Affirmed and Memorandum Opinion filed August 26, 2010.

In The

Fourteenth Court of Appeals

NO. 14-08-00725-CR

TIFFANY NICOLE WALTON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 7th District Court
Smith County, Texas
Trial Court Cause No. 007-1175-07

MEMORANDUM OPINION

Appellant Tiffany Nicole Walton appeals from her conviction for aggravated robbery. In two issues, appellant claims (1) the trial court erred in overruling appellant's objections to the State's peremptory strikes on the basis that they were exercised in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986) and (2) the evidence is factually insufficient to support her conviction. We affirm.[1]

[1] This appeal was transferred to this court from the Twelfth Court of Appeals. In cases transferred from one court of appeals to another, the transferee court must decide the case in accordance with the precedent of the transferor court if the transferee court's decision would have been inconsistent with the precedent of the transferor court. *See* TEX. R. APP. P. 41.3.

I. FACTUAL AND PROCEDURAL BACKGROUND

On the evening of April 14, 2007, Oscar Barker was delivering pizza to a residence on Adams Street in Smith County, but was unable to locate the residence listed on the delivery ticket. While driving down Adams Street, Barker noticed two individuals sitting on the porch steps of a home. Barker stopped and asked if they had ordered pizza, and they responded that they had. As Barker approached the porch, the taller of the two individuals pulled out a rifle and pointed it at Barker. Both of the individuals then stood up and said "Give me your money. We don't want the pizza. We want your money." Barker handed the individuals his wallet and some cash from his pockets after the unarmed individual stated "He'll shoot you. We're going to kill you. We want your money." As the unarmed individual insisted that Barker had more money, the gunman told Barker to lay face-down on the ground and placed the barrel of the rifle on Barker's neck. Barker then took more money from his pocket and threw it on the ground. After retrieving this money, the unarmed individual said "we got to go" and the two assailants ran away. Barker went to his vehicle, called 911, and described the robbers and the direction in which they were headed. Police officers arrived at Barker's location a few minutes later, and Barker explained what had happened and stated that the robbers took his wallet and cash.

Near the time of Barker's 911 call, the Tyler Police Department received information about two individuals dressed in dark clothing who were running towards a vehicle parked nearby. Several minutes later, police officers stopped a vehicle matching the suspect vehicle's description at a convenience store and placed the vehicle's occupants—Narauda Thompson, the driver; Sharonda Hampton, the front passenger; and appellant, the rear passenger—into separate police vehicles. The police found a wallet containing Barker's identification laying on the vehicle's rear floorboard and a rifle in the vehicle's trunk. The police brought Barker to the convenience store, where he positively identified the wallet found in the vehicle as belonging to him and the rifle in the trunk as

the one used in the robbery. Barker also positively identified Thompson and appellant as the two individuals who robbed him and told police that he had never seen Hampton before. Following Barker's identification, appellant, Thompson, and Hampton were transported to a police station. Thompson confessed his involvement in the robbery and told police that appellant committed the robbery with him.[2]

Appellant was subsequently indicted and tried for aggravated robbery. The jury found appellant guilty and assessed punishment at thirty years' confinement in the Texas Department of Criminal Justice, Institutional Division, and a $10,000 fine. This appeal followed.

II. APPELLANT'S *BATSON* MOTION

In her first issue, appellant claims the trial court erred by overruling her *Batson* objections to the State's peremptory challenges to two African-American venire members, Dannette Leach and Tracy Dews. During voir dire, fifty-two prospective jurors remained in the venire panel following strikes for cause and by agreement. Of these fifty-two individuals, only two (Leach and Dews) were African-American.[3] The State exercised two of its ten peremptory strikes against Leach and Dews. Appellant objected to the State's exercise of these strikes, arguing the strikes were racially motivated. The trial court held a *Batson* hearing in which the prosecutor explained the State's reasons for striking Leach and Dews.

