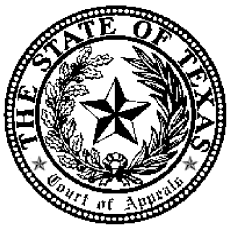
Affirmed and Opinion filed November 15, 2001.



In The

Fourteenth Court of Appeals

NO. 14-00-00884-CR

ROBERT GUSTAVO HIDALGO, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 262nd District Court
Harris County, Texas
Trial Court Cause No. 838,258

O P I N I O N

Appellant Robert Gustavo Hidalgo challenges his conviction for aggravated robbery, asserting legal and factual insufficiency of the evidence and ineffective assistance of counsel. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

Around 2:30 a.m. on the morning of November 28, 1999, Tracey Lynn Deel left a bar to head for home. Once inside the gated area of her apartment complex, she parked her car. As she sat listening to music, appellant and another man jumped into her car. Appellant got

into the driver's seat, pushing Tracey into the front passenger's seat while the other man, armed with a gun, entered the backseat. Appellant drove the car out of the complex to an open, grassy field. The men told Tracey to get out of the car and get down on her knees. Tracey, pleading for her life, offered them money on the condition that they drive her to an automated teller machine. Apparently receptive to this idea, the men ordered Tracey back into the car and appellant drove to a nearby bank.

When they arrived at the bank, Tracey gave appellant a credit card, along with her personal identification number. However, appellant was unsuccessful in his attempts to withdraw cash from the ATM machine. As appellant returned to the car, Tracey attempted to escape, but the men pulled her back inside the car and drove back to the open field. As they drove, the man in the backseat held a gun to Tracey's head.

When they arrived back at the field, both men ordered Tracey out of the car. The man with the gun walked Tracey out into the field while appellant remained behind urging his armed companion to "hurry it up." The man with the gun shot Tracey ten times at close range and got back into the car. Both men drove away, leaving Tracey for dead. Riddled with bullets but still alive, Tracey was able to make it from the field to a nearby apartment complex, crawling part of the way. Help was summoned and paramedics arrived shortly thereafter to rush her to the hospital emergency room.

Tracey suffered several bullet wounds to her head, including severe injuries to her eye and mouth. She also suffered from two bullet wounds to the back of her head, two bullet wounds to her neck, two bullet wounds to her chest, and three to her left hand.

Shortly after the assault, Tracey was able to describe appellant, but not the gunman, to a sketch artist. Initially, the police were unsuccessful in apprehending appellant. However, about three weeks after the attack, a Pasadena police officer responded to call from a department store reporting a robbery. The police officer saw appellant running from the department store toward a car, which was later identified as the car stolen from Tracey.

The police arrested appellant and placed his photograph in a photo array for identification. Tracey positively identified appellant as the man who had attacked her in the field. During an interview with appellant, Houston Police Sergeant Foltz learned that appellant's companion, whom Tracey could not identify, was Keven Rivas. After being charged and arrested for aggravated robbery, Rivas admitted to the assault on Tracey.

Because appellant was sixteen years old at the time of the offense, he was charged as a juvenile, but later certified to stand trial as an adult. Indicted for the felony offense of aggravated robbery, appellant entered a plea of not guilty. A jury found appellant guilty of aggravated robbery and assessed punishment at 75 years' of confinement in the Texas Department of Criminal Justice Institutional Division.

II. LEGAL AND FACTUAL INSUFFICIENCY

In his third and fourth points of error, appellant argues that the evidence is both legally and factually insufficient to support his conviction of aggravated robbery because the State failed to prove, as stated in the indictment, that he either shot Tracey Deel or was a party to the shooting.

In evaluating a legal sufficiency challenge, we view the evidence in the light most favorable to the verdict. *Weightman v. State*, 975 S.W.2d 621, 624 (Tex. Crim. App. 1998). As a reviewing court, it is not our duty to re-weigh the evidence from reading a cold record; rather, it is our duty to act as a due process safeguard, ensuring only the rationality of the fact finder's decision. *Williams v. State,* 937 S.W.2d 479, 483 (Tex. Crim. App. 1996). We will not overturn the verdict unless it is irrational or unsupported by proof beyond a reasonable doubt. *Matson*, 819 S.W.2d at 846. The jury, as the trier of fact, "is the sole judge of the credibility of witnesses and of the strength of the evidence." *Fuentes v. State*, 991 S.W.2d 267, 271 (Tex. Crim. App. 1999). The jury may choose to believe or disbelieve any portion of the witnesses' testimony. *Sharp v. State*, 707 S.W.2d 611, 614 (Tex. Crim. App. 1986). When faced with conflicting evidence, we presume the trier of fact resolved conflicts in favor

of the prevailing party. *Turro v. State*, 867 S.W.2d 43, 47 (Tex. Crim. App. 1993). Therefore, if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, we must affirm. *McDuff v. State*, 939 S.W.2d 607, 614 (Tex. Crim. App. 1997).

