Affirmed and Memorandum Opinion filed June 20, 2017.

In The

Fourteenth Court of Appeals

NO. 14-15-00968-CR

ISAIAS ARELLANO, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 339th District Court
Harris County, Texas
Trial Court Cause No. 1387915

M E M O R A N D U M O P I N I O N

A jury convicted appellant Isaias Arellano of aggravated robbery. *See* Tex. Penal. Code. Ann. § 29.03(a)(2) (West 2011). Appellant appeals his conviction in three issues. In his first issue, appellant argues that the evidence is legally insufficient to support his conviction because it does not show appellant intended to obtain and maintain control of the victim's property. We conclude the evidence of intent is sufficient; among other things, police saw appellant carrying a TV out

of the victim's apartment. Appellant argues in his second issue that there was legally insufficient evidence to support the jury's negative finding on his affirmative defense of duress. Given that the person whom appellant identified as the source of the duress denied threatening appellant, we conclude there is evidence supporting the jury's negative finding. In his last issue, appellant argues it was error for the trial court not to include a lesser-included-offense of aggravated assault in the jury charge. Because there is no evidence that appellant had permission to remove the property, a rational jury could not find appellant guilty only of aggravated assault on this record, and trial court did not err. We therefore affirm the trial court's judgment.

BACKGROUND

On May 15, 2013, Lauren Mitchell was nine months pregnant and lying in bed when appellant and Alex Tlamasico kicked down her front door and entered her apartment. They went into the bedroom and appellant asked Mitchell where he would find money and drugs. Mitchell told him there was money in her purse by the bed. Appellant went through her purse looking for money and credit cards.

Mitchell testified that appellant pulled out a gun and told Tlamasico to tie her up with duct tape. Tlamasico was shaking as he taped Mitchell. Appellant grabbed the duct tape from Tlamasico and told him to "go get the stuff," and then appellant tied Mitchell's wrists and ankles with the duct tape so she could not move. At Mitchell's request, appellant took her to the room where her two young children were and sat her on the bed. According to Mitchell, appellant pointed his gun at her head and stomach multiple times before he took her to her children's room. He also wrapped duct tape around her head, covering her mouth. He then dragged her into the hallway and stomped on her pregnant stomach.

While appellant was tying up Mitchell, Tlamasico took Mitchell's purse, a

television, and an Xbox to the car where the getaway driver, Hector Ramirez, was waiting. After stomping on Mitchell's stomach, appellant ran from the apartment carrying a television. The police arrived at Mitchell's apartment complex and caught appellant, Tlamasico, and Ramirez before they could leave.

Testimony revealed that appellant and Tlamasico were members of the Surenos Southside Midnighters gang. Mitchell explained during trial that her husband Jose Cuevas was a general in the Surenos gang. As a general, Cuevas manages other members of the Surenos gang. Although Mitchell and Cuevas were married and living together, they were no longer romantically involved. Ramirez, the getaway driver, was also a leader in the Surenos gang. Cuevas and Ramirez were close friends. A romantic relationship began between Mitchell and Ramirez in May 2012, and Mitchell became pregnant with Ramirez's child.

Cuevas was angry when Ramirez and Mitchell told him about her pregnancy. There was testimony at trial that Cuevas put a "green light" on Ramirez. In the Surenos gang, putting a "green light" on someone is a signal to gang members to murder that person. Cuevas, as a general in the Surenos gang, had the authority to put a green light on someone.

Tlamasico testified that Ramirez ordered the robbery and threatened him and appellant. He also testified that Ramirez told appellant not to forget to stomp Mitchell. Ramirez testified, however, that he did not threaten Tlamasico and appellant, and that he did not know before the robbery that they were going to Mitchell's apartment. Ramirez testified he thought they were going to rob another person's apartment.

The jury convicted appellant of aggravated robbery and found the enhancement paragraph alleging a prior felony true. It sentenced appellant to 60 years in prison and assessed a fine of $10,000. This appeal followed.

ANALYSIS

I. The evidence is legally sufficient to support appellant's conviction.

In his first issue, appellant argues the evidence is legally insufficient to support his conviction. Specifically, appellant argues there is no evidence that he intended to obtain and maintain control of the victim's property.

