Affirmed and Opinion filed November 10, 1999.

In The

Fourteenth Court of Appeals

NO. 14-97-00501-CR

ALVIN YOUNG, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 232nd District Court
Harris County, Texas
Trial Court Cause No. 734687

O P I N I O N

Following a jury trial, appellant was convicted of aggravated robbery. The jury assessed punishment at 25 years confinement in the Texas Department of Criminal Justice--Institutional Division. Appellant raises three points of error on appeal. First, he argues the trial court committed reversible error by failing to instruct the jury on the lesser included offense of theft. His second and third points of error challenge the legal and factual sufficiency of the evidence to support the conviction. We affirm.

On October 6, 1996, at approximately 8:00 p.m., the complainant, who was carrying a backpack, was walking home. As the complainant crossed an intersection, appellant held out an umbrella so as to block the complainant's path. Despite appellant's action, the complainant continued walking. Appellant followed and, at some point, appellant demanded that the complainant give over his backpack. When the complainant refused, appellant tried to take it at knife point. The two struggled. Eventually, however, the complainant yielded and appellant took the backpack. The complainant reported the incident to the police, describing in detail the perpetrator, backpack, umbrella, and pocketknife. A police officer located appellant, who matched the description the complainant had given, and found him in possession of the backpack, umbrella, and pocketknife. At trial, appellant claimed he bought the backpack from two men in the area. Appellant further claimed that at the time of the incident, he saw the two men near the complainant, but did not believe the complainant was being robbed and did not believe the backpack he purchased was stolen.

In his first point of error, appellant complains the trial court erred in failing to submit a jury instruction on the lesser included offense of theft. We disagree. A defendant is entitled to an instruction on a lesser included offense if (1) the lesser included offense is included within the proof necessary to establish the offense charged, and (2) some evidence exists in the record that would permit a jury rationally to find that, if the defendant is guilty, he is guilty only of the lesser offense. *See Bignall v. State*, 887 S.W.2d 21, 23 (Tex. Crim. App. 1994) (citing *Rousseau v. State*, 855 S.W.2d 666, 673 (Tex. Crim. App. 1993)). In determining entitlement to a charge on a lesser included offense, we should review all the evidence presented at trial and not focus solely on the defendant's evidence. *See id*. at 23-4. Anything more than a scintilla of evidence is enough to entitle the defendant to a charge on the lesser offense. *See id*. at 23.

Appellant notes that "no dispute exists that a completed theft is a lesser included offense of aggravated robbery." *Bignall*, 887 S.W.2d at 23. However, the question remains

whether any evidence exists in the record that would permit a rational jury to find the defendant guilty only of the lesser offense. *See Bignall*, 887 S.W.2d at 23.

We conclude there is no evidence in the record that would permit a rational jury to find that if appellant is guilty, he is guilty only of theft and not the greater offense of aggravated robbery. "If a defendant either presents evidence that he committed no offense or presents no evidence, *and there is no evidence otherwise showing he is guilty only of a lesser included offense*, then a charge on the lesser included offense is not required." *Id.* at 24. *See also McKinney v. State*, 627 S.W.2d 731, 732 (Tex. Crim. App. 1982); *Hackbarth v. State*, 617 S.W.2d 944, 947 (Tex. Crim. App. 1981); *Brooks v. State*, 690 S.W.2d 61, 63 (Tex. App. - Houston [14th Dist.] 1984, no pet.). The State's evidence establishes the commission of aggravated robbery. Appellant, however, presented no evidence that he committed the lesser offense of theft. Rather, appellant denied committing any offense, thereby indicating he was not guilty at all. Because theft was not raised either by the State's evidence or appellant's total denial of guilt, the trial court did not err in refusing appellant's requested instructions on the lesser included offense of theft.

Appellant contends a lesser included offense may be raised if (1) the evidence either affirmatively refutes or negates an element establishing the greater offense, or (2) the evidence on the issue is subject to two different interpretations, and one of the interpretations negates or rebuts an element of the greater. In support of his contention, he cites *Schweinle v. State*, 915 S.W.2d 17, 19 (Tex. Crim. App. 1996). In *Schweinle*, the appellant was convicted of aggravated kidnaping. *Id.* at 18. On appeal, he argued the court erred by holding that the lesser included offense of false imprisonment was not raised by the evidence. *See id.* The *Schweinle* court held that the defendant was entitled to a charge of false imprisonment as a lesser included offense. *See id.* at 20. However, appellant's reliance on *Schweinle* is misplaced. In this case, appellant offered no evidence to refute or negate the charge of aggravated robbery, as did the defendant in *Schweinle*. *See id.*

Appellant, in testifying he did not believe the complainant was being robbed, merely denied committing any offense. Moreover, the State's evidence only established the commission of the greater offense. Hence, there was no evidence by which a rational jury could believe appellant was guilty of only the lesser included offense of theft. *See id*.