In contrast, when evaluating a challenge to the factual sufficiency of the evidence, we view all the evidence without the prism of "in the light most favorable to the prosecution" and set aside the verdict only if it is "so contrary to the overwhelming weight of the evidence to be clearly wrong and unjust." *Johnson v. State*, 23 S.W.3d 1, 6–7 (Tex. Crim. App. 2000) (citing *Clewis v. State*, 922 S.W.2d 126, 129 (Tex. Crim. App. 1996)). This concept embraces both "formulations utilized in civil jurisprudence, i.e., that evidence can be factually insufficient if (1) it is so weak as to be clearly wrong and manifestly unjust or (2) the adverse finding is against the great weight and preponderance of the available evidence." *Id.* at 11. Under the second formulation, the court essentially compares the evidence which tends to prove the existence of a fact with the evidence that tends to disprove that fact. *Jones v. State*, 944 S.W.2d 642, 647 (Tex. Crim. App. 1996). "In conducting the factual sufficiency review, we consider the fact finder's weighing of evidence and can disagree with the fact finder's determination." *Clewis*, 922 S.W.2d at 133. However, we must employ appropriate deference so that we do not merely substitute our judgment for that of the jury. *See Jones*, 944 S.W.2d at 648. Our evaluation should not intrude upon the jury's role as the sole judge of the weight and credibility given to any witness's testimony. *See Cain v. State*, 958 S.W.2d 404 (Tex. Crim. App. 1997).

Appellant asserts that the State failed to prove either he or Rivas shot Tracey Deel with a firearm. Appellant claims the State added an additional element by including the language, "*shooting complainant with a firearm*," in the indictment when the State merely needed to prove that a firearm was used during the robbery. Appellant argues the application paragraph in the jury charge required the State prove two elements beyond a reasonable doubt: (1) that appellant shot Tracey *or* was a party, not only to the aggravated robbery itself,

but also to the shooting of Tracey and (2) that Rivas actually shot Tracey.

In order to prove the offense of robbery, the State must prove that while in the course of committing theft and with the intent to obtain and maintain control of the property, the defendant: (1) intentionally[1], knowingly[2], or recklessly[3] caused bodily injury[4] to another; or (2) intentionally or knowingly threatened or placed another in fear of imminent bodily injury or death. TEX. PEN CODE ANN. § 29.02 (Vernon 1994). To elevate this offense to aggravated robbery, the State must prove in addition to the elements of robbery, that during the course of the robbery the defendant either (1) caused serious bodily injury[5] to another; (2) used or exhibited a deadly weapon; *or* (3) caused bodily injury to another person or threatened or placed another person in fear of imminent bodily injury or death, if the other person is over sixty-five years old or disabled. *Id*. at § 29.03.

Proof of the use and exhibition of a deadly weapon is an essential element of the offense of aggravated robbery. *Gomez v. State*, 685 S.W.2d 333, 336 (Tex. Crim. App. 1985). The State is required to prove the use of a firearm beyond a reasonable doubt when

---

[1] Texas Penal Code, section 6.03(a) provides that "a person acts intentionally, or with intent, with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result."

[2] Texas Penal Code, section 6.03(b) provides that "[a] person acts knowingly, or with knowledge, with respect to the nature of his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or that the circumstances exist. A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result."

[3] Texas Penal Code, section 6.03(c) provides that "[a] person acts recklessly, or is reckless, with respect to circumstances surrounding his conduct or the result of his conduct when he is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint."

[4] Texas Penal Code, section 1.07(8) defines "Bodily Injury" as "physical pain, illness, or any impairment of physical condition."

[5] Texas Penal Code, section 1.07 (46) defines "Serious Bodily Injury"as "bodily injury that creates a substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ."

the indictment alleges the deadly weapon used by defendant was a firearm. *Gomez* , 685 S.W.2d at 336. Thus, when the State alleges in an indictment for aggravated robbery that the appellant *"shot the complainant with a firearm,"* as it did in this case, it is required to prove this fact beyond a reasonable doubt. *See e.g., Edwards v. State*, 10 S.W.3d 699, 701 (Tex. App.–Houston [14th Dist.] 2000, pet. granted) (stating that "when the state alleges in the indictment for aggravated robbery that the deadly weapon used by the defendant was a firearm, it is required to prove use of a firearm beyond a reasonable doubt). The record contains sufficient evidence for a rational trier of fact to reasonably conclude that appellant committed the offense charged in the indictment.