The prosecutor explained that Leach had been struck because she (1) favored rehabilitation over punishment, (2) had a friend who had been arrested for, charged with, or convicted of an offense greater than a class C misdemeanor, and (3) was unsure whether this friend had been treated fairly by law enforcement or the justice system. The prosecutor then explained that Dews had been struck because (1) she had a family

[2] Thompson subsequently pleaded guilty to his involvement in the robbery and was sentenced to forty years' imprisonment.

[3] The trial court took judicial notice that appellant is African-American and stated on the record that Leach and Dews are also African-American.

member who had been arrested for, charged with, or convicted of an offense greater than a class C misdemeanor and was unsure whether this family member had been treated fairly by the justice system and (2) the prosecutor recalled previously prosecuting another individual named Dews in Smith County. The trial court found that the prosecutor provided valid race-neutral reasons for exercising the challenged strikes and overruled appellant's *Batson* objection.

Appellant now contends the State's proffered reasons for striking Leach and Dews were a pretext for purposeful discrimination, thus entitling her to a new trial. The State maintains the trial court properly denied appellant's *Batson* objection because appellant did not satisfy her burden of showing the challenged strikes were racially motivated.

A) Standard of Review

We may overturn a trial court's ruling on a *Batson* objection only if that ruling was "clearly erroneous." *Snyder v. Louisiana*, 552 U.S. 472, 477 (2008); *Young v. State*, 283 S.W.3d 854, 866 (Tex. Crim. App.), *cert. denied*, 130 S. Ct. 1015 (2009). This highly deferential standard is used because of the trial court's unique position to make determinations regarding the prosecutor's credibility and demeanor, as well as the demeanor of the prospective jurors. *Snyder*, 552 U.S. at 477; *Gibson v. State*, 144 S.W.3d 530, 534 (Tex. Crim. App. 2004). A ruling is clearly erroneous if it leaves the reviewing court "with the 'definite and firm conviction that a mistake has been committed.'" *Guzman v. State*, 85 S.W.3d 242, 254 (Tex. Crim. App. 2002) (quoting *United States v. Fernandez*, 887 F.2d 564, 567 (5th Cir. 1989)). We review the record of the *Batson* hearing and the voir dire examination in the light most favorable to the trial court's ruling. *Young*, 283 S.W.3d at 866.

B) Applicable Law

Striking a prospective juror on the basis of race violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. *See* U.S. CONST. amend. XIV; *Batson*, 476 U.S. at 89; *see also* TEX. CODE CRIM. PROC. ANN. art. 35.261

(Vernon 2006). Resolution of a *Batson* challenge involves a three-step process. *Snyder*, 552 U.S. at 476. First, the defendant must establish a prima facie case showing that the State exercised a peremptory challenge in a discriminatory manner. *Id.*; *Young*, 283 S.W.3d at 866. Next, the burden shifts to the State to provide a race-neutral explanation for the challenged strike.[4] *Snyder*, 552 U.S. at 476–77; *Young*, 283 S.W.3d at 866. If the State provides a race-neutral explanation, the burden shifts back to the defendant to show that the explanation is merely a pretext for purposeful discrimination. *Williams v. State*, 301 S.W.3d 675, 688 (Tex. Crim. App. 2009), *cert. denied*, No. 09-9635, — S. Ct. — , 2010 WL 978827 (U.S. June 14, 2010). Ultimately, the trial court must determine whether the defendant carried the burden of proving purposeful discrimination by the State. *Snyder*, 552 U.S. at 477; *Young*, 283 S.W.3d at 866. While the burden of production may shift between the defendant and the State, the defendant bears the "ultimate burden of persuasion" and must show, by a preponderance of the evidence, that the challenged peremptory strike was racially motivated. *See Purkett v. Elem*, 514 U.S. 765, 768 (1995) (per curiam); *Watkins v. State*, 245 S.W.3d 444, 447 (Tex. Crim. App.), *cert. denied*, 129 S. Ct. 92 (2008).

