Affirmed and Opinion filed December 9, 1999.

In The

Fourteenth Court of Appeals

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NO. 14-98-00709-CR

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IAN DEREK REIZE, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 262nd District Court
Harris County, Texas
Trial Court Cause No. 772,486

O P I N I O N

Appellant, Ian Derek Reize, was convicted of aggravated assault and was sentenced to nine years imprisonment. Appellant asserts five points of error on appeal. Appellant argues that the trial court erred in refusing to include an instruction on the lesser included offense of misdemeanor assault in the jury charge; that the trial court erred in admitting evidence of an extraneous offense; and that the evidence was legally and factually insufficient to support his conviction. We overrule all of appellant's points of error and affirm the judgment of the trial court.

I. FACTUAL SUMMARY

Two somewhat different versions of the facts were presented at trial. Both sides agree, however, that on January 11, 1998, appellant was involved in an altercation with the complainant. The State asserted at trial that as the complainant was walking down Montrose Boulevard in Houston, he was confronted by appellant, who shoved a chrome-plated pistol in his face and commanded the complainant to give him whatever belongings he had. When the complainant refused to comply and attempted to push the gun out of his face, appellant began to beat him in the head and face with the butt of the gun. Appellant sustained numerous lacerations on his head in this beating and required emergency care. This testimony by the complainant was corroborated by a taxi driver who witnessed the events and quickly found a police officer. The State also presented witnesses to show that minutes before the attack on the complainant, and only a few blocks away, an individual resembling appellant who wielded a chrome-plated pistol and drove a car with a description and license plates that matched those of appellant's car had attacked and attempted to rob another in a similar fashion. Appellant was quickly arrested following the attack on the complainant. The complainant's checkbook, a gun, and a baseball bat were recovered from appellant's car.

Appellant presented a different version of the facts at trial. He claimed that the complainant was intoxicated, was crossing the street, and became enraged that appellant's car was in the crosswalk. According to appellant, the complainant began to curse at him and struck his car repeatedly with a leather bag he was carrying. Appellant also claimed that the bag broke during this display, and its contents, including the complainant's checkbook, flew into appellant's vehicle. Appellant opened the door of his car, attempted to exit, and the complainant slammed the door on his knee. Once outside the car, appellant claims that the complainant charged at him and, fearing for his safety, appellant began punching the complainant in the face. This testimony was corroborated by several friends of appellant, who were in the car during this episode.

II. DID THE TRIAL COURT ERR BY FAILING TO GIVE AN INSTRUCTION ON THE LESSER INCLUDED OFFENSE OF CLASS A MISDEMEANOR ASSAULT?

Appellant's first point of error is that the trial court erred in failing to instruct the jury on the lesser included offense of Class A misdemeanor assault. The state counters this argument, claiming that Class A

misdemeanor assault is not a lesser included offense of aggravated robbery and, even if it is, appellant failed to preserve this error. We agree with the State, that Class A misdemeanor assault is not within the proof necessary to establish aggravated robbery.

A. DID APPELLANT PRESERVE ERROR?

Before arguments about error can be entertained, the appellate court must be satisfied that the error was properly preserved in the record of the proceedings below. TEX. R. APP. P. 33.1. Although the State claims that the appellant did not preserve error on this issue at the trial court, this argument is incorrect. The State bases its argument on TEX. CODE CRIM. P. art. 36.15, which states, *inter alia*, that to preserve error on a requested special charge, the requesting party must "present written instructions and ask that they be given to the jury." The statute also provides that "[t]he requirement that the instructions be in writing is complied with if the instructions are dictated to the court reporter" prior to the charge being read to the jury. *Id.* Because the appellant did not comply with this rule, the State argues, error was not preserved.

The State's argument ignores another substantial tool to preserve error. Error in the charge can also be preserved if the party complaining about the charge objects with enough specificity to inform the trial court of the grounds of the objection and afford it an opportunity to correct the error before the charge is read to the jury. TEX. CODE CRIM. P. art. 36.14 (Vernon Supp. 1998); *Pennington v. State*, 697 S.W.2d 387, 390 (Tex. Crim. App. 1985); *Jones v. State*, 962 S.W.2d 96, 98-99 (Tex. App.–Houston [1st Dist.] 1997), *aff'd*, 984 S.W.2d 254 (Tex. Crim. App. 1998). Here, appellant, when asked by the trial court if he had any objections to the charge, requested the instruction on the lesser included offense of Class A misdemeanor assault. This request was denied.