The application paragraph in the charge allowed a conviction for aggravated robbery if the jury found either that: (1) appellant himself shot Tracey while in the course of committing the robbery or (2) appellant was a party to the shooting by promoting, encouraging, aiding, directing or attempting to aid Rivas in shooting Tracey with a firearm while in the course of committing the robbery. Under the law of parties, 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. TEX. PEN. CODE ANN. § 7.01(a) (Vernon 1999). A person is criminally responsible for an offense committed by 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. *Id.* § 7.02(a)(2). Thus, under the law of parties, even if appellant was not the person who actually shot Tracey, he is nonetheless criminally responsible for the aggravated robbery charged in the indictment.

In determining whether appellant participated in an offense as a party, the jury was free to examine events that occurred before, during, or after the commission of the offense, and could rely on the actions of appellant to show an understanding and common design to commit the offense. *See Burdine v. State*, 719 S.W.2d 309, 315 (Tex. Crim. App. 1986). Moreover, the jury could infer the necessary intent from the acts, words, and conduct of the

accused. *See Johnson v. State,* 32 S.W.3d 388, 392 (Tex. App.–Houston [14th Dist.] 2000, no pet.).

Appellant contends that the evidence is insufficient to show that Rivas was the one who actually shot Tracey, a finding necessary to make appellant a party to the offense. Appellant argues that because Tracey could not identify Rivas, the State only proved that Rivas was present at the time of the crime, not that he was the "unknown shooter." We do not find this argument persuasive.

Viewing the evidence presented in the light most favorable to the verdict, we find it sufficient to show that Rivas was the "unknown shooter" and that appellant aided him in shooting Tracey. At trial, Tracey testified that there were two individuals involved in the robbery and the shooting. Appellant and Rivas were the only ones present during both the robbery and the shooting. Tracey positively identified appellant. Rivas admitted to being the other man. Tracey also testified that although appellant was not the one who shot her, he was at the scene aiding and assisting Rivas in the shooting. Because there were only two men present at the time of the assault and Tracey testified that appellant was not the shooter, a logical inference is that Rivas, who admitted to being there, was the "unknown shooter."

There is sufficient evidence to show that although appellant is not the one who actually shot Tracey, he was present at the scene and was actively aiding and encouraging Rivas to shoot Tracey by using expressions such as "hurry it up." Moreover, Tracey testified that appellant *ordered* Rivas to shoot her:

> Q (Prosecutor): As best you can recall, what did that [appellant] say to [Rivas] before the shots started?
>
> A: Something along the lines of: Hurry it up. Hurry up. Then he started shooting me.
>
> . . .
>
> Q: . . . Is there any doubt in your mind there was an order to shoot you?
>
> A: No.

Q: You are certain that it was an order to shoot you?

A: Yes, yes.

In addition, other evidence presented at trial shows that appellant had a substantial amount of control over the situation and active involvement and participation in the events. Appellant was the one who drove Tracey's car and directed his companion to shoot Tracey. Appellant was later found nearby Tracey's stolen car with her car keys in his pocket. Both the gun used to shoot Tracey and her wallet were found in appellant's home. This evidence further supports the finding that appellant was a party to the crime, which is enough to make him criminally responsible for the charge as stated in the indictment.

We find that any reasonable fact finder could have found the elements of aggravated robbery, as set forth in the application paragraph of the charge, beyond a reasonable doubt. Moreover, the jury's verdict is not clearly wrong or unjust or against the great weight and preponderance of the evidence. Thus, we conclude the evidence is both legally and factually sufficient to support appellant's conviction for aggravated robbery. Accordingly, appellant's third and fourth points of error are overruled.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

In his first two points of error, appellant contends that he was denied effective assistance of counsel because his trial counsel failed to object to certain evidence and failed to obtain timely rulings on pretrial motions. Within his first point of error, appellant alleges specifically that his trial counsel was ineffective for: (1) allowing the State to present evidence which either proves that Rivas was the shooter or establishes a relationship between Rivas and himself; (2) failing to object to testimony regarding Rivas' relationship with Cazma Ramirez, the man arrested at the department store with appellant; (3) failing to timely object to hearsay testimony from Sergeant Foltz regarding whether Rivas confessed; (4) failure to obtain and seek to suppress any statements made by Rivas; and (5) failure to obtain a ruling on appellant's pretrial motion to suppress the in-court identification of appellant in

the photo array before an identification hearing. Appellant further contends in his second point of error that the cumulative effect of these errors resulted in ineffective assistance of counsel.

