant committed the offense of aggravated kidnapping. *See* TEX. PEN. CODE ANN. § 20.04(a)(4).

Appellant's first point of error is overruled.

IV. CAPABILITY OF CHALLENGED JUROR

In appellant's second point of error, he contends that the trial court abused its discretion by requiring appellant to proceed to trial without the benefit of twelve capable jurors, over appellant's objection, in violation of section 36.29(a) of the Texas Code of Criminal Procedure. *See* TEX. CODE CRIM. PROC. ANN. art. 36.29(a) (Vernon Supp. 2001). Before trial began and after the jurors were sworn in, the trial court learned from deputies that juror number 30 had been crying during the lunch hour, did not eat, and felt she was unable to serve. She had told them she possessed "a short attention span and no memory" and did not believe she would "be a very good juror." When questioned about the matter, she explained to the trial court: "I can't remember things. What I hear today, I won't remember tomorrow." Although she had not been diagnosed with any particular affliction, she explained: "I just know. It happens to me. I would have to write down everything."

Article 36.29(a) provides that "[n]ot less than twelve jurors can render and return a verdict in a felony case . . . however, when pending the trial of any felony case, one juror may die or be disabled from sitting at any time before the charge of the court is read to the jury, the remainder of the jury shall have the power to render the verdict . . . ." TEX. CODE CRIM. PROC. ANN. art. 36.29(a) (Vernon Supp. 2001). The term "disability" under art. 36.29 is not limited to physical disease, but also includes "any condition that inhibits a juror from fully and fairly performing the functions of a juror." *Reyes v. State*, 30 S.W.3d 409, 411 (Tex. Crim. App. 2000). Such conditions include any physical illness, mental condition, or emotional state that hinders a juror's ability to perform her duties. *Id.* The trial court determines whether a juror is disabled, and we review that determination for an

abuse of discretion. *Landrum v. State*, 788 S.W.2d 577, 579 (Tex. Crim. App. 1990). Trial courts have been held not to have abused their discretion in refusing to discharge jurors who merely exhibited a lack of focus or mental concentration but are nevertheless able to perform their duties. *See Bass v. State*, 622 S.W.2d 101, 106–07 (Tex. Crim. App. 1981).

After learning of juror number 30's concerns regarding her poor memory, the trial judge reminded her that the court permits the jurors to take notes, that the court would provide paper and pen, and that she could refresh her recollection with her notes, if necessary. When the court asked whether she felt that being able to take notes and refresh her memory from the notes would assist her with her memory, she responded, "Well, it will, yes." The juror also confirmed that having disputed testimony read back would assist her deliberations. Appellant's trial counsel then questioned the juror. The juror indicated she would not have trouble following the evidence, based on any attention problem, if she were able to "write it down . . . . [and] refer back to it."

The juror's explanation of her concerns about her memory and attention indicates nothing more than a lack of confidence in her abilities. When reminded that she could take notes during trial, refresh her memory with those notes, and possibly have disputed testimony read back to her, the juror seemed confident that she would not encounter attention or memory problems that would prevent her service as a juror in the case. Nothing in the record indicates she thereafter encountered any difficulties performing her duties as a juror. The record reveals that the only note sent out by the jurors requested copies of photographs from the crime scene and the handcuffs allegedly used.

Appellant has failed to show that juror number 30 had any physical illness, mental condition, or emotional state that would hinder performance of her duties as a juror. Accordingly, we find that the trial court did not abuse its discretion in refusing to discharge juror number 30.

Appellant's second point of error is overruled.

V. APPLICATION OF THE LAW OF PARTIES

In his third and final point of error, appellant contends the trial court committed fundamental error by failing to apply the law of parties to the facts of the case in the application paragraph of the jury charge. Specifically, appellant complains that, although the charge instructed that one's mere presence does not make one a party to an offense, the charge was defective in that it (1) failed to instruct the jury that a defendant's knowledge a crime is being committed does not establish that a defendant directed, aided, abetted, or solicited a crime and (2) failed to "set forth whether defendant solicited, encouraged, directed, aided, or attempted to aid (or combination thereof) the other person to commit the offense, as raised by the evidence." Appellant complains that the jury charge "failed to instruct the jury as to what acts the Appellant committed that would sustain his conviction as a party to the offense of Aggravated Kidnaping." The application paragraphs of the jury charge provide:

> Now, if you find from the evidence beyond a reasonable doubt that on or about the 8th day of February, 1999, in Harris County, Texas, the defendant, Cory Avery Talbert, did then and there unlawfully, intentionally or knowingly abduct Adonis Abbott, without his consent, with intent to prevent his liberation by secreting or holding Adonis Abbott in a place where Adonis Abbott was not likely to be found and with intent to facilitate the commission of a felony, namely aggravated assault; or if you find from the evidence beyond a reasonable doubt that on or about the 8th day of February, 1999, in Harris County, Texas, another person or persons, did then and there unlawfully, intentionally or knowingly abduct Adonis Abbott, without his consent, with intent to prevent his liberation by secreting or holding Adonis Abbott in a place where Adonis Abbott was not likely to be found and with intent to facilitate the commission of a felony, namely aggravated assault, and that the defendant, Cory Avery Talbert, with the intent to promote or assist the commission of the offense, if any, solicited, encouraged, directed, aided or attempted to aid the other person or persons to commit the offense if he did; or
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> If you find from the evidence beyond a reasonable doubt that on or about the 8th day or February, 1999, in Harris County, Texas, the defendant, Cory Avery Talbert, did then and there unlawfully[,] intentionally or knowingly abduct Adonis Abbott, without his consent, with intent to prevent his liberation by secreting or holding Adonis Abbott in a place where Adonis Abbott was not likely to be found and with intent to inflict bodily injury on Adonis Abbott; or if you find from the evidence beyond a reasonable doubt

