Affirmed and Opinion filed September 23, 1999.

In The

Fourteenth Court of Appeals

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NO. 14-98-00130-CR

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KEVYN CHARLES SMITH, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 176th District Court
Harris County, Texas
Trial Court Cause No. 760779

O P I N I O N

Appellant, Kevyn Charles Smith, was convicted of aggravated robbery and sentenced to imprisonment for 20 years and payment of a $5000 fine. On appeal, he contends the trial court erred in commenting on the weight of the evidence and in improperly excluding evidence. He also asserts the evidence is legally and factually insufficient to sustain the conviction. We affirm.

On July 20, 1997, two men entered the Motel 6 on Airport Boulevard. One approached the front desk and asked about room rates while the other walked past the desk to the pay phones. The first man then pulled a pistol, leapt over the counter, and held the clerk at gunpoint

while the second man emptied the cash drawer of some $500. The two men fled with the money. During the police investigation, the clerk, Ms. Chandra Henry, went to two line-ups. At the first line-up she was unable to positively identify anyone as the robber. At the second. however, she positively identified the appellant as the gun-wielding robber.

At trial, Ms. Henry again identified Appellant as the robber. Appellant presented an alibi defense, calling seven witness to testify that he was socializing at a car wash during the commission of the offense. He was convicted and now presents four points of error.

Comment on the Weight of the Evidence

In his first point of error, appellant contends the trial court committed reversible error by commenting on the weight of the evidence in violation of Article 38.05 of the Code of Criminal Procedure. Article 38.05 provides that "[i]n ruling upon the evidence, the judge shall not discuss or comment upon the weight of the same or its bearing in the case, but shall simply decide whether or not it is admissible; nor shall he, at any stage of the proceeding previous to the return of the verdict, make any remark calculated to convey to the jury his opinion of the case." TEX. CODE CRIM. PROC. Ann. Art. 38.05 (Vernon 1979); *see also Clark v. State*, 878 S.W.2d 224, 226 (Tex. App.–Dallas 1994, no pet.) (holding that the trial judge should maintain an attitude of impartiality throughout the trial) (citing *Lagrone v. State,* 209 S.W. 411, 415 (1919)); *Livingston v. State*, 782 S.W.2d 12, 14 (Tex.App.–Dallas 1989, pet. ref'd) (holding that to the jury, the language and conduct of the trial court have a special and peculiar weight).

The pertinent testimony is as follows:

> Q: You were present when the judge gave the warnings?
>
> A: Yes, sir.
>
> Q: Did you see the defendant sign his name to the waiver of any of those statutory warnings?
>
> A: That is not required, signature is not required on statutory warning, only the judge's signature.
>
> Q: Only the judge's signature?
>
> A: Yes

Q: And she gave –

A: I gave them the pink copy.

Q: But you are saying the warning was not independent of any law enforcement officer?

A: I'm a law enforcement officer.

Q: But you were present?

A: Yes

THE COURT: Excuse me. Is there a point to this line of questioning?

MR. CURTIS: Well, he's going to say he voluntarily waived his rights and he left the judge –

THE COURT: I'm asking is there a point to this line of questioning? If there is let's get to it.

MR. CURTIS: Judge, I wouldn't be asking it if I didn't think there was a point.

THE COURT: Lets get to it.

MR. CURTIS: That's a comment on the weight of the evidence.

Q: (By Mr. Curtis) Officer Saldivar, did you take the defendant from the place where the judge questioned him to the line-up?

Notably, there was no objection after the judge's last statement. Even assuming that "that's a comment on the weight of the evidence" is a sufficient objection, there is neither a ruling nor an objection to the failure to rule as is required to preserve an issue for appeal. *See* TEX. R. APP. P. 33.1. Even if the issue had been preserved for appeal, the court's comments were not improper. A trial court improperly comments on the weight of the evidence only if it makes a statement that implies approval of the State's argument, that indicates any disbelief in the defense's position, or that diminishes the credibility of the defense's approach to its case. *See Clark*, 878 S.W.2d at 226.

The judge's remark appears to have been an attempt to save time, and we do not find it to necessarily be a comment on the weight of the evidence. The judge asked if there was a point to the questioning. Once the attorney said there was, the judge simply instructed him to

"get to it." This does not imply approval of the State's argument, indicate any disbelief in the defense's position, or diminish the credibility of the defense's approach. It appears to be simply an attempt to avoid the needless consumption of time.[1] Innocuous statements by a judge are not comments on the weight of the evidence. *See Bermudez v. State*, 504 S.W.2d 868 (Tex. Crim. App. 1974) (ruling that trial court's comment "you look faintly amused by this" made by court to defendant who was smiling while on witness stand was not a comment on weight of evidence but an effort by court to impress upon defendant serious nature of proceedings); *Rosales v. State*, 932 S.W.2d 530, 538 (Tex. App.–Tyler 1995, pet. ref'd) (holding no reversible error resulted from trial court's comment while overruling relevant objection, that disputed testimony seemed "a little far afield"); *Carrasquillo v. State*, 742 S.W.2d 104, 113 (Tex. App.–Fort Worth 1987, no pet.) (ruling that trial court's comment in overruling defendant's hearsay objection to testimony of State's witness on direct examination, "that appears to be a very small item there," was not a comment on evidence calculated to benefit State or prejudice defendant).