C) Analysis

Appellant's only argument on appeal is that a statistical review of the State's use of its peremptory strikes shows the prosecutor's proffered reasons for striking Leach and Dews were a pretext for racial discrimination. When determining whether the State's explanations for exercising peremptory strikes are a pretext for purposeful discrimination, we examine (1) whether statistics show a disproportionate number of peremptory strikes were used against minorities and (2) whether comparative evidence demonstrates disparate treatment of minority venire members. *Thomas v. State*, 209 S.W.3d 268, 273

[4] An explanation is race-neutral if it is "based on something other than the race of the juror." *Hernandez v. New York*, 500 U.S. 352, 360 (1991). The State's reason need not be persuasive or even plausible. *Purkett v. Elem*, 514 U.S. 765, 767–68 (1995) (per curiam). The State's explanation will be deemed race-neutral unless "a discriminatory intent is inherent in the prosecutor's explanation." *Hernandez*, 500 U.S. at 360.

(Tex. App.—Houston [1st Dist.] 2006, no pet.); *see also Miller-El v. Dretke*, 545 U.S. 231, 240–41 (2005) (considering several factors, including "bare statistics" and "side-by-side comparisons" of venire members struck by the prosecution with those who were not, while analyzing appellant's *Batson* challenge).

i) Proportionality of Strikes

Appellant argues the State's use of two of its ten peremptory strikes (20%) to eliminate 100% of the African-Americans in the strike zone shows that the State's proffered reasons for striking Leach and Dews were a pretext for purposeful discrimination. In support of this contention, appellant cites two cases in which reviewing courts found some evidence of purposeful discrimination after conducting a statistical analysis of the prosecution's use of peremptory strikes. Appellant first cites *Miller-El v. Dretke*, in which the United States Supreme Court concluded the prosecution's use of its peremptory strikes against ten of eleven African-American venire members constituted a disparate use of strikes. *See Miller-El*, 545 U.S. at 240–41. Appellant then cites *Thomas v. State*, in which the First Court of Appeals determined the State utilized a disproportionate number of peremptory strikes to exclude minorities by using six of its ten peremptory strikes to exclude six of the seven African-Americans remaining in the venire panel. *See Thomas*, 209 S.W.3d at 274.[5]

When conducting a statistical review of the State's use of peremptory challenges, we are mindful that "a repetition of such strikes in suspiciously large numbers" against minorities is an indicator of purposeful discrimination. *See Linscomb v. State*, 829

[5] Several other courts have reached similar conclusions. *See Watkins*, 245 S.W.3d at 451–52 (concluding prosecution's use of seven of the State's eleven peremptory strikes against seven out of eight African-American prospective jurors constituted a disproportionate use of peremptory challenges); *Leadon v. State*, No. 01-08-00839-CR, — S.W.3d — , 2010 WL 143467, at *11 (Tex. App.—Houston [1st Dist.] Jan. 14, 2010, no pet.) (determining State's use of four of its eleven peremptory strikes against four out of five African-American venire members constituted a statistically disproportionate number of strikes); *Greer v. State*, 310 S.W.3d 11, 15 (Tex. App.—Dallas 2009, no pet.) (concluding State's use of all of its six peremptory strikes against six out of eight African-American venire members was "remarkably disproportionate").

S.W.2d 164, 166 (Tex. Crim. App. 1992). In this case, unlike those relied upon by appellant, the State did not utilize a majority of its strikes against African-Americans. Because two out of ten strikes is not a "suspiciously large number" of available strikes, we cannot conclude that the exclusion of 100% of the African-Americans from the venire panel "results more from purposeful discrimination than from random chance." *See Vasquez v. State*, No. 01-09-00217-CR, 2009 WL 4855229, at *3–4 (Tex. App.—Houston [1st Dist.] Dec. 17, 2009, pet. ref'd) (mem. op., not designated for publication) (determining prosecution's use of two out of ten peremptory strikes to remove 100% of the Hispanics in the strike zone was not a disproportionate use of peremptory strikes). Thus, we cannot agree with appellant that a statistical review of the State's use of its peremptory challenges shows the prosecution's proffered reasons for striking Leach and Dews were a pretext for purposeful discrimination.