Addressing appellant's second argument first, we find appellant has presented nothing for our review. An allegation that the cumulative effect of two or more purported errors by the trial court denies appellant a fair trial is not a proper ground of error and therefore presents nothing for appellate review. *See e.g.*, TEX. R. APP. P. 38.1(h); *see also Ford v. State*, 14 S.W.3d 382, 395 (Tex. App.–Houston [14th Dist.], 2000,); *Lape v. State*, 893 S.W.2d 949, 953 (Tex. App.–Houston [14th Dist.] 1994, pet. ref'd). Thus, we overrule appellant's second point of error.

In addressing appellant's remaining ineffective assistance claims, we begin by noting that both the United States and Texas Constitutions guarantee an accused the right to assistance of counsel. *See* U.S. CONST. amend. VI; TEX. CONST. art. I, § 10; TEX. CODE CRIM. PROC. ANN. art. 1.05 (Vernon 1977). This right to counsel includes the right to reasonably effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *see Ex parte Gonzales*, 945 S.W.2d 830, 835 (Tex. Crim. App. 1997). To prove ineffective assistance of counsel, appellant must show that (1) counsel's representation or advice fell below objective standards of reasonableness and (2) the result of the proceeding would have been different but for trial counsel's deficient performance. *Strickland*, 466 U.S. at 688–92. Moreover, the appellant bears the burden of proving his claims by a preponderance of the evidence. *Jackson*, 973 S.W.2d 954, 956 (Tex. Crim. App. 1998).

In assessing appellant's claims, we apply a strong presumption that trial counsel was competent. *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999). We presume counsel's actions and decisions were reasonably professional and were motivated by sound trial strategy. *See Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994). Appellant has the burden to rebut this presumption by presenting evidence illustrating why trial counsel did what she did. *See id.* An appellant cannot meet this burden if the record

does not specifically focus on the reasons for trial counsel's conduct. *Osorio v. State*, 994 S.W.2d 249, 253 (Tex. App.–Houston [14th Dist.] 1999, pet. ref'd).

If appellant establishes deficient performance of his counsel, we then determine whether the appellant has shown prejudice resulting from that deficient performance. *See Hernandez v. State*, 988 S.W.2d 770, 772 (Tex. Crim. App. 1999). To establish prejudice, the appellant must prove there is a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. *Jackson*, 973 S.W at 956. A reasonable probability is "a probability sufficient to undermine confidence in the outcome of the proceedings." *Id.*

When there is no proper evidentiary record developed at a hearing on a motion for new trial, it is extremely difficult to show that trial counsel's performance was deficient. *See Gibbs v. State*, 7 S.W.3d 175, 179 (Tex. App.–Houston [1st Dist.] 1999, pet. ref'd). If there is no hearing, or if counsel does not appear at the hearing, an affidavit from trial counsel becomes almost vital tot he success of an ineffective assistance claim. *See Howard v. State*, 894 S.W.2d 104, 107 (Tex. App.–Beaumont 1995, pet. ref'd). Here, appellant failed to file a motion for new trial or otherwise show that his counsel's performance was not based on sound trial strategy. The only record before us is the trial record, which shows that counsel made objections, filed motions, and cross-examined all of the State's witnesses. The trial record does not contain any direct evidence of trial counsel's reasoning or strategy. The court of criminal appeals has noted that "[a] substantial risk of failure accompanies an appellant's claim of ineffective assistance on direct appeal . . . . In a majority of instances, the record on direct appeal is simply undeveloped and cannot adequately reflect the failings of trial counsel." *Thompson*, 9 S.W.3d at 813-14. The reason an adequate record is so important in these cases is because in the absence of such a record, the court "must apply the strong presumptions that counsel's performance was a part of trial strategy, and typically will not second-guess a matter of trial strategy." *Young*, 991 S.W.2d at 837.

Whatever trial counsel's reasons may have been for pursuing the chosen course, in

the absence of a record identifying these reasons, we must presume they were made deliberately as part of sound trial strategy. Because we are unable to conclude that defense counsel's performance fell below an objective standard without evidence in the record, we find that the appellant has failed to meet the first prong of *Strickland.* Inasmuch as appellant has failed to establish the first prong in the *Strickland* analysis, we need not address the second, prejudice prong of *Strickland*. Accordingly, we overrule appellant's first and second points of error.

Finding no merit in any of appellant's points of error, we affirm the judgment of the trial court.

/s/ Kem Thompson Frost
Justice

Judgment rendered and Opinion filed November 15, 2001.
Panel consists of Justices Anderson, Hudson, and Frost.
Do Not Publish — TEX. R. APP. P. 47.3(b).