A. Standard of review

We review evidentiary sufficiency challenges under the standard set forth in *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). *See Brooks v. State*, 323 S.W.3d 893, 895 (Tex. Crim. App. 2010). The reviewing court must consider the evidence in the light most favorable to the verdict and determine whether a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson*, 443 U.S. at 319; *Anderson v. State*, 416 S.W.3d 884, 888 (Tex. Crim. App. 2013). The jury is the sole judge of the credibility of the witnesses and the weight to afford testimony. *Montgomery v. State*, 369 S.W.3d 188, 192 (Tex. Crim. App. 2012). The jury may reasonably infer facts from the evidence presented, credit the witnesses it chooses, disbelieve any or all of the evidence or testimony proffered, and weigh the evidence as it sees fit. *See Canfield v. State*, 429 S.W.3d 54, 65 (Tex. App.—Houston [1st. Dist.] 2014, pet. ref'd). Our role on appeal is simply to ensure that the evidence reasonably supports the jury's verdict. *Montgomery*, 369 S.W.3d at 192.

B. There is sufficient evidence that appellant intended to obtain or maintain control of Mitchell's property.

A person commits robbery if, in the course of committing theft and with intent to obtain or maintain control of the property, he intentionally or knowingly threatens or places another in fear of imminent bodily injury or death. Tex. Penal Code Ann. § 29.02(a)(2) (West 2011). A person commits theft if he unlawfully

appropriates property with intent to deprive the owner of property. Tex. Penal Code Ann. § 31.03(a) (West 2011). A person commits aggravated robbery if he uses or exhibits a deadly weapon during the commission of a robbery. Tex. Penal Code. Ann. § 29.03(a)(2) (West 2011).

Appellant argues the evidence does not show his intent was to obtain and maintain control of Mitchell's property. Appellant claims that the testimony shows appellant was ordered by Mitchell's husband, Cuevas, to remove the property. Because Cuevas was the owner of the property too, appellant argues, the evidence does not support he intended to rob Mitchell. Rather, appellant contends, the evidence shows he was ordered to "stomp" Mitchell, and there was no evidence he intended to commit robbery. We disagree and conclude the evidence is sufficient as to appellant's intent to commit aggravated robbery.

There is no evidence that suggests Cuevas ordered appellant to remove the property. Appellant cites a portion of Mitchell's testimony where she was asked if she was aware that Cuevas put a green light on Ramirez. When she responded yes, appellant's counsel asked if that was the reason she knew the robbery was gang related. She responded, "for that reason no." This evidence does not suggest Cuevas ordered appellant to remove property from the apartment.

There is also affirmative evidence of appellant's intent. Ramirez testified that appellant wanted to rob Cuevas because Cuevas had a gun and sells weed. Mitchell testified that during the robbery, appellant asked where he would find money and drugs. After she told appellant he could find money in her purse, he started taking money out of her purse and looking for credit cards. She also testified appellant told Tlamasico to "get the stuff." Tlamasico and two police officers saw appellant carrying a television from Mitchell's apartment. This evidence is legally sufficient to demonstrate appellant's intent to obtain and

maintain control of Mitchell's property.

For these reasons, we conclude that a reasonable jury could find beyond a reasonable doubt that appellant intended to commit aggravated robbery. We overrule appellant's first issue.

II. There is legally sufficient evidence to support the jury's negative finding on appellant's duress defense.

In his second issue, appellant challenges the legal sufficiency of the evidence to support the jury's negative finding that he was acting under duress.[1]

A. Standard of review

In a legal sufficiency review of a negative finding on an affirmative defense, we first examine the record for a scintilla of evidence favorable to the jury's finding and disregard all evidence to the contrary, unless a reasonable jury could not. *Butcher v. State*, 454 S.W.3d 13, 20 (Tex. Crim. App. 2015); *Matlock v. State*, 392 S.W.3d 662, 669–70 (Tex. Crim. App. 2013). If no evidence supports the jury's negative finding on the defendant's affirmative defense, then we search the record to see if the defendant established his affirmative defense as a matter of law. *Matlock*, 392 S.W.3d at 669–70. The jury's negative finding on a defendant's affirmative defense should be overturned for lack of legal sufficiency only if the appellant establishes the evidence conclusively proves his affirmative defense and no reasonable jury was free to think otherwise. *Id.* at 70.

