MODIFY and AFFIRM; and Opinion Filed November 27, 2018.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-17-01207-CR

MARCUS BARTHOLOMEW BOOKER, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the 291st Judicial District Court
Dallas County, Texas
Trial Court Cause No. F-1652028-U

MEMORANDUM OPINION

Before Justices Stoddart, Whitehill, and Boatright
Opinion by Justice Boatright

A jury convicted appellant of aggravated robbery and assessed his punishment at 75 years' confinement. Appellant claims the evidence is insufficient to support his conviction, among other alleged errors. We modify the judgment and affirm it as modified.

BACKGROUND

The alleged robbery occurred on February 9, 2016, at a Walmart store in Dallas County. Around 9:30 that evening, Kyla Draden was working as a cashier. She testified that a man holding a pistol turned the corner, pointed the gun at her, and asked "where it's at, where it's at?" Draden pretended to enter a code that would open the register. The man again asked "where it's at," to which Draden replied, "I don't know." The man fired a shot, and Draden fled. At trial, she identified appellant as the perpetrator.

The State offered the testimony of ten other witnesses and sixty-five exhibits, including a surveillance video that recorded the events in question. Thereafter, the jury found appellant guilty of aggravated robbery, as defined in sections 29.02(a)(2) and 29.03(a)(2) of the Penal Code. The trial proceeded to the punishment phase, in which the State offered evidence to prove the offenses alleged in the enhancement paragraphs of the indictment. The jury found both enhancements to be "true" and assessed appellant's punishment at 75 years' confinement. The district court rendered judgment on the jury's verdict, which appellant has appealed.

ANALYSIS

Appellant raises three issues, each of which we will address below.

Sufficiency of the Evidence

Appellant first contends that the evidence is insufficient to establish that he was the person who committed the offense in question. In reviewing this assertion, we must "view the evidence in the light most favorable to the verdict and determine whether, based on the evidence and reasonable inferences therefrom, a rational juror could have found the essential elements of the crime beyond a reasonable doubt." *Queeman v. State*, 520 S.W.3d 616, 622 (Tex. Crim. App. 2017) (citation and internal quotation marks omitted). "The jury is the sole judge of the credibility of witnesses and the weight to be given to their testimonies," and we must not usurp this role by substituting our own judgment for that of the jury. *Montgomery v. State*, 369 S.W.3d 188, 192 (Tex. Crim. App. 2012). Our duty "is simply to ensure that the evidence presented supports the jury's verdict and that the [S]tate has presented a legally sufficient case of the offense charged." *Id.*

We begin by examining the evidence, in addition to Draden's testimony, regarding the identification of appellant as the perpetrator. Michael Bailey, a Dallas County Deputy Sheriff, was working off-duty security on the evening in question. He was in the back of the store when he

heard a loud noise in the store. He walked closer to investigate and then heard a gunshot, followed by a "stampede" of customers who ran towards him. He directed the customers to leave the building through a back stockroom.

Officer Bailey then ran to the front of the store and called 911. He saw the suspect behind the counter of a bank inside the store. The suspect climbed on the counter, and Officer Bailey could see the gun in his hand. The suspect fired several shots. Officer Bailey pressed himself against the wall and lost sight of the suspect for a minute or two. When he realized the suspect had gone outside, Officer Bailey ran out to the parking lot in pursuit. He ran down an aisle that was adjacent to the aisle that led to the front door and came upon two men engaged in a struggle on the ground. He testified he had no doubt that one of these men was the suspect.

Dallas Police Department Officer Cassie Dotsy was the first on-duty officer to arrive on the scene. Officer Dotsy was in her patrol car, in the parking lot of an adjacent shopping center, when she heard gunshots. She saw people running out of the Walmart, and she drove closer to have a better look. A man left the store with a gun in his hand, and he fired at least two shots while in the entryway. Officer Dotsy got out of her car and chased the suspect on foot through the parking lot. Her gun was drawn, and she told the suspect to drop his gun. When he did so, a citizen volunteer, Julio Garza, tackled him. Officer Dotsy apprehended the suspect with the assistance of Officer Bailey, Garza, and another citizen. Garza's testimony corroborated Officer Dotsy's that the suspect fired shots while leaving the Walmart. Both Officer Dotsy and Garza identified appellant at trial as the suspect.

