In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-09-00508-CR
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NATHANIEL JAMON WHITAKER, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 411th District Court
Polk County, Texas
Trial Cause Nos. 20663, 20665

MEMORANDUM OPINION

A jury convicted Nathaniel Jamon Whitaker of robbery and aggravated robbery. The trial court sentenced Whitaker to ten years in prison for robbery and twenty-five years in prison for aggravated robbery. On appeal, Whitaker challenges: (1) the consolidation of the two offenses; (2) the legal and factual sufficiency of the evidence to support his convictions; and (3) the trial court's refusal to allow him to use a prior inconsistent statement during cross-examination of a witness. We affirm the trial court's judgments.

Factual Background

Robbery

Richard Kinser and his friend Brandon were walking from the skate park when Whitaker, Mashaw Tucker, and "R.C." approached him. Kinser did not know R.C.'s name at the time. It was dark outside, and Kinser had a "bad feeling" because he "knew somebody was going to end up hitting [him] for nothing." Specifically, Kinser feared that R.C., who had a reputation for attacking people, would hit him. Whitaker stood in the middle of the three men and asked Kinser for a cigarette. Kinser gave Whitaker a cigarette, but Whitaker took the package of cigarettes from Kinser. R.C. then struck Kinser on the face. Tucker began to walk away, but R.C. and Whitaker remained. Kinser walked away and contacted police. He later learned that someone had also struck Brandon.

Kinser testified that Whitaker made no attempt to prevent R.C.'s actions, but admitted that Whitaker may have failed to intervene because of R.C.'s reputation for violence. Kinser admitted that Whitaker never threatened him, harmed him, or attempted to leave with the cigarettes. He was not afraid of being assaulted by Whitaker and did not tell police that he was assaulted by Whitaker. However, Kinser believed that the men "had it all planned out" and that Whitaker knew R.C. intended to assault him. Whitaker never returned the cigarettes to Kinser.

Officer Ashley Brame met with Kinser and testified that he appeared distraught, in shock, and confused. Brame testified that Kinser's face was swollen and bore a red mark

and a knot, suggesting that he had been struck. Brame testified that Kinser identified Whitaker as the man who assaulted him and stole his cigarettes. In his written statement, Kinser identified an unknown man as his attacker and Whitaker as the man who took his cigarettes.

Aggravated Robbery

Brian Thomas was walking home one evening when he saw R.C., Tucker, and Whitaker park a white vehicle in an alleyway by the skate park. R.C. approached and told Thomas that he liked his jacket. When Thomas saw Tucker and Whitaker get out of the vehicle, he noticed they were holding something behind their backs. Thomas grew concerned. The men were no more than a couple feet away from him. Thomas turned to walk away, but was struck on the back with a "club or a bat-like object." Thomas fell to his knees, received blows to his chest and ribs, and was kicked several times. He heard either Tucker or Whitaker say, "Hurry up. We need to go." R.C. took Thomas's jacket, and the jacket was never recovered.

Thomas suffered pain and bruises as a result of the attack. He believed that both Tucker and Whitaker struck him with the objects they had been hiding behind their backs. Although Thomas did not see what the men were hiding, he testified that he was struck with a baseball bat-like object or club, not a hand. When the object struck his spine, he heard a "ding," like a metal baseball bat striking "across concrete or something." Having umpired baseball, he was familiar with the feeling of being struck by a baseball bat. He never saw Whitaker strike him, but was "positive" that Whitaker

did so. Thomas testified that he was in fear of imminent bodily injury or death during the assault.

Legal and Factual Sufficiency

In issue two, Whitaker challenges the legal and factual sufficiency of the evidence to support his convictions for robbery and aggravated robbery.

Standard of Review and Applicable Law

Under legal sufficiency review, we assess all the evidence in the light most favorable to the prosecution to determine whether any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007). Under factual sufficiency review, we assess the evidence "in a neutral light and ask[] whether the evidence supporting the verdict is so weak or so against the great weight and preponderance of the evidence as to render the verdict manifestly unjust." *Steadman v. State*, 280 S.W.3d 242, 246 (Tex. Crim. App. 2009).