Accordingly, we find the judge's statement was not a comment on the weight of the evidence. Appellant's first point of error is overruled.

Admissibility of Declaration against Interest

Appellant's second point of error is that the court improperly refused to admit hearsay testimony by Dawnakesha Smith, Appellant's sister. After appellant's arrest, Jason Harrison and Dawnakesha Smith allegedly met on a public street and during their conversation, Harrison said (1) he committed the robbery, (2) Kevyn Smith was not with him, and (3) he would so testify at trial. Harrison, however, did not testify at trial. Nevertheless, appellant sought to

[1] In *Hoang v. Texas*, the court found comments such as an admonishment to defense counsel to "[q]uit being repetitious" and "let's get to the point" to be similarly acceptable attempts to move the trial along. *See* No. 06-98-00187-CR, 1999 WL 378133, at *2-3 (Tex. App.–Texarkana June 11, 1999, no pet. h.).

introduce the alleged statement through Dawnakesha Smith as a statement against interest under Tex. R. Evid. 803(24).[2]

The standard of review of a trial court's decision to admit or exclude a hearsay statement under Rule 803(24) is whether the trial court abused its discretion. *See Bingham v. State*, 987 S.W.2d 54, 57 (Tex. Crim. App. 1999). Any determination regarding the admissibility of a statement in accordance with rule 803(24) requires a two-step inquiry. First, the trial court must determine whether the statement in question tends to expose the declarant to criminal liability. *Id*. A court may not just assume that a statement is self-inculpatory merely because it is part of a fuller confession. *See Clark v. State*, 947 S.W.2d 650, 654 (Tex. App.–Fort Worth 1997, pet. ref'd) (holding that since Appellant "did not identify or isolate the specific portions" of the testimony which were self-inculpatory the court's exclusion of that testimony was not an abuse of discretion). While Harrison's statement that he robbed a Motel 6 is against his penal interest, the statement that Kevyn Smith was not with him is not "so far tended to subject the declarant to civil or criminal liability. . . that a reasonable person in declarant's position would not have made the statement unless believing it to be true." TEX. R. EVID. 803(24). Since the statement appellant wants to introduce is not a statement against declarant's interest, it is not admissible under 803(24).

Second, the trial court must determine if there are corroborating circumstances that clearly indicate the trustworthiness of the statement. The burden is on the party seeking admission of the statement to establish these corroborating circumstances. *See Davis v.*

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[2] Rule 803(24) defines a "statement against interest" as:

> A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, or to make the declarant an object of hatred, ridicule, or disgrace, that a reasonable person in declarant's position would not have made the statement unless believing it to be true. In criminal cases, a statement tending to expose the declarant to criminal liability is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

State, 872 S.W.2d 743, 749 (Tex. Crim. App. 1994); *White v. State*, 982 S.W.2d 642, 649 (Tex. App.–Texarkana 1998, pet. ref'd); *Jefferson v. State*, 909 S.W.2d 247, 251 (Tex. App.–Texarkana 1995, pet. ref'd). There is no definitive test by which to gauge the existence of corroborating circumstances. *See Davis* at 748, 49. Instead, the focus of the inquiry should be on *verifying to the greatest extent possible* the trustworthiness of the statement, so as to avoid the admissibility of a fabrication. *Id.* All evidence should be considered in determining whether there are corroborating circumstances clearly indicating the trustworthiness of a statement against interest. *See Cofield v. State,* 891 S.W.2d 952, 955 (Tex. Crim. App. 1994); *Cunningham v. State*, 877 S.W.2d 310, 313 (Tex. Crim. App. 1994). Evidence which undermines the reliability of the statement as well as evidence corroborating its trustworthiness may be considered, so long as the Court is careful not to engage in a weighing of the credibility of the witness. *See Davis* at 748, 49. Specific factors which may be considered include: whether the guilt of the declarant is inconsistent with the guilt of the accused; whether the declarant was so situated that he might have committed the crime; the timing of the declaration and its spontaneity; the relationship between the declarant and the party to whom the declaration was made; and the existence of independent, corroborative facts. *Id.*

The guilt of the declarant is not inconsistent with the guilt of the accused. There were two robbers, and Harrison did not claim to be the gunman. His statement does not contradict Ms. Henry's testimony that appellant was the gunman. It is unknown if declarant was so situated that he might have committed the crime. The timing of the declaration and its spontaneity do not indicate trustworthiness; the declaration was made only after Harrison was questioned by appellant's sister. The relationship between the declarant and the party to whom the declaration was made seems to indicate nothing; Jason Harrison was an acquaintance of both her and her brother. Finally, independent facts cut both ways. Harrison may have had a motive to lie to exonerate his friend,[3] but Harrison has been implicated in other, similar

[3] Any motive on the part of Ms. Smith to lie in an effort to exonerate her brother is not a valid (continued...)

crimes. The alibi witnesses tend to corroborate that appellant was not at the scene, but the eyewitness unambiguously identified him as the gunman. There are no circumstances that *clearly* indicate the trustworthiness of the statement.