While the disproportionate use of peremptory challenges may support appellant's burden of persuasion that the State's proffered race-neutral explanations for the challenged strikes are a pretext for discrimination, a comparative analysis of the State's peremptory strikes is more powerful evidence than bare statistics. *See Miller-El*, 545 U.S. at 241; *Watkins*, 245 S.W.3d at 452; *see also Held v. State*, 948 S.W.2d 45, 49–50 (Tex. App.—Houston [14th Dist.] 1997, pet. ref'd) (recognizing a proper *Batson* analysis involves considering a combination of factors and not merely "looking for some magic number or 'telling' percentage" of stricken minority venire members). Thus, we will consider the prosecutor's reasons for exercising the challenged strikes and determine whether the record shows disparate treatment of minority venire members.

ii) Comparative Juror Analysis

Evidence tending to prove purposeful discrimination exists if the record shows that a prosecutor's explanations for striking a minority venire member apply equally to an otherwise similar non-minority who is permitted to serve. *Miller-El*, 545 U.S. at 241. As discussed above, the prosecutor explained during the *Batson* hearing that Leach had been

struck because she favored rehabilitation over punishment and was unsure whether a friend who had been involved in a criminal investigation had been treated fairly by law enforcement or the justice system. The prosecutor also stated that Dews had been struck because she was unsure whether a family member who had been involved in a criminal investigation had been treated fairly by the justice system and the prosecutor remembered prosecuting another individual named Dews in Smith County.[6] The prosecutor further noted that the State struck four white venire members who, like Leach, favored rehabilitation over punishment and another white venire member who, like Dews, was uncertain whether a family member involved in a criminal investigation had been treated fairly by the justice system. Appellant did not challenge these assertions or identify any similarly situated non-minority individuals who were not struck by the State and eventually served on the jury during appellant's trial. Appellant also does not make a comparative analysis argument on appeal. We decline to examine the record to discover any comparisons to rebut those presented by the State. *See Lizcano v. State*, No. AP-75879, 2010 WL 1817772, at *4 (Tex. Crim. App. May 5, 2010) (not designated for publication) (foregoing a comparative juror analysis because appellant failed to identify any non-minority jurors who were not struck by the State with characteristics similar to a minority venire member who was struck by the State).

Once the prosecutor provided the State's explanations for striking Leach and Dews, appellant bore the burden to convince the trial court that the reasons were not race-neutral and were, in fact, a pretext for purposeful discrimination. *See Williams*, 301 S.W.3d at 688; *see also Perez v. State*, No. 14-07-00319-CR, 2008 WL 2261455, at *3

[6] We note that a prospective juror's belief that rehabilitation is the primary goal of punishment can be a race-neutral reason for exercising a peremptory strike. *See Crew v. State*, No. 05-08-00959-CR, 2009 WL 2712386, at *5 (Tex. App.—Dallas Aug. 31, 2009, pet. ref'd) (mem. op., not designated for publication); *Montgomery v. State*, 198 S.W.3d 67, 76 (Tex. App.—Fort Worth 2006, pet. ref'd); *Victor v. State*, 995 S.W.2d 216, 222 (Tex. App.—Houston [14th Dist.] 1999, pet. ref'd). Additionally, the fact that a prospective juror has a family member or close friend who has been arrested, charged, or convicted of a crime may also be a race-neutral basis for utilizing a peremptory strike. *See Emerson v. State*, 851 S.W.2d 269, 272 (Tex. Crim. App. 1993); *Vasquez*, 2009 WL 4855229, at *4; *Montgomery*, 198 S.W.3d at 76.

(Tex. App.—Houston [14th Dist.] May 27, 2008, pet. ref'd) (mem. op., not designated for publication) ("It was incumbent upon appellant to establish that the State's proffered reasons were mere pretext, and to do so by a preponderance of the evidence."). A defendant's failure to offer any rebuttal to the prosecutor's race-neutral explanations can be fatal to a *Batson* challenge. *See Johnson v. State*, 68 S.W.3d 644, 649 (Tex. Crim. App. 2002); *see also Wamget v. State*, 67 S.W.3d 851, 859–60 (Tex. Crim. App. 2001) (overruling *Batson* challenge where appellant presented no evidence of racial or ethnic discrimination beyond general statement that venire member was excluded because she was "born in Liberia").