In *Jones v. State*, the First Court of Appeals was faced with a similar question. There, the defendant, charged with aggravated robbery, asked the court to include an instruction on the lesser included offenses of assault and theft, providing a short explanation of the bases for these instructions when asked by the court. *Jones*, 962 S.W.2d at 98-99. The court held that this was sufficiently specific to preserve the error in the charge. *Id.* at 99.

Appellant's objection was specific enough to apprize the trial court of the objection since it referenced Class A misdemeanor assault, a specific crime with specific elements of proof. We find that this objection was sufficient to preserve any error that was committed by the trial court.

B. WAS APPELLANT ENTITLED TO THE INSTRUCTION ON CLASS A MISDEMEANOR ASSAULT?

To determine if a defendant is entitled to a jury instruction on a lesser included offense, Texas courts apply a two-pronged test. First, they are to determine if the lesser included offense is included within the proof necessary to establish the charged offense. *See Bignall v. State*, 887 S.W.2d 21, 23 (Tex. Crim. App. 1994). Second, some evidence must be present in the trial record that would allow a jury to rationally find that, if the defendant is guilty, he is guilty only of the charged offense. *Id.*

Here, appellant's argument fails the first prong of the *Bignall* test. Defendant was charged with aggravated robbery. The language of the indictment is as follows:

> "while in the course of committing theft of property owned by [the complainant] and with intent to obtain and maintain control of the property [appellant did] *intentionally and knowingly threaten and place [the complainant] in fear of imminent bodily injury and death*, and the [appellant] did then and there use and exhibit a deadly weapon, to-wit: A FIREARM." (emphasis added).

The Penal Code defines a Class A misdemeanor assault as "intentionally, knowingly or recklessly causing bodily injury to another" or "intentionally or knowingly causing [offensive or provocative] physical contact with" an elderly or disabled individual. TEX. PEN. CODE ANN. § 22.01(b)(1), 22.01(c) (Vernon 1994). Assault resulting from "intentionally or knowingly threaten[ing] another with imminent bodily injury" is a Class C misdemeanor. *Id.* at 22.01(c). Thus, since the State was not required to prove bodily injury or physical contact, the lesser included offense requested by appellant is not contemplated in the indictment and cannot be a lesser included offense under the facts of this case.

Accordingly, we overrule point of error one.

III. DID THE TRIAL COURT ERR IN ADMITTING EVIDENCE OF AN EXTRANEOUS ACT OVER APPELLANT'S OBJECTION?

In points of error two and three, appellant argues that the trial court erred in admitting evidence of an extraneous offense over his objections. Specifically, appellant contends that the extraneous offense was irrelevant, and in the alternative, was more prejudicial than probative. We overrule both of these points of error.

A. WAS THE EXTRANEOUS ACT IRRELEVANT?

At trial, the State introduced evidence that minutes before the attack on the complainant, a similar crime was committed nearby with a similar weapon. This evidence was presented through the victim of this crime, an eyewitness, police testimony, and through the cross-examination of appellant and his passengers. Prior to the admission of this testimony, appellant objected to its use on relevance grounds. The trial court overruled his objection.

1. Standard of review

A trial court's ruling on the relevance of evidence is to be upheld by appellate courts absent an abuse of discretion. *Montgomery v. State*, 810 S.W.2d 372, 391 (Tex. Crim. App. 1990). The trial court abuses its discretion only if, based on common experience, there is no way that the admitted evidence can make the existence or non-existence of a fact more or less probable than it would be without the evidence. *Id*. Further, a trial court abuses its discretion if the admission of the evidence is based on unreasonable prejudice rather than common reason. *Id*.

