Affirmed and Opinion filed October 19, 2000.

In The

Fourteenth Court of Appeals

NO. 14-99-01153-CR

GEORGE O'BRIEN, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 263rd District Court
Harris County, Texas
Trial Court Cause No. 815671

O P I N I O N

Appellant, George O'Brien, was charged by indictment with the felony offense of aggravated robbery. The indictment contained an enhancement paragraph for the felony offense of unauthorized use of a motor vehicle. Appellant entered a plea of not guilty, but after considering the evidence, a jury found him guilty of aggravated robbery as charged in the indictment. The trial court subsequently found the enhancement paragraph to be true and assessed appellant's punishment at confinement for forty-five (45) years in the Institutional Division of the Texas Department of Criminal Justice. In three points of error, appellant claims: (1) the evidence was sufficient to support appellant's affirmative defense of duress; (2) the trial court abused its discretion in proceeding with a portion of the punishment phase of the trial when

the appellant was not present; and (3) the trial court erred in admitting evidence of extraneous offenses notwithstanding the state's failure to provide proper notice of intent to use under TEX. R. EVID. 404(b). We affirm.

Factual Background

During the course of one month, appellant robbed several convenience stores. While responding to a dispatch of the final robbery, a police officer observed appellant run a red light. A high-speed chase ensued, in which appellant hit another car and spun off the highway into a grassy area. Appellant then unsuccessfully attempted to flee the scene on foot. Appellant was charged in this case with one aggravated robbery.

Duress

In his first point of error, Appellant contends the jury's verdict was against the great weight and preponderance of the evidence in that it rejected his affirmative defense of duress. In other words, appellant seeks a factual review relevant to his affirmative defense; not a sufficiency review as to whether there was sufficient evidence to warrant a conviction. *See Olivier v. State*, 850 S.W.2d 742, 744 (Tex. App.—Houston [14th Dist.] 1993, pet. ref'd). "The two reviews are mutually exclusive." *Meraz v. State*, 785 S.W.2d 146, 153 (Tex. Crim. App. 1990). Because the Court of Appeals is constitutionally vested with the authority to determine whether a jury finding is against the great weight and preponderance of the evidence, we are not obliged to accept the jury's implicit finding that appellant failed to prove his affirmative defense by a preponderance of the evidence if such a finding is irrational. *See* TEX. CONST. art. V, § 6; *Olivier*, 850 S.W.2d at 744. When determining whether appellant has proved his affirmative defense by a preponderance of the evidence, the correct standard of review is whether after considering all the evidence relevant to the issue at hand, the judgment is so against the great weight and preponderance of the evidence so as to be manifestly unjust. *See Meraz*, 785 S.W.2d at 155.

Appellant presented evidence that on May 1, 1999, he met an individual named "Eddie." Because Eddie's car needed repairs, Eddie and his wife, accompanied by appellant and his common law wife, set out for an auto parts store. While en route, they stopped at a convenience store. Eddie went inside the

store to purchase cigarettes, leaving his three companions in the car. Shortly after entering, Eddie came running out of the store yelling for his wife, who was in the driver's seat, to "hurry up, get moving." Startled by the incident, appellant asked Eddie to explain what had happened. Eddie then pointed a gun at appellant and told him to "shut up."

Eddie's wife allegedly drove to another convenience store where Eddie pointed his gun at appellant's wife and threatened to kill her if appellant did not rob the store clerk. Fearing for himself, his wife, and his unborn child, appellant committed the robbery. Later that day, Eddie robbed several more stores, forcing appellant to participate.

Appellant and his wife were then taken to an apartment where they were kept in a back room against their will for several weeks. Later, they were transferred to a motel room. While appellant's wife remained a hostage at the motel, appellant helped Eddie rob several additional convenience stores.

On May 31st, the day of appellant's arrest, appellant and Eddie committed several robberies. At the conclusion of the final robbery, appellant testified that Eddie left him behind. Fearing for his wife's safety, appellant began looking for the motel where his wife was being held. Appellant then became involved in a high speed chase, which resulted in his arrest.

Duress is an affirmative defense to prosecution. *See* TEX. PENAL CODE ANN. § 8.05(a) (Vernon 1994). The defense is based on compulsion by threat and focuses on the conduct of the person making the threats. *See Maestas v. State*, 963 S.W.2d 151, 157 (Tex. App.—Corpus Christi 1998), *aff'd*, 987 S.W.2d 59 (Tex. Crim. App. 1999). Compulsion exists only if the force or threat of force would render a person of reasonable firmness incapable of resisting the pressure. *See* TEX. PENAL CODE ANN. § 8.05(c) (Vernon 1994).