Given the conflicting factors, we cannot say the trial court's decision to exclude Dawnakesha Smith's statement was an abuse of its discretion. Appellant's second point of error is overruled.

Legal Sufficiency of the Evidence

In his third point of error, appellant contends the evidence is legally insufficient to support his conviction for aggravated robbery. Appellant argues that since seven witnesses testified he was at a car wash at the time of the offense, no rational jury could have convicted him of the offense.

The test for legally sufficient evidence is 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." *Staley v. State*, 887 S.W.2d 885, 888 (Tex. Crim. App. 1994); *Geesa v. State*, 820 S.W.2d 154, 156 (Tex. Crim. App. 1991). This is a high burden. As the Court of Criminal appeals said in *Ex parte Elizondo*:

> When we conduct a legal sufficiency-of-the-evidence review . . . we do not weigh the evidence tending to establish guilt against the evidence tending to establish innocence. Nor do we assess the credibility of witnesses on each side. We view the evidence in a manner favorable to the verdict of guilty. . . [Regardless of] how powerful the exculpatory evidence may seem to us or how credible the defense witnesses may appear. If the inculpatory evidence standing alone is enough for rational people to believe in the guilt of the defendant, we simply do not care how much credible evidence is on the other side.

947 S.W.2d 202, 206 (Tex. Crim. App. 1996)

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[3] (...continued)
consideration in determining trustworthiness of the statement. Witness credibility is a matter solely for the jury.

The eyewitness, Ms. Henry, testified that appellant pulled a pistol, pointed it at her, leapt the counter, pushed her backwards, and held her at gunpoint while his accomplice emptied the cash drawer of approximately $500. She also testified that during the robbery the defendant was less than four feet from her and that she was "100 percent sure" of her identification of appellant as the robber. The jury was entitled to accept Ms. Henry's testimony and reject the testimony of the alibi witnesses. *See Penagraph v. State*, 623 S.W.2d 341, 343 (Tex. Crim. App. 1981). This evidence, if believed by the jury, is sufficient for a rational trier of fact to find appellant committed the elements of the offense. Appellant's third point of error is overruled.

Factual Sufficiency of the Evidence

In his fourth point of error, appellant claims the evidence is factually insufficient. Appellant argues the verdict was contrary to the weight of the evidence and clearly unjust since seven witness placed the defendant at a car wash at the time of the offense, and the State introduced the testimony of only one eyewitness.

A factual sufficiency review must be deferential to the trier of fact, to avoid substituting our judgment for theirs. *See Clewis v. State*, 922 S.W.2d 126, 133 (Tex. Crim. App. 1996). The appellate court maintains this deference by reversing only when "the verdict is against the great weight of the evidence presented at trial so as to be clearly wrong and unjust." *Santellan v. State*, 939 S.W.2d 155, 164 (Tex. Crim. App. 1997).

Appellant had the testimony of seven people, all friends and relatives, who claimed that he was at a social gathering at a car wash at the time of the offense. In contrast, the State's eyewitness positively identified the appellant as the man who held her at gunpoint during the robbery. She had the opportunity to observe the appellant at extremely close range in a well-lit motel lobby. She gave a positive identification at the second line-up, and never identified anyone else.

To prove aggravated robbery, the State must show that the defendant 1) unlawfully appropriated property with intent to deprive the owner of it; 2) intentionally or knowingly threatened or placed another in fear of imminent bodily injury or death to obtain or maintain control of the property; and 3) used or exhibited a deadly weapon. *See* TEX. PEN. CODE ANN. §§ 29.02, 29.03, 31.03 (Vernon 1994).

The State's eyewitness testimony was that Appellant pulled a pistol, pointed it at her, leapt the counter, pushed her backwards, and held her a gunpoint while his accomplice emptied the cash drawer of approximately $500. The complainant lacked any apparent motive to fabricate testimony and had an excellent opportunity to observe the events in question. We find the verdict is not against the great weight of the evidence presented at trial so as to be clearly wrong and unjust.

Appellant's final point of error is overruled, and the judgment of the trial court is affirmed.

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J. Harvey Hudson
Justice

Judgment rendered and Opinion filed September 23, 1999.
Panel consists of Chief Justice Murphy and Justices Anderson and Hudson.
Do Not Publish — TEX. R. APP. P. 47.3(b).