Once an objection is made to the relevance of the evidence, the burden of proof shifts to the proponent of the evidence to show that the evidence is relevant to prove something other than the character of the person and that he acted in conformity with this character on this occasion. TEX. R. EVID. 404(d); *Montgomery*, 810 S.W.2d at 386. This can be accomplished by showing that the evidence is relevant to proving motive, intent, opportunity, plan, or other such factual or elemental claims. *Id*. Here, the

appellant's objection to the relevance of the evidence shifted the burden to the State to show that the extraneous act was relevant to something other than the appellant's character.

2. The trial court did not abuse its discretion in admitting the evidence of appellant's extraneous act.

Appellant contends that the State admitted this evidence only to make the forbidden propensity argument–that since appellant has committed other crimes, he is likely to have committed this crime. TEX. R. EVID. 404(d). The State, conversely, argues that it admitted the evidence to prove intent or motive, since appellant was claiming that he hit the complainant in self-defense. We agree with the State's argument.

Once a defendant raises the issue of self-defense, the State can introduce evidence of extraneous acts or offenses where defendant was the aggressor to show intent. *Booker v. State*, 929 S.W.2d 57, 63 (Tex. App.–Beaumont 1996, pet. ref'd); *Robinson v. State*, 844 S.W.2d 925, 929 (Tex. App.–Houston [1st Dist.] 1992, no pet.). In the present case, appellant testified at trial that he hit the complainant only in self-defense and only after the complainant acted aggressively toward him. The fact that appellant had been involved in a similar crime only minutes earlier in which appellant was the aggressor makes his status as an aggressor more likely than it would be without this evidence.

Further, this prior extraneous act is relevant to prove the appellant's motive in his altercation with the complainant. Appellant denied that he intended to rob the complainant. If, however, he had committed, or attempted to commit, a robbery earlier in the evening, this would be relevant to his intent or motive in accosting the complainant.

Because the evidence proffered by the State of appellant's extraneous acts is relevant to prove motive or intent, and is relevant to disproving appellant's self-defense claim, we overrule point of error number two.

B. WAS THE EXTRANEOUS ACT MORE PREJUDICIAL THAN PROBATIVE?

In point of error four, appellant argues that the extraneous act evidence should have been excluded by the trial court because it was more prejudicial than probative, basing his argument on TEX. R. EVID. 403. The State contends that appellant did not preserve this error in the record, making the point moot to this appeal. We agree.

Appellant admits in his brief that his Rule 403 objection was implicit in his relevancy objection. While a relevancy objection used to be sufficient to preserve error under Rule 403, the Court of Criminal Appeals changed this in *Montgomery*. Now, an objection based on relevance is not sufficient to preserve Rule 403 error. *Montgomery*, 810 S.W.2d at 388. Rather, a separate Rule 403 objection must be lodged to preserve the error. *Id*. Since appellant made no such objection, we overrule point of error number three.

IV. WAS THE EVIDENCE LEGALLY AND FACTUALLY INSUFFICIENT TO SUPPORT APPELLANT'S AGGRAVATED ASSAULT CONVICTION?

In points of error four and five, appellant asks this court to overturn his conviction for aggravated assault based on legal and factual insufficiency. He bases this argument on the premise that the complainant was intoxicated at the time the offense occurred. Because we find appellant's argument to be without merit, we overrule points of error four and five.

A. WAS THE EVIDENCE LEGALLY SUFFICIENT TO SUPPORT APPELLANT'S CONVICTION?

In reviewing legal sufficiency, appellate courts are to view the evidence in the light most favorable to the prosecution, overturning the lower court's verdict only if a rational trier of fact could not have found all of the elements of the offense beyond a reasonable doubt. *Santellan v. State*, 939 S.W.2d 155, 160 (Tex. Crim. App. 1997) (*citing Jackson v. Virginia* 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979)).

When viewed in the light most favorable to the prosecution, the State proved all necessary elements of aggravated assault. The evidence adduced at trial showed that appellant, through the use of a handgun, intentionally or knowingly caused the complainant to fear serious bodily injury or death. On the issue of

the complainant's intoxication, appellant and his witnesses testified that the complainant was obviously intoxicated, while the complainant testified that he had probably only consumed two or three beers. Viewing this evidence in the light most favorable to the prosecution, we conclude that a rational trier of fact could have concluded that the complainant was not intoxicated, especially since the complainant's testimony about the attack was corroborated by an eyewitness.