B. There is evidence favorable to the jury's negative finding on duress.

It is an affirmative defense to prosecution that the defendant was compelled

[1] A defendant may challenge a jury's negative finding on an affirmative defense for both legal and factual sufficiency. *See Butcher v. State*, 454 S.W.3d 13, 20 (Tex. Crim. App. 2015). Appellant only challenges the legal sufficiency of the evidence supporting the jury's rejection of his duress defense.

to act by threat of imminent death or serious bodily injury to himself or another. Tex. Penal Code. § 8.05(a) (West 2011). Compulsion means force or threat of force that would render a person of reasonable firmness incapable of resisting the pressure. Tex. Penal Code. § 8.05(c). An imminent threat is a present threat of harm. *See Devine v. State*, 786 S.W.2d 268, 270–71 (Tex. Crim. App. 1989) (discussing meaning of imminent in the context of robbery); *see also Anguish v. State*, 991 S.W.2d 883, 886 (Tex. App.—Houston [1st Dist.] 1999, pet. ref'd) (relying on the Court of Criminal Appeals' interpretation of imminent for duress). A duress defense is unavailable if the defendant intentionally, knowingly, or recklessly placed himself in a situation where it was probable he would be subjected to compulsion. Tex. Penal Code. Ann. § 8.05(d).

Appellant argues the evidence was legally sufficient to support his duress defense. Appellant points to Tlamasico's testimony that when a member of the Surenos gang receives an order, there is no choice but to follow the order or the member or the member's family will be hurt or killed. Tlamasico also testified Ramirez threatened him and appellant. Before we consider evidence that shows duress, however, we must first search the record for evidence that supports the jury's negative finding on duress. *Butcher*, 454 S.W.3d at 20.

The record contains legally sufficient evidence that defendant was not acting under duress. There is evidence that there was no threat at all: Ramirez testified he did not threaten appellant to make him commit the robbery. This evidence supports the jury's negative finding on duress.

Moreover, there is evidence that suggests appellant was not compelled by a threat of imminent harm. Tlamasico testified Ramirez threatened, "you better do it," but Ramirez did not say "do it or I'm going to kill your family." Additionally, Ramirez did not have a gun at the time of the robbery. The evidence shows

appellant was the only person with a gun during the robbery. From this evidence, the jury could have found that Ramirez's alleged threat was not enough to render appellant incapable of resisting the pressure because there was not a present, imminent threat of death or serious bodily injury to appellant or anyone else if appellant did not act. Tex. Penal Code. Ann. § 8.05(c); *see Divine*, 786 S.W.2d at 270–71; *see Anguish*, 991 S.W.2d at 886–87 (alleged threat was not imminent when defendant was told four days earlier to rob a bank or he and his family would be killed and the record did not show the person making the threat was prepared to carry it out immediately). The lack of evidence showing that appellant was compelled to act by an imminent threat therefore supports the jury's negative finding on duress. [2]

We conclude there is more than a scintilla of evidence in the record favorable to the jury's negative finding on appellant's affirmative defense of duress, and that appellant did not conclusively prove he was acting under duress. We therefore overrule appellant's second issue.

III. The trial court did not err by refusing to charge the jury on the lesser-included offense of aggravated assault.

In his third issue, appellant argues it was error for the trial court not to instruct the jury on the lesser-included offense of aggravated assault. Appellant argues the property taken was also Cuevas's and that there is a reasonable

[2] Even if the jury believed appellant was compelled, the evidence is undisputed that appellant was a member of the Surenos gang. This is evidence that appellant placed himself in a situation where it was probable that he would be subjected to compulsion from gang leaders and therefore the duress defense would not be available. Tex. Penal Code Ann. § 8.05(d); *see Guffey v. State*, No. 11–10–00106–CR, 2012 WL 1470185 at *4 (Tex. App.—Eastland April 26, 2012, pet. ref'd) (mem. op., not designated for publication) (holding trial court did not err in refusing to instruct jury on duress because there was no evidence of imminent threat, and defendant was gang member so defense was unavailable under section 8.05(d)). Evidence of appellant's gang membership therefore also supports the jury's negative finding on duress.

inference Cuevas ordered the removal of the property. Therefore, appellant argues, there is evidence that appellant was not guilty of aggravated robbery, but instead only aggravated assault.

A. Standard of review and applicable law

When reviewing an alleged error in the jury charge, we use a two-step process. First, we determine whether error actually exists. *Ngo v. State*, 175 S.W.3d 738, 743 (Tex. Crim. App. 2005). Then, if error exists, we determine whether it is harmful using the framework outlined in *Almanza v. State*, 686 S.W.2d 157 (Tex. Crim. App. 1985). *See Hung Phuoc Le v. State*, 479 S.W.3d 462, 472 (Tex. App.—Houston [14th Dist.] 2015, no pet.).