Appellant further claims a jury is free to selectively believe all or part of the conflicting testimony proffered and introduced by either side. *See Bell v. State*, 693 S.W.2d 434, 443 (Tex. Crim. App. 1985). In *Bell*, the defendant was convicted of aggravated assault. *See id*. at 436. On appeal, the defendant argued the trial court erred in failing to grant his requested charge upon the lesser included offense of reckless conduct. *See id*. The *Bell* court held there was conflicting testimony proffered and introduced by both sides concerning appellant's state of mind. *See id*. In the instant case, however, appellant testified that he did not commit any offense at all. As such, there was no conflicting evidence directly germane to the lesser offense for the jury to consider before an instruction on a lesser included offense was warranted. *See Bignall*, 887 S.W.2d at 24. It is not enough that the jury may disbelieve evidence pertaining to the greater offense. *See id*.

We find the trial court did not commit reversible error in failing to give a jury instruction on the lesser offense. Accordingly, we overrule appellant's first point of error.

In his second and third points of error, appellant challenges the legal and factual sufficiency of the evidence to support his conviction. Specifically, he argues the complainant's testimony was not credible.

When reviewing the legal sufficiency of the evidence, we examine all the evidence in a light most favorable to the jury's verdict to determine whether any rational jury could have found the essential elements of the offense beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 318-19, 99 S.Ct. 2781, 2788-89, 61 L.Ed.2d 560 (1979). In doing so, we will not re-evaluate the weight and credibility of the evidence; rather, we act

only to ensure the jury reached a rational decision. *See Muniz v. State*, 851 S.W.2d 238, 246 (Tex. Crim. App. 1993). When reviewing the factual sufficiency of the evidence, we look at the evidence without the prism of "in the light most favorable to the prosecution" and will set aside the verdict only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *See Clewis v. State*, 922 S.W.2d 126, 129 (Tex. Crim. App. 1996). During this examination, we will consider the jury's weighing of the evidence. *See id*. at 133. We are also permitted to disagree with the fact finder's decision. *See id*. In either case, the review must be appropriately deferential so as to avoid substituting our judgment for that of the jury. *See id*.

A person commits aggravated robbery if, in the course of committing theft, he intentionally or knowingly threatens or places another in fear of imminent bodily injury. *See* TEX. PEN. CODE ANN. § 29.02(a)(2) (Vernon 1994). In this case, the testimony established that appellant approached the complainant and blocked his path with an umbrella. Appellant then followed the complainant and eventually demanded his backpack at knife point. The complainant testified that when the appellant placed the knife against his rib cage, he felt threatened and frightened by appellant's action. Additionally, the record shows that appellant was found with the backpack, umbrella, and pocketknife, which the complainant had described to the police upon reporting the incident. Under these facts, a rational jury could have found the essential elements of the offense beyond a reasonable doubt.

Appellant asserts the evidence is legally and factually insufficient because the complainant's testimony incriminating appellant was not credible. Thus, he contends this court cannot have confidence in a verdict supported solely by the testimony of the complainant. Appellant relies on *Bowden v. State*, 628 S.W.2d 782 (Tex. Crim. App. 1982), in support of this contention. In *Bowden*, the defendant challenged the sufficiency of the evidence alleging there were inconsistencies between the complainant's trial

testimony and the description he gave the police. *See id*. at 784. In the instant case, however, there are no such inconsistencies. The record shows the complainant described his backpack to the police in detail, including the contents, the color, and the brand. The record also establishes that the complainant gave a description of appellant to the police, and that at least one officer noted at trial that appellant matched the description exactly. Furthermore, appellant was found with the backpack and other items the complainant described to the police. Had there been any inconsistencies, the jury was free to reconcile any conflicts and contradictions in the evidence. *See id*.

Viewing the evidence in light most favorable to the jury's verdict, we conclude the evidence is sufficient to show the guilt of the appellant and to support the verdict. Moreover, considering the evidence noted above, the verdict is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. A rational jury could have believed the complainant's testimony that he was robbed, at knife point, by appellant. Accordingly, we overrule appellant's second and third points of error.

Having overruled all of appellant's points of error, we affirm the judgment of the trial court.

/s/ Leslie Brock Yates
Justice

Judgment rendered and Opinion filed November 10, 1999.
Panel consists of Justices Yates, Fowler and Frost.
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