Several items recovered from the crime scene were also admitted into evidence. These included a pistol and fired cartridge casings[1] that a firearms examiner confirmed had been fired

[1] We address below appellant's contention that the State offered an insufficient chain of custody to justify the admission of the pistol and the cartridge casings.

from the pistol. The State also offered photographs of various articles of clothing in the parking lot, including a jacket, a shirt, and a pair of shoes. Officer Bailey testified that the suspect was wearing less clothing outside the store than he had previously worn while inside. In addition, Officer Dotsy saw the suspect pull his shirt off after he dropped his gun. Garza also testified that the suspect was hit by a vehicle in the parking lot and was knocked out of his shoes. A photo of appellant taken at the police station shows that he was not wearing a shirt or shoes.

Appellant notes that Draden testified she saw his face only "a little bit." He also points to Officer Dotsy's testimony that she was initially too far away to see the suspect's face and that, when later pursuing the suspect in the parking lot, she could see a man's head between the cars. Moreover, appellant relies upon Officer Bailey's testimony that he told the 911 operator he could not determine the suspect's race because he had something over his head. In addition, appellant notes that the surveillance video clips offered at trial were missing a portion of the parking lot sequence. He also claims, contrary to Officer Dotsy's testimony referenced above, that none of the witnesses testified that they saw the suspect removing his clothing in the parking lot.

Appellant additionally urges that the police did not perform a thorough investigation. Specifically, they did not conduct a photo lineup, they did not submit a gunshot residue test, and they were not aware of any fingerprint results with respect to physical items collected at the scene. They also lost a cell phone video that showed the car hitting appellant in the parking lot. Moreover, the lead detective did not interview appellant back at the police station because he concluded that appellant "probably wasn't in a good condition to be interviewed."

The foregoing criticisms do not negate the sufficiency of the evidence to support appellant's conviction. "Each fact need not point directly and independently to the guilt of the appellant, as long as the cumulative force of all the incriminating circumstances is sufficient to support the conviction." *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007). In addition to

Draden's, Dotsy's, and Garza's eyewitness testimony, the incriminating circumstances in this case include the pursuit and apprehension of appellant in the parking lot, the evidence that the gunman removed his clothes in the parking lot, and the evidence that appellant was wearing no shirt or shoes when he was apprehended. Upon viewing the evidence in the light most favorable to the verdict, we conclude that a rational juror could find beyond a reasonable doubt that appellant was the person who committed the offense in question. *Queeman*, 520 S.W.3d at 622. We overrule appellant's first issue.

Lesser Included Offense

During the charge conference, appellant's counsel requested a jury instruction on the lesser included offense of attempted robbery because "there was no property actually taken," appellant "never got access to any funds," and he "never exited with any money." The court denied appellant's request, stating that the offense of aggravated robbery did not require such proof. Appellant's second issue contends that the court erred in denying the requested instruction. He relies on authority holding that "if evidence from any source raises the issue of a lesser included offense, a charge on that offense must be included in the court's charge." *Saunders v. State*, 840 S.W.2d 390, 391 (Tex. Crim. App. 1992) (per curiam). Moreover, "[t]he credibility of the evidence and whether it conflicts with other evidence must not be considered in deciding whether the charge on the lesser included offense should be given." *Id.*

In its response, the State relies upon the two-prong test applicable to determining whether a jury charge on a lesser included offense must be given. *Rousseau v. State*, 855 S.W.2d 666, 672 (Tex. Crim. App. 1993). "[F]irst, the lesser included offense must be included within the proof necessary to establish the offense charged, and, second, some evidence must exist in the record that if the defendant is guilty, he is guilty only of the lesser offense." *Id*. The State acknowledges that the offense of attempted robbery meets the criteria for a lesser included offense under article

37.09 of the Code of Criminal Procedure, but it contends that appellant has not shown that, if guilty, he is guilty only of attempted robbery.

Specifically, the State refers to the statutory definition of robbery: "[a] person commits an offense 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) (emphasis added). It notes that the statute defines "'in the course of committing theft'" as "conduct that occurs in *an attempt to commit*, during the commission, or in immediate flight after the *attempt* or commission of theft." *Id.* § 29.01(1) (emphases added).

