Affirmed and Opinion filed October 28, 1999.

In The

Fourteenth Court of Appeals

NO. 14-97-01223-CR

MIKE RIVERA HERNANDEZ, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 272nd District Court
Brazos County, Texas
Trial Court Cause No. 25,161-272

O P I N I O N

This is an appeal from a conviction of aggravated robbery. TEX. PEN. CODE ANN. § 29.03 (Vernon 1994). Appellant pleaded not guilty and the case was tried before a jury. The jury found him guilty and assessed punishment at eighteen years confinement in the Institutional Division of the Texas Department of Criminal Justice. In three points of error, appellant complains that the trial court committed reversible error by allowing the jury to consider uncorroborated accomplice witness and hearsay testimony and by failing to instruct the jury to consider the lesser included offense of robbery. We affirm.

On March 29, 1997, the complainant was working in a liquor store in Bryan, Texas. Shortly before 6:00 p.m., appellant, an overweight Hispanic male, entered the store. He was wearing a dirty, white t-shirt, blue jeans, and a baseball cap. Tinted glasses covered his eyes. The complainant could not describe appellant's face, but said that it was covered by a bandana. She also noticed a gun stuck in his pants. The complainant described the gun as light grey in color, with a long barrel. She did not believe that it was a revolver, but looked like the kind of gun that "you put in a clip or something."

Appellant pointed the gun at the complainant. He said, "this is a hold-up, I want your money." As the complainant was walking to the cash register, appellant told her to hurry up or he would blow her head off. She emptied the register and appellant took approximately $700. He then had the complainant lie on the floor. After he left the store, appellant got into a Mercury Zephyr driven by Isabel Gutierrez, and left the store. Gutierrez later confessed to her part in the crime and identified appellant as the robber.

In his first point of error, appellant complains that the trial court erred in denying appellant's motion for instructed verdict where there was no corroboration of the accomplice witness testimony identifying appellant as the robbery suspect. Appellant claims that under TEX. CODE CRIM. PROC. ANN. Art. 38.14 (Vernon 1981), the State must corroborate the accomplice witness testimony by adequate evidence apart from the witness's testimony tending to connect the defendant with the offense committed. Otherwise, appellant argues, the conviction is improper.

Gutierrez did not testify at the trial. The record only shows that Bryan Police Officer Daniel Rutledge interviewed her prior to her arrest. During the interview, Gutierrez said that she was the driver of the car and that appellant committed the robbery. She also stated that appellant had a handgun when he entered and store and that he threw his bandana and sunglasses out of the car after leaving the store. Rutledge testified to these statements at the trial.

The corroboration requirement does not apply to a hearsay statement of a non-testifying accomplice to the offense. *Bingham v. State*, 913 S.W.2d 208, 211 (Tex. Crim. App. 1995). Accomplice "testimony" that must be corroborated is evidence given by competent witnesses under oath or affirmation. *Id.* at 210. Evidence derived from writings, and other sources, including out-of-court statements of an accomplice does not require corroboration. *Id.*; *Hammond v. State*, 942 S.W.2d 703,

707 (Tex. App.–Houston [14th Dist.] 1997, no pet). Because Gutierrez did not testify under oath, we find that her statement to Officer Rutledge does not require corroboration. Appellant's first point of error is overruled.

In his second point of error, appellant complains that statement made by Gutierrez, and testified to by Officer Rutledge, was hearsay. We find that appellant failed to preserve error with respect to his hearsay objection.

Prior to Officer Rutledge's testimony about his interview with Gutierrez, appellant's counsel objected that the interview responses were not relevant, that they constituted hearsay, and that it would be highly prejudicial to his client if they were allowed into evidence. The prosecutor responded that the interview responses would be admissible under an exception to the hearsay rule. The trial court did not rule on the objection, but instead listened to Officer Rutledge testify about the interview, outside the presence of the jury. After Rutledge testified, the trial judge asked appellant's counsel why the responses would not be proper. Counsel stated that the State failed to show that Gutierrez answered voluntarily or that she was read her *Miranda* rights. The court denied appellant's objection and asked him if he had any other legal objection. Appellant's counsel said no.

Appellant failed to obtain a ruling on his initial hearsay objection. To preserve error for review, a defendant must receive an adverse ruling on his objection, and the ruling must be conclusory; that is, it must be clear from the record that the trial judge in fact overruled the defendant's objection. Otherwise, error is waived. *Powell v. State*, 897 S.W.2d 307, 310 (Tex. Crim. App. 1994); TEX. R. APP. P. 33.1. Appellant did not obtain a final ruling on his hearsay objection, and made different objections after the officer testified outside the presence of the jury. Therefore appellant has failed to preserve error for review. Appellant's second point of error is overruled.

In his third point of error, appellant complains that the trial court erred in denying appellant's requested jury instruction for the lesser included offense of robbery.

This court must apply a two-prong test to determine if an instruction on a lesser included offense is required. First, the lesser offense must be included within the proof necessary to establish the offense charged. *Rousseau v. State*, 855 S.W.2d 666, 672-73 (Tex. Crim. App. 1993), *cert. denied*, 510

U.S. 919, 114 S.Ct. 313, 126 L.Ed.2d 260 (1993). A robbery can be proven by the same facts necessary to prove aggravated robbery. *See* TEX. PEN. CODE ANN. § 29.02 and § 29.03(Vernon 1994). Therefore, robbery is a lesser included offense of aggravated robbery and the first prong of the test is met.

Second, there must be some evidence that would permit a jury rationally to find that if appellant is guilty, he is guilty only of the lesser offense. *Bignall v. State*, 887 S.W.2d 21, 23 (Tex. Crim. App.1994); *Jones v. State*, 921 S.W.2d 361, 364 (Tex.App.--Houston [1st Dist.] 1996, pet. ref'd). *Id*. "It is not enough that the jury may disbelieve crucial evidence pertaining to the greater offense. Rather, there must be some evidence directly germane to a lesser-included offense for the fact finder to consider before an instruction on a lesser-included offense is warranted." *Cantu v. State*, 939 S.W.2d 627, 646 (Tex. Crim. App.1997), *cert. denied*, --- U.S. ----, 118 S.Ct. 557, 139 L.Ed.2d 399, 66 USLW 3385 (1997).

After the police identified the two people involved in the robbery, Officer Rutledge obtained a search warrant for appellant's house. Rutledge found a .40 caliber round and BB's. Appellant argues that this evidence indicates that a BB gun was used during the robbery. Because a BB gun is not a firearm, appellant contends that the lesser included instruction was warranted. We disagree. During her interview with Officer Rutledge, Gutierrez said that appellant was carrying a handgun. The complainant also described the gun as the type that required a clip. There is no testimony that a BB gun was used. The bullets and BB's recovered in appellant's home are not proof that either one was used during the robbery. We overrule appellant's third point of error.

The judgment of the trial court is affirmed.

/s/ Ross A. Sears
Justice

Judgment rendered and Opinion filed October 14, 1999.

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

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

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* Senior Justices Ross A. Sears, Bill Cannon, and Norman Lee sitting by assignment.