In this case, appellant offered no rebuttal evidence or argument that the prosecutor's reasons for striking Leach and Dews were a pretext for discrimination. Instead, defense counsel simply questioned one of the prosecutors as to whether the race of any venire member was noted on the State's list or chart of prospective jurors. Following this brief line of questioning, defense counsel indicated he had no further questions or arguments. We, therefore, cannot conclude the State's proffered reasons for the challenged strikes were a pretext for purposeful discrimination. *See Johnson*, 68 S.W.3d at 649; *see also Burton v. State*, No. 14-06-00827-CR, 2008 WL 4151843, at *6 (Tex. App.—Houston [14th Dist.] Mar. 27, 2008, pet. ref'd) (mem. op., not designated for publication) (determining appellant's failure to rebut prosecutor's race-neutral reasons or present evidence establishing explanations were pretextual precluded a finding that the challenged strikes were exercised on the basis of race). Under these circumstances, appellant has not established that Leach and Dews were excluded on the basis of race. Because of this, we cannot say the trial court's denial of appellant's *Batson* motion was clearly erroneous. *See Guzman*, 85 S.W.3d at 254. Accordingly, we overrule appellant's first issue.

III. FACTUAL SUFFICIENCY OF THE EVIDENCE

In her second issue, appellant challenges the factual sufficiency of the evidence to support her conviction. Specifically, she asserts that the evidence fails to prove she participated in the robbery.

A) Standard of Review

When conducting a factual-sufficiency review, the only question to be answered is: "Considering all of the evidence in a neutral light, was a jury rationally justified in finding guilt beyond a reasonable doubt?" *Grotti v. State*, 273 S.W.3d 273, 283 (Tex. Crim. App. 2008). Evidence can be factually insufficient when the evidence supporting the verdict is (1) so weak that the verdict is clearly wrong and manifestly unjust or (2) outweighed by the great weight and preponderance of the contrary evidence so as to render the verdict clearly wrong and manifestly unjust. *Id.* We follow three basic principles in our review: First, we consider all of the evidence in a neutral light rather than in a light most favorable to the verdict. *Laster v. State*, 275 S.W.3d 512, 518 (Tex. Crim. App. 2009). Second, we may find the evidence factually insufficient only when necessary to prevent manifest injustice. *Id.* Third, we must explain why the evidence is too weak to support the verdict or why the conflicting evidence greatly weighs against the verdict. *Id.* We are not free to disregard the verdict simply because we disagree with it. *Id.*

B) Applicable Law

We consider the elements of the charged offense as defined by a hypothetically correct jury instruction when reviewing a factual-sufficiency challenge. *Wooley v. State*, 273 S.W.3d 260, 268 (Tex. Crim. App. 2008). Such a charge (1) accurately sets out the law, (2) is authorized by the indictment, (3) does not unnecessarily increase the State's burden of proof or unnecessarily restrict the State's liability theories, and (4) adequately describes the particular offense for which the defendant was tried. *Villarreal v. State*,

286 S.W.3d 321, 327 (Tex. Crim. App.), *cert. denied*, 130 S. Ct. 515 (2009). As authorized by the indictment in this case, the hypothetically correct jury charge would include the following elements of the charged offense: (1) appellant, (2) while in the course of committing theft and with intent to obtain or maintain control of the property, (3) intentionally or knowingly threatened or placed Oscar Barker in fear of imminent bodily injury or death (4) while using or exhibiting a deadly weapon.[7] *See* TEX. PENAL CODE ANN. §§ 29.02(a)(2), 29.03(a)(2) (Vernon 2003). The hypothetically correct jury charge in this case would also instruct the jury that, even if appellant did not use or exhibit a deadly weapon herself, she could be criminally responsible for the charged offense if, acting with intent to promote or assist the commission of the offense, appellant solicited, encouraged, directed, aided, or attempted to aid another person to commit the offense. *See id.* § 7.02(a)(2).

