Affirmed and Opinion Filed November 13, 2017

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-16-01169-CR

ANDRES DANIEL VERA, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the Criminal District Court No. 2
Dallas County, Texas
Trial Court Cause No. F-1576839-I

MEMORANDUM OPINION

Before Justices Bridges, Fillmore, and Stoddart
Opinion by Justice Bridges

A jury convicted appellant Andres Daniel Vera of aggravated robbery. He pleaded true to a prior 2014 felony conviction for burglary of a habitation, and a jury sentenced him to thirty-three years' confinement.[1] In two issues, appellant argues the trial court erred by allowing the State to amend the indictment during trial and by denying his request for a lesser-included offense instruction. We affirm.

Background

Complainant returned to her home in the middle of the afternoon on December 21, 2015, and "the whole living area looked like a bomb had gone off." Within seconds, she felt a gun against her head and a male said, "Don't move." He pushed her across the floor with the gun

[1] During punishment, the jury also heard evidence involving a 2011 conviction for marijuana possession and a 2012 conviction for attempted theft.

still to her head. He tied her up to a kitchen chair and tied a piece of fabric around her eyes. While tied up, she heard him fill bags with her belongings and make three trips outside to a car. He stole jewelry, identification documents, credit cards, a computer, and her cell phone.

After he left in her black Camaro, she slipped off the ropes and ran across the street. She called 911 from a neighbor's house. She told the 911 operator the man used a "small automatic" that she saw briefly.

Officer Steve Gomez responded to the robbery call. He determined the point of entry was a small, back window. Complainant provided a description of her attacker and the stolen car. Officer Gomez issued a "be on the lookout" over the radio. He tried to locate her vehicle and laptop through electronic tracking, but they were not immediately found.

Detective Roosevelt Holiday lifted fingerprints from the broken, back window. Fingerprint analysis confirmed appellant's prints on the window.

Officer Ivan Saldana received a dispatch later that night regarding an abandoned car on fire at the end of a residential street. Based on his initial observations, someone tried to "torch it." The car was identified as complainant's stolen Camaro.

Detective Ramon Martinez received information from complainant about use of her stolen credit cards on December 22, 2015. Detective Martinez visited the CVS and 7-Eleven where the stolen credit cards were used. Based on surveillance video, he acquired leads on a suspect. Appellant later used complainant's credit card at an AutoZone and signed his name and phone number on the receipt. Based on this information, officers found appellant's address.

Officers went to the location and entered the home. Appellant was in a back bedroom and refused to open the door. He eventually responded to verbal commands, and officers took him into custody. Officers recovered complainant's credit cards and driver's license.

After obtaining a search warrant, officers found a loaded silver semiautomatic .22 caliber pistol in a jacket hanging inside the bedroom door where appellant was hiding. A black BB gun was also recovered.

Detective John Valdez interviewed appellant after he was in custody. Appellant denied using a "real gun," but said he found a black airsoft gun or BB gun inside complainant's house in a drawer in the living room and used it during the robbery. He admitted threatening to shoot complainant with "her gun" if she did not obey him.

Detective Valdez testified complainant did not own a gun. Moreover, complainant told Detective Valdez appellant used a silver gun during the robbery. When Detective Valdez told appellant officers found a black BB gun and a silver gun at his home, appellant said he took the black gun from complainant's house, but did not know where the silver gun came from. Appellant claimed he did not have it with him at the time of the robbery.

After Detective Valdez showed appellant a picture of the silver gun found in his jacket, appellant changed his story. Appellant identified the silver gun as a .22 caliber gun that "was hers." He claimed he got it from complainant's bedroom nightstand. He denied pointing the silver gun at complainant, but said he "laid the silver gun down in front of her." Detective Valdez asked, "You think that's when she saw it?" Appellant nodded yes. Appellant admitted hiding the silver gun in his jacket before the police arrived at his home so his girlfriend would not see it.

The State indicted appellant for intentionally and knowingly "while in the course of committing theft of property and with intent to obtain or maintain control of said property, threaten and place [complainant] in fear of imminent bodily injury and death, and defendant used or exhibited a deadly weapon, to-wit: A FIREARM." The jury convicted appellant of aggravated robbery. This appeal followed.

Motion to Amend Indictment

In his first issue, appellant argues the trial court erred by granting the State's motion to amend the indictment during trial. The State responds amending the enhancement paragraph of the indictment during trial was not error because it was not part of the substance of the indictment.

Article 28.10(a) provides that after notice to a defendant, "a matter of form or substance in an indictment or information may be amended at any time before the date the trial on the merits commences." TEX. CODE CRIM. PROC. ANN. art. 28.10(a) (West 2006). It further states an indictment "may not be amended over the defendant's objection as to form or substance if the amended indictment . . . charges the defendant with an additional or different offense or if the substantial rights of the defendant are prejudiced." *Id*. art. 28.10(c). However, article 28.10 does not apply to the amendment of enhancement allegations in the indictment. *Davis v. State*, No. 05-14-00378-CR, 2015 WL 1542211, at *7 (Tex. App.—Dallas Apr. 2, 2015, no pet.) (mem. op., not designated for publication); *Choice v. State*, No. 05-11-00629-CR, 2012 WL 3104676, at *3 (Tex. App.—Dallas July 31, 2012, pet. ref'd) (not designated for publication). Enhancement allegations that are not part of the State's case-in-chief are not part of the "substance" of the indictment. *Davis*, 2015 WL 1542211, at *7.

