Affirmed and Memorandum Opinion filed March 16, 2010

In The

Fourteenth Court of Appeals

NO. 14-08-01088-CR

D'ANDRE DEMOND DAVIS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 149th District Court
Brazoria County, Texas
Trial Court Cause No. 56,119

MEMORANDUM OPINION

D'Andre Demond Davis pleaded guilty to the offense of aggravated robbery. After the trial court conducted a presentence investigation, the court sentenced Davis to ten years and three months' confinement in the Institutional Division of the Texas Department of Criminal Justice. Davis's sole issue on appeal is that the trial court erred by failing to find him not guilty or guilty of a lesser-included offense based on the evidence presented in the record. We affirm.

I

D'Andre Demond Davis pleaded guilty to the offense of aggravated robbery. Although Davis did not physically participate in the bank robbery, he admitted to assisting in its preparation. Davis provided the vehicle, disguises, and BB guns for the other parties involved in the crime to use during the commission of the robbery. Davis also admitted he was willing to receive any amount of payment the other parties wanted to give him after they committed the crime.

Davis requested that the court reset the date for sentencing until after the court reviewed Davis's presentence investigation ("PSI") report. The trial judge accepted Davis's plea, but agreed he would consider the PSI before sentencing Davis. Davis's PSI report contained a description of the charged offense, his statements about the offense, the crime the other parties were charged with as well as their sentences, his prior criminal history, his family history, details about his education and employment, a statement about his mental and physical health, character reference letters, victim impact letters, and an evaluation by a community supervision officer. At the sentencing hearing, the trial judge explained he reviewed the PSI report, but he sentenced Davis to ten years and three months' confinement and stated the sentence was "as light as I [could] go on this one because it is aggravated robbery of a bank." This appeal followed.

II

In his sole issue, Davis contends that the trial court erred by failing to find him not guilty or guilty of a lesser-included offense. Specifically, Davis argues that the evidence in the record "does not support a finding a firearm was used to commit the offense"; therefore, the trial court had a duty to either find him not guilty or guilty of a lesser-included offense. The State argues that the trial judge properly found Davis guilty of aggravated robbery because the evidence was sufficient to support the plea, and the trial judge was not required to *sua sponte* find Davis not guilty or guilty of a lesser-included

offense. Additionally, the State asserts that Davis did not properly preserve his issue for appeal. We will address the State's preservation contention first.

Generally, a party must make a timely and specific objection, motion, or complaint to preserve error for appellate review. Tex. R. App. P. 33.1(a); *Aldrich v. State*, 104 S.W.3d 890, 895 (Tex. Crim. App. 2003) (stating the general rule does not apply to two types of errors that may be raised for the first time on appeal: (1) violations of "rights which are waivable only;" and (2) denials of "absolute systematic requirements"). During a plea hearing in *Aldrich v. State*, the appellant "remained silent about the pendency of a decision on guilt"; she never claimed she was innocent; and she did not seek an acquittal, withdrawal of her plea, or conviction of a lesser-included offense. 104 S.W.3d at 894, 896. The Court of Criminal Appeals concluded that the appellant had not preserved error for review regarding her guilty plea because the record did not reflect that she voiced her complaint in the trial court and obtained a ruling on the complaint. *Aldrich*, 104 S.W.3d at 896.

As in *Aldrich*, Davis never objected to the trial judge's sentence. Before sentencing occurred, the trial judge asked if "anyone had good cause why [he] should not sentence at this time." Davis's attorney responded, "No, [y]our honor. The only thing I wanted to add is that . . . [Davis's] charge was actually aggravated robbery and the other two guys that came before you . . . the grand jury indicted them under robbery, even though they were the ones with the gun." The trial judge emphasized that he understood the charges, but to him all the defendants, including Davis, were parties to the same offense. The trial judge then sentenced Davis based on his guilty plea for aggravated robbery. Davis did not seek an acquittal, withdrawal of his guilty plea, or request a conviction of a lesser-included offense. Additionally, Davis did not argue that the evidence did not support his guilty plea. Because the record does not reflect Davis made

a timely and specific objection in the trial court and obtained a ruling thereon, he has not preserved this issue for appeal.[1] Accordingly we overrule his sole issue.

* * *

For the foregoing reasons, we affirm the trial court's judgment.

/s/ Jeffrey V. Brown
Justice

Panel consists of Justices Yates, Frost, and Brown.

Do Not Publish — TEX. R. APP. P. 47.2(b).

[1] Davis argues that the Court of Criminal Appeals's decision in *Moon v. State* imposes a duty on a judge to either withdraw the defendant's guilty plea or find the defendant guilty of a lesser-included offense if the evidence does not support the defendant's guilty plea. 572 S.W.2d 681, 682 (Tex. Crim. App. 1978). Davis contends that the trial court must abide by this safeguard to "assure the voluntary nature of the plea." *See Griffin v. State*, 703 S.W.2d 193, 195 (Tex. Crim. App. 1986). The Court of Criminal Appeals in *Aldrich*, however, reviewed its prior *Moon* decision. 104 S.W.3d at 893–95. The court emphasized "*Moon* did not create a requirement of a review proceeding in the course of a plea of guilty. It merely recognized the obvious duty of a court to consider the evidence that is before it." *Id.* at 894. Here, the trial court did review and consider the evidence before it, including the PSI report, but we will not review the merits of the decision because as in *Aldrich*, Davis did not preserve his error for review. *See id.* at 896.