C) Analysis

Appellant contends the evidence is factually insufficient to prove she participated in the charged offense. The State bore the burden of proving appellant's participation in the robbery beyond a reasonable doubt. *See Smith v. State*, 56 S.W.3d 739, 744 (Tex. App.—Houston [14th Dist.] 2001, pet. ref'd). Identity may be proved through direct or circumstantial evidence, or through inference. *Id.* To prove appellant's identity as a participant in this case, the State elicited testimony from Thompson showing that appellant called him on the night of the offense and "came up with the idea of robbing the pizza man" because she needed money to pay probation fees. Thompson also testified appellant was with him "the whole time" during the offense and that appellant told Barker to give up his money. Multiple witnesses also testified that Barker, after being brought to the convenience store where appellant was in custody, positively identified appellant as one of the individuals who robbed him. During cross-examination, Barker vehemently denied defense counsel's suggestions that he initially identified Hampton, not

[7] A deadly weapon is defined, in relevant part, as a firearm. TEX. PENAL CODE ANN. § 1.07(a)(17)(A) (Vernon Supp. 2009).

appellant, as one of the robbers. Thompson also testified that Hampton did not participate in the robbery. At trial, Barker positively identified appellant and stated he was "100 percent" certain she was "the person out there not holding the gun" when he was robbed. The positive identification of a defendant as a perpetrator is sufficient to support a conviction. *Cate v. State*, 124 S.W.3d 922, 928 (Tex. App.—Amarillo 2004, pet. ref'd) (per curiam); *see also Kesaria v. State*, 148 S.W.3d 634, 641 (Tex. App.—Houston [14th Dist.] 2004) ("Positive identification of a defendant by the victim of a robbery is to be given great weight."), *aff'd*, 189 S.W.3d 279 (Tex. Crim. App. 2006).

Appellant contends Barker's identification testimony contains contradictions and inconsistencies and is therefore factually insufficient evidence to prove appellant's participation. In support of this position, appellant references portions of Barker's testimony in which Barker stated that it was dark at the scene, the offense occurred very quickly, he did not initially know whether the robbers were male or female, and that appellant, Thompson, and Hampton were all wearing similar dark clothing. Barker testified, however, that he was able to see the robbers because the house next door was well lit and he was close enough to see the robbers' faces. Barker also stated that he was able to identify appellant from her face rather than her relative size or clothing. Appellant is essentially challenging Barker's credibility as a witness. As the exclusive judge of the credibility of the witnesses and the weight to give their testimony, it is the sole province of the jury to resolve any conflicts or inconsistencies in the evidence. *Wesbrook v. State*, 29 S.W.3d 103, 111 (Tex. Crim. App. 2000); *State v. Moreno*, 297 S.W.3d 512, 522 (Tex. App.—Houston [14th Dist.] 2009, pet. ref'd); *see also Lancon v. State*, 253 S.W.3d 699, 705 (Tex. Crim. App. 2008) (reviewing courts afford almost complete deference to a jury's determination that is based upon an evaluation of witness credibility). A jury's resolution of conflicting evidence in the State's favor does not render the decision manifestly unjust. *See Cain v. State*, 958 S.W.2d 404, 410 (Tex. Crim. App. 1997). We cannot say that any inconsistencies or conflicts in Barker's testimony greatly outweigh his consistent positive identification of appellant, both on the

night of the offense and at trial, as one of the individuals who participated in the charged offense.

Appellant also asserts Thompson's testimony was motivated by his desire to protect Hampton, the mother of his child, from criminal prosecution. Additionally, appellant contends that "numerous facts" provided by Thompson's testimony implicate Hampton, rather than appellant, in the offense. These facts include: Thompson took the rifle used in the robbery from Hampton's house, Hampton drove the suspect vehicle to the scene, Thompson used a phone belonging to Hampton's mother to order the pizza, Hampton was wearing dark clothing similar to appellant's, and Hampton was in the suspect vehicle when it was stopped by police. Thompson acknowledged these facts, but consistently testified that Hampton was not involved in the offense. When Thompson confessed his involvement in the offense, he stated appellant was involved and did not mention Hampton's name.[8] The evidence concerning Thompson's alleged motive to lie and the facts showing Hampton's possible involvement in the offense were before the jury. It was the jury's role to consider Thompson's credibility and the weight to give any evidence challenging Thompson's testimony concerning appellant and Hampton's involvement. *Lancon*, 253 S.W.3d at 705. Absent evidence that the jury's decision is clearly wrong or manifestly unjust, we will not disturb the jury's verdict. *Grotti*, 273 S.W.3d at 280.