The responsibility of proving an affirmative defense is upon the defendant, and the burden of proof is by a preponderance of the evidence. *See* TEX. PENAL CODE ANN. § 2.04(d) (Vernon 1994). To be successful, a defendant's duress defense must have an objective, reasonable basis. *See Maestas*, 963 S.W.2d at 156. Here, appellant attempted to prove the defense of duress through his own testimony and the testimony of his wife. However, there were numerous conflicts between the testimony of appellant and his wife. Appellant, for example, testified they were kept captive in the motel for three to four weeks, while

his wife said they were held for only one or two weeks. Appellant testified that his wife was in the car during one of his robberies, but appellant's wife said she remained in the motel room during all of the robberies.

In evaluating the evidence, we recognize the jury was free to examine the witnesses' demeanor in the courtroom. *See Cain v. State*, 958 S.W.2d 404, 408-409 (Tex. Crim. App. 1997). Moreover, the jury was authorized to evaluate appellant's affirmative defense against his actions as depicted in videotapes from several of the stores that were hijacked. Finally, the jury heard testimony that at the time he was arrested, appellant was alone; he attempted to evade capture; he led police on a high speed chase; and he attempted to flee on foot with money taken in the robbery.

After reviewing all of the evidence, we find the jury's verdict is not so against the overwhelming weight of the evidence as to be irrational or manifestly unjust. Appellant's first point of error is overruled.

Punishment Phase

In his second point of error, appellant contends the court abused its discretion in proceeding with a portion of the punishment phase of the trial while he was absent from the courtroom. The record reflects that when the jury's verdict was announced in the courtroom, appellant was not present. Appellant's counsel made the following objection:

> I would like the record to reflect that Mr. O'Brien has been injured. He has been taken to Ben Taub Hospital. The jury has indicated two buzzes that they have a verdict and I am at this time objecting to the the [sic] verdict of the jury in Mr. O'Brien's absence.

It is well-settled that the defendant must be present when the verdict is rendered in a felony case. *See Wyatt v. State*, 94 S.W. 219 (Tex. Crim. App. 1906); TEX. CODE CRIM. PROC. ANN. art. 33.03 (Vernon 1989) ("In all prosecutions for felonies, the defendant must be personally present at the trial...."). However, reversal under Article 33.03 requires an actual showing of injury or a showing of facts from which injury can be inferred. *See Valadez v. State*, 979 S.W.2d 18, 20 (Tex. App.—Houston [14th Dist.] 1998, pet. ref'd.). Appellant has failed to show how his absence at during the reading of the punishment verdict harmed his defense. Appellant's second point of error is overruled.

Extraneous Offenses

In his final point of error, appellant contends the trial court erred in admitting evidence of extraneous offenses after the State had failed to provide him proper notice of its intent to offer evidence of extraneous offenses as required by TEX. R. EVID. 404(b).

Under certain circumstances, evidence of other crimes, wrongs, or acts are admissible "provided that upon timely request by the accused in a criminal case, reasonable notice is given in advance of trial of intent to introduce...." TEX. R. EVID. 404(b). Here, the record shows that on July 22, 1999, appellant filed a request for reasonable notice of the State's intent to introduce evidence of extraneous offenses. The State responded to appellant's request by mailing written notice of its intent to introduce evidence of extraneous offenses on August 13, 1999, ten days prior to the trial. Defense counsel did not receive the notice until August 16, 1999. Appellant contends the State's response cannot be considered *reasonable* notice in advance of trial.

In determining whether the notice provided was *reasonable* within the meaning of TEX. R. EVID. 404(b), we consider the notice that is to be expected or required under the particular circumstances of the case. *See Webb v. State*, No. 14-98-00407-CR, 2000 WL 64018, at *6 (Tex. App.—Houston [14 th Dist.] Jan. 27, 2000, no pet.). Here, appellant received the State's notice one week before trial. Appellant had five business days to investigate witnesses and to prepare for their cross-examination at trial. Moreover, the only extraneous offense introduced by the State during its case-in-chief was the final robbery which was associated with his high speed flight and arrest. The remaining extraneous offenses were admitted and introduced by appellant as part of his affirmative defense of duress. Considering what might be reasonably expected under the particular circumstances of this case, we find the State's notice, given five business days prior to trial, was not unreasonable. Appellant's third point of error is overruled.

Finding no reversible error, we affirm the judgment of the court below.

/s/ J. Harvey Hudson

Justice

Judgment rendered and Opinion filed October 19, 2000.

Panel consists of Chief Justice Murphy and Justices Hudson and Wittig.

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