Based on this evidence, a jury could rationally have found all of the elements of aggravated assault beyond a reasonable doubt. Accordingly, we overrule appellant's fourth point of error.

B. WAS THE EVIDENCE FACTUALLY SUFFICIENT TO SUSTAIN APPELLANT'S CONVICTION?

In reviewing factual sufficiency questions, the court of appeals must 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 as to be clearly wrong or unjust. *Clewis v. State*, 922 S.W.2d 126, 129 (Tex. Crim. App. 1996). This is accomplished by viewing all of the evidence adduced at trial, using enough deference to keep the appellate court from substituting its own judgment for that of the fact finder. *Santellan*, 939 S.W.2d at 164. The appellate court will overrule the fact finder only when its finding is "manifestly unjust," "shocks the conscience," or "clearly demonstrates bias." *Id.* at 165 (*citing Clewis*, 922 S.W.2d at 135).

Here, appellant contends that if the complainant were intoxicated, his testimony would be factually insufficient to support appellant's conviction. At trial, appellant and his witnesses provided the only testimony of the complainant' intoxication. The arresting officer, as well as the eyewitness, testified that they were close enough to the complainant to observe any signs of intoxication and did not remember perceiving any. Further, the complainant also testified that he was not intoxicated at the time of the incident. This conflict in testimony does not appear so manifestly unjust or shocking to warrant finding fault with the fact finder, especially since the complainant's testimony was corroborated by several other witnesses and the physical evidence of his injury.

Appellant also contends that the fact that an eyewitness claimed that the complainant was hit with a bat rather than a gun makes the evidence factually insufficient to sustain his conviction. Appellant mischaracterizes this eyewitness' testimony. The witness in question, a taxi driver, states that appellant appeared to be hitting the complainant with a stick or some other weapon held with two hands and swung with a bat-like motion. This witness also claims that his view was obstructed, but he could see appellant bringing a weapon down on the complainant in a brutal fashion. This witness never states in the record that appellant definitely struck the complainant with a bat or a gun. Further, though a police officer testified that a bat was recovered from appellant's car, and that this bat had no blood or tissue on it, this does not make appellant's conviction so shocking or unjust to warrant overturning it, especially since the State presented testimony that a gun was also found in appellant's car. The complainant also testified that appellant assaulted him with a gun, which appellant again asserts raises the issue of his intoxication.

The alleged intoxication of the complainant bears only on his credibility, a determination solely within the province of the jury. In addressing a similar factual sufficiency challenge, the Court of Criminal Appeals held:

> None of these factors–that [the victim] was drunk, had trouble remembering the assault, and had been extremely intoxicated previously–definitively favor or contradict the jury's verdict; all bear on the amount of credibility [the witness'] testimony should receive. While the Court of Appeals obviously finds that the listed factors make the victim a less than credible witness, this is only one possible interpretation; it is equally plausible that the victim's story, although "confused," is true and credible. The victim's testimony does not weigh definitively in favor of, or against, Appellant's guilt. As such, this determination is within the exclusive province of the jury, and a court of appeals must show deference to such a jury finding. *Cain v. State*, 958 S.W.2d 404, 409 (Tex. Crim. App. 1997).

Here, it is obvious from the conviction that the jury chose to find the complainant's testimony, and the testimony of the other State witnesses, more credible than the testimony of appellant or his witnesses. This determination, especially in light of the eyewitness testimony and the severity of appellant's injuries, is not so contrary to the weight of the evidence to make the verdict unjust. Accordingly, under *Cain*, we must defer to the jury's judgment on this issue.

Because we are satisfied that the evidence presented at appellant's trial was factually sufficient to support his conviction, we overrule appellants fifth point of error.

Because we find no reversible error in the trial court's rulings, we affirm the judgment of the trial court.

/s/ Paul C. Murphy
Chief Justice

Judgment rendered and Opinion filed December 9, 1999.

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

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