"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 2003). "Each party to an offense may be charged with commission of the offense." *Id*. § 7.01(b). Section 7.02 of the Penal Code provides various theories of party liability. *See* TEX. PEN. CODE ANN. § 7.02 (Vernon 2003). Under the theory of party liability applicable to this case, the jury must have found beyond a reasonable doubt that: (1) acting with intent to promote or

assist the commission of the offense, (2) Whitaker solicited, encouraged, directed, aided, or attempted to aid the other person to commit the offense[s]. *Id.* § 7.02(a)(2); *Hooper*, 214 S.W.3d at 14 n.3.

The jury may consider '"events occurring before, during and after the commission of the offense, and . . . rely on actions of the defendant which show an understanding and common design to do the prohibited act.'" *Ransom v. State*, 920 S.W.2d 288, 302 (Tex. Crim. App. 1996) (op. on reh'g) (quoting *Cordova v. State*, 698 S.W.2d 107, 111 (Tex. Crim. App. 1985)). "Evidence is sufficient to convict under the law of parties where the defendant is physically present at the commission of the offense and encourages its commission by words or other agreement." *Id.* "[C]ircumstantial evidence may be used to prove party status." *Id.*

Robbery

A person commits robbery if, "in the course of committing theft" and "with intent to obtain or maintain control of the property," he (1) "intentionally, knowingly, or recklessly causes bodily injury to another;" or (2) "intentionally or knowingly threatens or places another in fear of imminent bodily injury or death." TEX. PEN. CODE ANN. § 29.02(a) (Vernon 2003).

Whitaker contends that the State failed to show that he intentionally, knowingly, or recklessly caused bodily injury to Kinser or placed Kinser in fear of imminent bodily injury because (1) he was unaware that R.C. would assault Kinser; and (2) he neither promoted nor assisted the assault of Kinser.

The Court of Criminal Appeals has held, "Knowledge of a co-conspirator's violent propensity or intent to commit aggravated assault is not an element of the offense under either theory of party liability, so the lack of evidence of such knowledge is not dispositive of sufficiency." *Hooper*, 214 S.W.3d at 14. "There is no requirement . . . that one prosecuted as a party, when engaged in those actions set forth in Section 7.02 with the intent to promote or assist the commission of an offense by another, know in advance that the other party intends to commit that offense." *Smith v. State*, 243 S.W.3d 796, 799 (Tex. App.—Eastland 2007, pet. ref'd). Accordingly, the question is not whether Whitaker knew that R.C. intended to commit the offense, but whether Whitaker acted with intent to promote or assist R.C.'s commission of the offense.

In this case, the men arrived at the scene together, and Whitaker instigated the contact with Kinser that led to R.C.'s assault of Kinser. Whitaker did nothing to prevent R.C.'s actions and, instead of walking away, remained with R.C. after the attack. The record also shows that R.C. has a violent reputation and that the men had been involved in past activities that convinced Kinser he would be assaulted during the encounter. In fact, the jury heard evidence of the aggravated robbery of Thomas, which involved similar details and the same individuals. *See Koontz v. State*, 868 S.W.2d 27, 29 (Tex. App.—Fort Worth 1993, pet. ref'd) ("[T]he jury was free to infer Koontz's intent in being present at the robbery by virtue of his having been present at a similar robbery involving a different victim."). The jury bore the burden of deciding whether Whitaker acted out of fear of R.C. or acted with an understanding and common design to commit

the offense. *See Lancon v. State*, 253 S.W.3d 699, 707 (Tex. Crim. App. 2008); *see also Wyatt v. State*, 23 S.W.3d 18, 30 (Tex. Crim. App. 2000). In doing so, the jury could reasonably conclude that Whitaker acted with intent to promote or assist commission of the robbery by aiding or attempting to aid the assault of Kinser. *See* TEX. PEN. CODE ANN. § 7.02(a)(2); *see also Ransom*, 920 S.W.2d at 302.

Viewing all the evidence in the light most favorable to the verdict, the jury could reasonably conclude, beyond a reasonable doubt, that Whitaker committed the offense of robbery. *See Jackson*, 443 U.S. at 318-19; *see also Hooper*, 214 S.W.3d at 13. The proof of guilt is not so weak nor the conflicting evidence so strong as to render the jury's verdict clearly wrong or manifestly unjust. *Steadman*, 280 S.W.3d at 246.