In the instant case, the State requested an amendment to the enhancement paragraph because it incorrectly stated the offense originated in the 282nd district court instead of the 265th district court. The enhancement allegation the State sought to amend was not part of its case-in-chief. Accordingly, article 28.10 did not apply. Because article 28.10 was not applicable, the trial court did not err by overruling appellant's objection to the State's motion to amend the indictment after the trial had commenced. *Choice*, 2012 WL 3104676, at *3. Appellant's first issue is overruled.

Lesser-Included Offense Instruction

In his second issue, appellant argues the trial court erred by refusing to include an instruction on the lesser-included offense of robbery. The State responds the trial court did not err because there is no evidence that if appellant was guilty, he was guilty only of robbery.

A defendant is entitled to an instruction on a lesser-included offense when the lesser offense is included within the proof necessary to establish the offense charged and some evidence is presented that would permit a jury to rationally find that if the defendant is guilty, he is guilty only of the lesser offense. *Rousseau v. State*, 855 S.W.2d 666, 672–73 (Tex. Crim. App. 1993); *Drake v. State*, No. 05-14-01115-CR, 2015 WL 6861363, at *2 (Tex. App.—Dallas Nov. 9, 2015, no pet.) (mem. op., not designated for publication). As alleged here and as acknowledged by the State, robbery is a lesser-included offense of aggravated robbery, the difference between the two being the use or exhibition of a deadly weapon. *See* TEX. PENAL CODE ANN. § 29.02, 29.03(a)(2) (West 2011).

The indictment alleged appellant used a firearm, and the charge defined "deadly weapon" as a "firearm or anything manifestly designed, made or adapted for the purpose of inflicting death, serious bodily injury, or anything in the manner of its use or intended use that is capable of causing death or serious bodily injury." Thus, appellant was entitled to an instruction on robbery if there was some affirmative evidence in the record from which a rational jury could find that he did not use or exhibit a firearm or anything else capable of causing death or serious bodily injury. Anything more than a scintilla of evidence is sufficient. *Cavazos v. State*, 382 S.W.3d 377, 385 (Tex. Crim. App. 2012); *Drake*, 2015 WL 6861363, at *2. However, the evidence must establish the lesser-included offense as a "valid, rational alternative to the charged offense." *Cavazos*, 382 S.W.3d at 385.

In reviewing the trial court's denial of the instruction, we evaluate the evidence in the context of the entire record, but do not consider whether the evidence is credible, controverted, or in conflict with other evidence. *Hall v. State*, 158 S.W.3d 470, 473 (Tex. Crim. App. 2005). So while it is true that the evidence may be weak or contradicted, the evidence must still be directly germane to the lesser-included offense and must rise to the level that a rational jury could find that if appellant is guilty, he is guilty only of the lesser-included offense. *Cavazos*, 382 S.W.3d at 385; *Drake*, 2015 WL 6861363, at *3. "Meeting this threshold requires more than mere speculation—it requires affirmative evidence that both raises the lesser-included offense and rebuts or negates an element of the greater offense." *Id*.

To support his argument, appellant relies on the custodial interrogation where he denied using a firearm during the offense but instead claimed he used a CO_2 or BB gun. However, appellant's argument ignores the fact that Detective Valdez testified "airsoft guns" powered by CO_2 cartridges are considered deadly weapons capable of causing serious injury. Thus, while appellant denied using a "firearm," he admitted to using another weapon capable of causing serious bodily injury. *See, e.g., Adame v. State*, 69 S.W.3d 581, 582 (Tex. Crim. App. 2002) (evidence that defendant displayed BB gun and that it was capable of causing serious bodily injury if pointed and fired at someone was sufficient to support a deadly weapon finding). Because the jury heard testimony an "airsoft" gun is capable of serious bodily injury and appellant admitted to pointing an "airsoft" gun at complainant and threatening to shoot her, the State provided evidence supporting his use of a "deadly weapon" as defined by the jury charge.

To the extent appellant asserts he used a "toy" gun during the offense, this assertion was not presented to the jury during the guilt-innocence phase of trial. Rather, appellant said he used a "toy gun" in a written note his attorney read to the judge during punishment outside the presence of the jury. Appellant's statement (made after the jury had already decided his guilt)

was not evidence that could serve as a basis for a lessor-included offense instruction. *See Cavazos*, 382 S.W.3d at 385 (explaining that affirmative evidence must raise the lesser-included offense). Accordingly, appellant provided no evidence of a valid, rational alternative to the charged offense that would allow a jury to rationally find that, if he is guilty, he is guilty only of robbery. *See Bullock*, 509 S.W.3d at 925 ("[A] statement made by the defendant cannot be plucked out of the record and examined in a vacuum."); *Cavazos*, 382 S.W.3d at 385.

Because the record does not contain affirmative evidence that a deadly weapon was not used, we conclude that the trial court did not abuse its discretion in refusing to submit a charge on the lesser-included offense of robbery. *Penaloza v. State*, 349 S.W.3d 709, 713 (Tex. App.—Houston [14th Dist.] 2011, pet. ref'd). Appellant's second issue is overruled.

Conclusion

The judgment of the trial court is affirmed.

/David L. Bridges/
DAVID L. BRIDGES
JUSTICE

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Court of Appeals
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JUDGMENT

ANDRES DANIEL VERA, Appellant	On Appeal from the Criminal District Court No. 2, Dallas County, Texas
No. 05-16-01169-CR V.	Trial Court Cause No. F-1576839-I.
	Opinion delivered by Justice Bridges.
THE STATE OF TEXAS, Appellee	Justices Fillmore and Stoddart participating.

Based on the Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

Judgment entered November 13, 2017.