> that on or about the 8th day or February, 1999, in Harris County, Texas, another person or persons, did then and there unlawfully[,] intentionally or knowingly abduct Adonis Abbott, without his consent, with intent to prevent his liberation by secreting or holding Adonis Abbott in a place where Adonis Abbott was not likely to be found and with intent to inflict bodily injury on Adonis Abbott, and that the defendant, Cory Avery Talbert, with the intent to promote or assist the commission of the offense, if any, solicited, encouraged, directed, aided or attempted to aid the other person or persons to commit the offense, if he did; or
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> If you find from the evidence beyond a reasonable doubt that on or about the 8th day of February, 1999, in Harris County, Texas, the defendant, Cory Avery Talbert, did then and there unlawfully[,] intentionally or knowingly abduct Adonis Abbott, without his consent, with intent to prevent his liberation by secreting or holding Adonis Abbott in a place where Adonis Abbott was not likely to be found and with intent to terrorize Adonis Abbott; or if you find from the evidence beyond a reasonable doubt that on or about the 8th day or February, 1999, in Harris County, Texas, another person or persons, did then and there unlawfully intentionally or knowingly abduct Adonis Abbott, without his consent, with intent to prevent his liberation by secreting or holding Adonis Abbott in a place where Adonis Abbott was not likely to be found and with intent to terrorize Adonis Abbott, and that the defendant, Cory Avery Talbert, with the intent to promote or assist the commission of the offense, if any, solicited, encouraged, directed, aided or attempted to aid the other person or persons to commit the offense, if he did, then you will find the defendant guilty as charged in the indictment.
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> Unless you so find beyond a reasonable doubt, or if you have a reasonable doubt thereof, you will acquit the defendant and say by your verdict "Not Guilty."

Appellant has failed to adequately brief this issue. *See* TEX. R. APP. P. 38.1(h). Appellant cites no authority, nor have we found any, requiring a trial court to caution jurors against transforming a defendant's mere knowledge of a crime into a defendant's directing, aiding, abetting, or soliciting another in the commission of a crime. In any event, the notion that mere knowledge of a crime will not create party liability is implicit in the instruction's requirement of *action* on the defendant's part:

> All persons are parties to an offense who are guilty of *acting together* in the commission of the offense. A person is criminally responsible as a

> party to an offense if the offense is committed by his own *conduct*, by the conduct of another for which he is criminally responsible, or by both.
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> 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.[3]

Mere knowledge of aggravated kidnapping could not, under this instruction, be equated with *acts* of soliciting, encouraging, directing, aiding, or attempting to aid another to commit the offense.

Appellant cites no authority suggesting the jury charge must explicitly outline whether appellant's involvement as a party derives from his acts of soliciting, encouraging, directing, aiding, or attempting to aid another's commission of the offense. By failing to do so, appellant has waived his complaint. *See* TEX. R. APP. P. 38.1(h). This waiver notwithstanding, we find the argument lacks merit. We are aware of no requirement that the charge specify the precise means by which one accused of being a party to an offense promoted or assisted the commission of the offense by another. Under Texas Penal Code section 7.02, the conduct may take the form of soliciting, encouraging, directing, aiding, or attempting to aid another person's commission of an offense, and the jurors may consider any of these alternative means of committing the offense. *See* TEX. PEN. CODE ANN. § 7.02(a)(2); *Johnson v. State*, 739 S.W.2d 299, 311 (Tex. Crim. App. 1987) (finding that a jury charge authorizing conviction if the jury found the defendant committed the offense "either acting alone or with . . . [another] as a party to the offense as that term is hereinbefore defined," failed to sufficiently inform the jury which specific mode or modes of conduct enumerated in § 7.02(a)(2) (whether the accused "solicited, encouraged, directed, aided or attempted to aid) may form an alternative basis for conviction); *Cunningham v. State*, 848 S.W.2d 898, 900 (Tex. App.— Corpus Christi 1993, pet. ref'd) (relying upon *Johnson* in finding the following portion of the charge proper: "ROSS

[3] Emphasis added.

CUNNINGHAM, acting with intent to promote or assist in the commission of that offense, did direct, aid or attempt to aid Charles Poff to commit that offense . . . .).

Appellant's third point of error is overruled.

The judgment of the trial court is affirmed.

/s/ Kem Thompson Frost
Justice

Judgment rendered and Opinion filed August 23, 2001.

Panel consists of Justices Edelman, Frost, and Murphy.[4]

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

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