In this case, the State presented evidence that appellant intentionally or knowingly placed Draden in fear of imminent bodily injury or death by using or exhibiting a firearm while in the course of committing theft. Draden testified that appellant pointed his gun at her and demanded the money in her register. The video clips played to the jury also showed coins falling out of the till at Draden's register as appellant shook the till. Appellant threw the till on the floor, and the police subsequently discovered that the till had sustained the impact of a bullet. While appellant failed in securing the money that he sought to steal, "[a]n actual theft is not necessary to support a robbery conviction." *Gilmore v. State*, 822 S.W.2d 350, 351 (Tex. App.—Waco 1992, no pet.) (per curiam). In sum, the evidence in this case is probative of an aggravated robbery, not an attempted robbery. Stated conversely, the record contains no evidence that appellant is guilty, if at all, only of attempted robbery. Thus, the court did not err in overruling appellant's request for an attempted robbery instruction. We overrule appellant's second issue.

Chain of Custody

Appellant's third issue urges that the court erred in overruling his objection to the admission of State's exhibits 55 through 69, which consisted of the pistol and the shell casings

collected at the crime scene. The court sustained appellant's objection that the State had not offered a sufficient predicate to support the admission of this evidence, subject to allowing the State a future opportunity to lay a further predicate. Later in the trial, the State again offered the foregoing exhibits during the testimony of Rico Harris, the lead DPD detective on appellant's case. Harris did not collect the evidence at the crime scene, nor did he put it in the DPD evidence room, though he did bring it from the evidence room to the trial. Harris testified that DPD paperwork reflects the chain of custody, and he verified that only law enforcement personnel had access to the evidence once it was logged in the evidence room. He also confirmed that the serial number on the pistol and the identification number on the shell casings matched the numbers recorded in DPD's paperwork when these items were collected. Appellant renewed his objection based on Harris's lack of personal knowledge regarding the chain of custody. The court overruled the objection.

We review a trial court's admission of evidence under an abuse of discretion standard, and we will not reverse if the court's ruling is within the "zone of reasonable disagreement." *Tillman v. State*, 354 S.W.3d 425, 435 (Tex. Crim. App. 2011). While the Texas Rules of Evidence do not expressly address chain of custody, "they do state that identification for admissibility purposes is satisfied if the evidence is sufficient to support a finding that the matter in question is what its proponent claims." *Druery v. State*, 225 S.W.3d 491, 503 (Tex. Crim. App. 2007) (citing, inter alia, TEX. R. EVID. 901(a)). Evidence of tampering or other fraud can affect the admissibility of evidence, *id.*, but appellant made no such objection in this case. He instead objected that Harris lacks personal knowledge regarding the chain of custody, which affected the weight to be given the foregoing exhibits, not their admissibility. *Id.* at 503–04. For this reason, the court did not abuse its discretion when it admitted the exhibits into evidence. We overrule appellant's third issue.

Reformation of Judgment

In a cross-point, the State seeks to reform a portion of the judgment that is inconsistent with the record. Specifically, the judgment recites "N/A" with respect to appellant's plea to each of the two enhancement paragraphs in the indictment. The judgment also states "N/A" concerning the jury's findings as to each of the foregoing enhancements. Contrary to the judgment, the record reflects that appellant pled "not true" to the enhancement paragraphs, and the jury found them to be "true." "This court has the power to correct and reform the judgment of the court below to make the record speak the truth when it has the necessary data and information to do so." *Asberry v. State*, 813 S.W.2d 526, 529 (Tex. App.—Dallas 1991, pet. ref'd). Consistent with the record, we modify the judgment to reflect that appellant pled "not true" to each enhancement paragraph and that the jury found each such paragraph to be "true."

CONCLUSION

We modify the court's judgment and affirm the judgment as modified.

/Jason Boatright/
JASON BOATRIGHT
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

MARCUS BARTHOLOMEW BOOKER, Appellant	On Appeal from the 291st Judicial District Court, Dallas County, Texas Trial Court Cause No. F-1652028-U.
No. 05-17-01207-CR V.	Opinion delivered by Justice Boatright. Justices Stoddart and Whitehill participating.
THE STATE OF TEXAS, Appellee	

Based on the Court's opinion of this date, the judgment of the trial court is **MODIFIED** to reflect that appellant pled "not true" to each of the first and second enhancement paragraphs and that the jury found each such paragraph to be "true."

As **REFORMED**, the judgment is **AFFIRMED**.

Judgment entered this 27th day of November, 2018.