Aggravated Robbery

A person commits aggravated robbery if he commits robbery and "uses or exhibits a deadly weapon." TEX. PEN. CODE. ANN. § 29.03(a)(2) (Vernon 2003). A deadly weapon constitutes "anything that in the manner of its use or intended use is capable of causing death or serious bodily injury." TEX. PEN. CODE ANN. § 1.07 (a)(17)(B) (Vernon Supp. 2010).

Whitaker contends that the evidence is legally and factually insufficient to support aggravated robbery because (1) he was merely present at the scene of the offense and did not assist with the taking of Thomas's jacket; and (2) the State failed to show that a deadly weapon, *i.e.*, a club, was used or exhibited during commission of the offense,

given that Thomas never saw the weapon during the offense, and the State presented no evidence of the weapon's capabilities.

"[M]ere presence of an accused at the scene of an offense is not alone sufficient to support a conviction . . . ." *Valdez v. State*, 623 S.W.2d 317, 321 (Tex. Crim. App. 1981) (op. on reh'g). It is, however, "a circumstance tending to prove guilt which, combined with other facts, may suffice to show that the accused was a participant." *Id*.

The record shows that Whitaker arrived in the same vehicle with Tucker and R.C. and was seen hiding something behind his back. When R.C. expressed interest in Thomas's jacket, Thomas attempted to walk away, but was struck more than once with a club or baseball bat-like object. Thomas's jacket was taken and the men left together in the same vehicle. The jury also heard evidence of the robbery of Kinser. *See Koontz*, 868 S.W.2d at 29. The jury could reasonably conclude that Whitaker was not merely present at the scene of the offense, but acted with intent to promote or assist commission of the aggravated robbery by aiding the robbery of Thomas's jacket through a use of force. *See* TEX. PEN. CODE ANN. § 7.02(a)(2); *see also Ransom*, 920 S.W.2d at 302.

Moreover, that Thomas did not actually see the weapon with which he was attacked does not preclude a deadly weapon finding. *See Mixon v. State*, 781 S.W.2d 345, 346 (Tex. App.—Houston [14th Dist.] 1989), *aff'd*, 804 S.W.2d 107 (Tex. Crim. App. 1991) ("[W]e see nothing in the reasoning of prior deadly weapon cases that would preclude a deadly weapon finding simply because the weapon is not specifically known."); *see also Regan v. State*, 7 S.W.3d 813, 820 (Tex. App.—Houston [14th Dist.]

1999, pet. ref'd) (Victim did not see the weapon used during the offense, but testified that object "felt like a knife or an ice pick" and was a "handled instrument because she never felt [Regan's] right hand on her."). Whether an object is capable of causing death or serious bodily injury depends on a variety of factors, including "the physical proximity of the parties, the threats or words used by the defendant, the size, shape, and sharpness of the weapon, the manner in which the defendant used the weapon, and the wounds inflicted on the victim." *Wingfield v. State*, 282 S.W.3d 102, 107 (Tex. App.—Fort Worth 2009, pet. ref'd).

Thomas testified that the men were in close proximity to him. Whitaker's act of hiding an object behind his back carried an implied threat that he was prepared to cause death or serious bodily injury should Thomas attempt to resist. *See Hammons v. State*, 856 S.W.2d 797, 801 (Tex. App.—Fort Worth 1993, pet. ref'd). In fact, Thomas apparently perceived this threat, growing concerned upon seeing Whitaker and Tucker approaching. The threat was carried out once Thomas attempted to resist. The initial blow was hard enough to send him to his knees. Subsequent blows created enough sounds and physical sensations to allow Thomas to conclude that he was struck with a baseball bat-like object or club, not a hand. The blows caused bruises and pain. Thomas testified that he was in fear of imminent bodily injury or death because he "didn't know what might happen."