Finally, appellant points to the testimony of Jessica Walton, appellant's sister, as strong evidence showing she was not involved in the charged offense. Walton testified that she was with appellant on the night of the offense until 11 p.m., when appellant was picked up at a restaurant by Hampton and Thompson in a green van. To rebut Walton's testimony, the State presented video evidence showing that appellant, Thompson, and Hampton were stopped by police at 10:11 p.m. in a silver Mercury Grand Marquis. As the sole judge of the weight and credibility to give witness testimony, the jury is free to

[8] Thompson initially told police that appellant and another individual were involved in the robbery, but later confessed that only he and appellant participated in the offense.

believe or disbelieve all or any portion of a witness's alibi testimony. *See Vasquez v. State*, 67 S.W.3d 229, 236–39 (Tex. Crim. App. 2002) (conducting factual-sufficiency review and concluding jury could reasonably disbelieve alibi testimony presented by appellant's girlfriend); *Leadon v. State*, No. 01-08-00839-CR, — S.W.3d — , 2010 WL 143467, at *6 (Tex. App.—Houston [1st Dist.] Jan. 14, 2010, no pet.) (recognizing jury's role in assessing witness credibility and weight to give witness testimony and declining to disturb jury's decision to disbelieve appellant's alibi witnesses). By its verdict, the jury chose to disbelieve Walton's testimony and believe the evidence showing that appellant was a participant in the charged offense.

We conclude the evidence showing that appellant was present at the scene of the offense and actively encouraged Barker to give his money to her and Thompson, combined with Barker's consistent positive identifications of appellant as one of the individuals involved in the offense, constitutes factually sufficient evidence to support a finding that appellant participated in the charged offense. *See* TEX. PENAL CODE ANN. §§ 29.02(a)(2), 29.03(a)(2); *see also Harmon v. State*, 167 S.W.3d 610, 614 (Tex. App.—Houston [14th Dist.] 2005, pet. ref'd) (holding evidence was legally and factually sufficient to support aggravated robbery conviction where complainant identified appellant from a photo lineup and testified at trial that "she was '[a]bsolutely sure' that appellant was the person who beat and robbed her"); *Apolinar v. State*, 106 S.W.3d 407, 412–13 (Tex. App.—Houston [1st Dist.] 2003) (concluding identification evidence was factually sufficient to support aggravated robbery conviction where complainant identified appellant three times at trial and witness testimony was fairly consistent in describing appellant's appearance, although complainant demonstrated confusion and vision problems at trial), *aff'd*, 155 S.W.3d 184 (Tex. Crim. App. 2005).

After viewing all the evidence in a neutral light, we conclude the jury was rationally justified in finding appellant's guilt for the charged offense beyond a reasonable doubt because the evidence supporting the verdict is not (1) so weak as to be

clearly wrong and manifestly unjust or (2) outweighed by the great weight and preponderance of the contrary evidence. Thus, the evidence is factually sufficient to support appellant's conviction. *See Grotti*, 273 S.W.3d at 283. We overrule appellant's second issue.

IV. CONCLUSION

After reviewing the record, we conclude (1) the trial court did not err by overruling appellant's *Batson* motion because appellant failed to demonstrate that the prosecutor's proffered reasons for striking Leach and Dews were a pretext for purposeful discrimination and (2) the evidence is factually sufficient to show that appellant participated in the charged offense. We affirm the judgment of the trial court.

/s/ Leslie B. Yates
Justice

Panel consists of Justices Yates, Seymore, and Brown.
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