We employ a two-step analysis to determine whether the trial court erred in failing to instruct the jury on a lesser-included offense. *Rousseau v. State*, 855 S.W.2d 666, 672 (Tex. Crim. App. 1993). First, we determine whether the lesser-included offense is included within the proof necessary to establish the offense charged. *Id.* Second, some evidence must exist in the record that if the defendant is guilty, he is guilty only of the lesser included offense. *Id.* "It is not enough that the jury may disbelieve crucial evidence pertaining to the greater offense. Rather, there must be some evidence directly germane to a lesser-included offense for the factfinder to consider before an instruction on the lesser-included offense is warranted." *Skinner v. State*, 956 S.W.2d 532, 543 (Tex. Crim. App. 1997).

An offense is a lesser-included offense if "it is established by proof of the same or less than all the facts required to establish the commission of the offense charged." Tex. Code Crim. Proc. art. 37.09(1) (West 2006). One way of committing aggravated assault is when a person (1) intentionally or knowingly threatens another with imminent bodily injury and (2) uses or exhibits a deadly weapon during the commission of the assault. Tex. Penal Code Ann. §§ 22.02(2),

21.01(a)(2). One way of committing aggravated robbery is when a person, (1) while in the course of committing theft and with intent to obtain or maintain control of the property, (2) intentionally or knowingly threatens or places another in fear of imminent bodily injury or death, and (3) uses or exhibits a deadly weapon. Tex. Penal Code Ann. §§ 29.03(2), 29.02(a)(2).

Here, the indictment alleged that appellant did,

> while in the course of committing theft of property owned by [Mitchell], and with intent to obtain and maintain control of the property, INTENTIONALLY AND KNOWINGLY THREATEN AND PLACE [Mitchell] IN FEAR OF IMMINENT BODILY INJURY AND DEATH, and the defendant did then and there use and exhibit a deadly weapon, namely, A FIREARM.

Because the indictment alleged appellant committed aggravated robbery by intentionally and knowingly threatening and placing Mitchell in fear of imminent bodily injury and death, and exhibiting a firearm, aggravated assault can be proved by the same or less than all the facts required to prove aggravated robbery. *See* Tex. Code Crim. Proc. Ann. art. 37.09(1). Aggravated assault therefore is a lesser-included offense of aggravated robbery in this case. *See Ex parte Denton*, 399 S.W.3d 540, 547 (Tex. Crim. App. 2013) (concluding aggravated assault was lesser-included offense of aggravated robbery when counts for aggravated robbery and aggravated assault both asserted defendant intentionally or knowingly threatened another with imminent bodily injury and used or exhibited a deadly weapon).

B. There is no affirmative evidence supporting an aggravated assault instruction.

To meet the second requirement for obtaining an instruction on a lesser-included offense, the record must contain some evidence that is directly germane to the lesser-included offense. *Skinner*, 956 S.W.2d at 543. Although the evidence

may be weak or contradicted, the evidence must raise more than mere speculation. *Cavazos v. State*, 382 S.W.3d 377, 385 (Tex. Crim. App. 2012); *see also Hooper v. State*, 214 S.W.3d 9, 16 (Tex. Crim. App. 2007) ("Speculation is mere theorizing or guessing about the possible meaning of facts and evidence presented."). There must be "affirmative evidence that both raises the lesser-included offense and rebuts or negates an element of the greater offense." *Cavazos*, 382 S.W.3d at 385.

Appellant argues that some evidence shows Cuevas ordered the removal of the property that Cuevas co-owned with Mitchell, and therefore removing it was not a robbery of Mitchell's property as charged in the indictment. Because evidence shows appellant had permission to take the property, appellant argues, there is some evidence he was not guilty of aggravated robbery but guilty only of aggravated assault.

After reviewing the record, we conclude there is no affirmative evidence that Cuevas ordered appellant to remove the property from the apartment. In his argument, appellant cites no evidence, only defense counsel's argument objecting to the jury charge. We have already concluded that the portion of Mitchell's testimony appellant cited in his sufficiency argument was not evidence that Cuevas ordered the removal of the property.

Although there is evidence that Cuevas was upset about Mitchell's pregnancy with Ramirez's child, we cannot speculate that based on this evidence, Cuevas ordered appellant to take property from Mitchell. *Cavazos*, 382 S.W.3d at 385. There is evidence that Ramirez ordered appellant to rob and "stomp" Mitchell. But there is no evidence that Ramirez had any right to possess the property and thus to give appellant permission to take it.

Because there is no evidence in the record that would allow a rational jury to find appellant guilty only of aggravated assault, we conclude it was not error to

deny appellant's request to instruct the jury on the lesser-included offense of aggravated assault. We therefore overrule appellant's third issue.

CONCLUSION

Having overruled appellant's three issues, we affirm the trial court's judgment.

/s/ J. Brett Busby
Justice

Panel consists of Justices Boyce, Busby, and Wise.
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