Thomas's testimony shows that the object used during the offense was capable of causing death or serious bodily injury. *See Hammons*, 856 S.W.2d at 801 ("Anstine's

testimony that he thought Hammons would hurt him badly sufficed as lay testimony about the bat's capacity to cause serious bodily injury."). The jury could reasonably conclude that the object used to strike Thomas was a club or baseball bat-type object capable of causing death or serious bodily injury. *Id.* ("[A]ll mankind know that death or serious bodily injury can be inflicted by a baseball bat in the hands of a grown man.").[1]

The jury could reasonably conclude, beyond a reasonable doubt, that Whitaker committed the offense of aggravated robbery. *See Jackson*, 443 U.S. at 318-19. The proof of guilt is not so weak nor the conflicting evidence so strong as to render the jury's verdict clearly wrong or manifestly unjust. *Steadman*, 280 S.W.3d at 246.

Summary

Because the evidence is legally and factually sufficient to support Whitaker's convictions for robbery and aggravated robbery, we overrule issue two.

Severance

In issue one, Whitaker contends that the trial court abused its discretion by consolidating the two offenses of robbery and aggravated robbery.

Once offenses have been consolidated or joined under section 3.02(b) of the Penal Code, "the defendant shall have a right to a severance of the offenses." TEX. PEN. CODE

[1] Whitaker cites *Denham v. State*, 574 S.W.2d 129 (Tex. Crim. App. 1978) and *In re S.B.*, 117 S.W.3d 443 (Tex. App.—Fort Worth 2003, no pet.) for the proposition that the evidence in this case is insufficient to show the weapon's ability to cause death or serious bodily injury. *Denham* involved a knife, not a baseball bat or club. *See Denham*, 574 S.W.2d at 130. In *S.B.*, unlike the present case, the baseball bat was not used to strike the victim. *See S.B.*, 117 S.W.3d 448-49. Thus, we do not find these cases persuasive.

ANN. § 3.04(a) (Vernon Supp. 2010). A request is timely if raised pretrial. *See Thornton v. State,* 986 S.W.2d 615, 617 (Tex. Crim. App. 1999); *see also Rodriguez v. State*, 90 S.W.3d 340, 357 (Tex. App.—El Paso 2001, pet. ref'd). However, "[w]hen a defendant creates the impression that he is abandoning his objection, his initial objection is insufficient to preserve the issue for appeal." *Rodriguez*, 90 S.W.3d at 357. "[A]n accused may not be allowed to benefit on appeal from any situation or error he brought upon himself during the trial." *Id.*

Although Whitaker timely filed his objection and request for severance, he did not urge the request during pretrial hearings and effectively abandoned his request for severance by announcing "ready" at trial and failing to pursue his right to severance when the trial court called the two cases for trial. *See Rodriguez*, 90 S.W.3d at 357. Issue one is not preserved for appellate review. *Id.*

Limitation of Cross-Examination

In issue three, Whitaker contends that the trial court abused its discretion and violated his Sixth Amendment confrontation rights by refusing to allow him to cross-examine Officer Brame about prior inconsistent statements made by Kinser.

Kinser testified that he never told police that Whitaker assaulted him. During cross-examination of Officer Brame, the defense attempted to use Kinser's written statement, but the trial court sustained the State's hearsay objection. Initially, Officer Brame testified that, in his written statement, Kinser identified Whitaker, not R.C., as his assailant. However, Officer Brame further testified, "Based on my initial report from the

scene, no, sir, Mr. Kinser did not identify [his assailant]." Officer Brame later clarified that Kinser's written statement identifies an unknown man as Kinser's assailant.

On appeal, Whitaker contends that he should have been allowed to use Kinser's written statement, pursuant to Rule 801 of the Rules of Evidence. *See* TEX. R. EVID. 801. However, according to the record, the parties agreed to admit Kinser's written statement into evidence. Thus, assuming without deciding that the trial court abused its discretion, any error would be harmless because the statement was later admitted into evidence. *See Baldree v. State*, 248 S.W.3d 224, 232 (Tex. App.—Houston [1st Dist.] 2007, pet. ref'd). We overrule issue three.

Conclusion

Having overruled Whitaker's three issues, we affirm the judgments of the trial court.

AFFIRMED.

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STEVE MCKEITHEN
Chief Justice

Submitted on September 22, 2010
Opinion Delivered October 6, 2010
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Before McKeithen, C.J., Kreger and Horton, JJ.