

Opinion issued January 20, 2011



In The
Court of Appeals
For The
First District of Texas

NO. 01-09-00938-CR

OSCAR OLIVARES, Appellant
V.
THE STATE OF TEXAS, Appellee

**On Appeal from the 337th Criminal District Court
Harris County, Texas
Trial Court Case No. 1170743**

MEMORANDUM OPINION

Appellant Oscar Olivares and his brother were indicted for aggravated robbery and tried together. Olivares was charged as an accomplice under the law of parties. TEX. PENAL CODE ANN. § 7.02(a)(2) (Vernon 2003). A jury convicted Olivares of the lesser-included offense of aggravated assault. *See id.* §§ 22.01,

22.02 (Vernon Supp. 2010); *see* TEX. CODE CRIM. PROC. art. 37.09 (Vernon 2006).

The court assessed punishment at 40 years' confinement in prison. Olivares appeals, arguing that the evidence is factually insufficient to support his conviction. We affirm.

Background

The testimony at trial established that Oscar Olivares went to complainant Erika Rodriguez's home on the afternoon of May 22, 2008. Rodriguez's roommate Chante Jones answered the door and let Olivares into the living room. Jones told Rodriguez that Olivares wanted to see her, but Rodriguez was in bed and told Jones to tell him to go away. Olivares did not leave; instead, he waited several hours at the house for Rodriguez to get up.

Jones testified that a friend of Rodriguez drove her and Olivares to a restaurant where they bought dinner. When Olivares and Jones returned to the house, Rodriguez was awake. Rodriguez, Jones, and Olivares ate together in the living room. Jones testified that Olivares stepped outside to take a phone call. Several minutes later, Olivares's brother, who at that time was unknown to Jones and Rodriguez, burst through the door brandishing a gun. He fired and ordered the women to go into the front bedroom where Olivares tied them up. Jones testified that Olivares bound her and Rodriguez's hands and feet. Jones was on her back or side with her hands tied behind her back. She could see Olivares going into and

coming out of a spare bedroom, which Jones and Rodriguez both admitted was full of stolen property. Rodriguez was also tied up, but she could not see what Olivares was doing. Olivares's brother, who was pointing his gun at the women, began cursing and yelling at Rodriguez and Jones.

Rodriguez testified that after some time had passed, one of the defendants said, "Somebody's coming." Olivares's brother, who was behind Rodriguez at the time, cursed at Rodriguez and then shot her in the head. He then pointed the gun at Jones and pulled the trigger, but the gun did not discharge. Jones testified that the gun went "click, click, click." Both Olivares and his brother then fled the scene.

Jones, who believed Rodriguez was dead, freed herself from the rope bindings, rolled under the bed, and escaped out the window. She ran to a friend's house nearby and called the police. The 9-1-1 operator indicated that a police unit and ambulance had already been dispatched to the house. Jones then returned to the house, where the EMTs and responding officer were already on the scene.

Officer M. Agee, the first responding officer, conducted a preliminary investigation. He briefly interviewed both women before Rodriguez was taken to the hospital. Hospital records admitted into evidence indicated that Rodriguez suffered a gunshot wound to the scalp. When she testified at trial, the bullet had not been removed from her head.

Officer Agee testified that he did not see any blood in the bedroom where Jones and Rodriguez were tied up. He did not collect any physical evidence at the scene, nor did he request a crime scene unit to collect evidence. Officer Agee testified that he saw a small piece of rope between 8 and 12 inches in length on the floor of the bedroom, but he neither collected it nor made a note of it in his report.

Sergeant G. Urie conducted the follow-up investigation and interviewed both witnesses. Based on the information provided by Jones and Rodriguez, Sgt. Urie prepared a photo array containing a picture of Olivares. Both Jones and Rodriguez positively identified him as their attacker. Sgt. Urie also showed Jones and Rodriguez a photo array containing an image of Olivares's brother. Only Jones was able to positively identify Olivares's brother.

Olivares was later indicted on aggravated robbery charges under the law of parties. TEX. PENAL CODE ANN. § 7.02(a)(2). The jury convicted him of the lesser-included offense of aggravated assault with a deadly weapon. The court assessed punishment at 40 years' imprisonment. Olivares timely filed a notice of appeal, and he argues on appeal that the State failed to present factually sufficient evidence to support his conviction.

Analysis

In his sole issue, Olivares challenges the factual sufficiency of the evidence to support his conviction. Specifically, he argues that the State's witnesses lacked

credibility and that the lack of physical evidence undermines the verdict. He further contends that because the jury found him not guilty of aggravated robbery, they could not, based on the same testimony, also convict him of the lesser-included offense of aggravated assault.

I. Standard of review

A court reviewing the sufficiency of evidence to support a criminal conviction must determine “whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789 (1979). Our state-law standard for reviewing the factual sufficiency of the evidence mirrors the standard required by the United States Constitution. *See Brooks v. State*, 323 S.W.3d 893, 911–12 (plurality op.), 926 (Cochran, J., concurring) (Tex. Crim. App. 2010) (articulating legal standard for factual-sufficiency review by courts of appeals).

The jury is the exclusive judge of the facts. TEX. CRIM. PROC. CODE ANN. arts. 36.13, 38.04 (Vernon 2007 & 1979); *Brooks*, 323 S.W.3d at 908. Accordingly, “[a]ppellate courts should afford almost complete deference to a jury’s decision when that decision is based upon an evaluation of credibility.” *Lancon v. State*, 253 S.W.3d 699, 705 (Tex. Crim. App. 2008). “The jury is in the best position to judge the credibility of a witness because it is present to hear the

testimony, as opposed to an appellate court who relies on the cold record.” *Id.* The jury is the sole judge of the credibility of the witnesses and may accept or reject any part or all of the testimony given by the State or defense witnesses. *Johnson v. State*, 571 S.W.2d 170, 173 (Tex. Crim. App. 1978). Accordingly, the factfinder may choose to believe some testimony and disbelieve other testimony. *Lancon*, 253 S.W.3d at 707.

II. Aggravated assault

A person commits assault when he intentionally, knowingly, or recklessly causes or threatens another with imminent bodily injury. TEX. PENAL CODE ANN. § 22.01(a)(1)–(2). The offense of assault becomes aggravated assault if, during the commission of the assault, the offender causes serious bodily injury to another or uses or exhibits a deadly weapon during the commission of the assault. *Id.* § 22.02(a)(2). Under the law of parties, a person is criminally responsible for an offense committed by the conduct of another if he acts with intent to promote or assist the commission of the offense. *Id.* § 7.02(a)(2).

Here, Olivares argues that the evidence is factually insufficient because the testimony of Jones and Rodriguez was “punctuated with discrepancies,” one or both of them was lying, and the witnesses’ testimony lacked credibility. Olivares contends that because the witnesses’ testimony was not credible, the jury could not have acquitted him on the aggravated robbery charge without also acquitting him

of the lesser-included offense of aggravated assault. Olivares also points to the lack of physical evidence, arguing that the evidence is factually insufficient because the responding officer failed to collect physical evidence at the scene of the crime.

A. Discrepancies in testimony

Olivares argues that Jones and Rodriguez were not credible witnesses because of discrepancies in their testimony. The discrepancies relied upon by Olivares relate to the witnesses' living arrangements, the facts relating to the trip to buy dinner, the number of gunshots and how the witnesses were tied up, and differences in their accounts to the police.

Jones testified initially that she was living with Rodriguez because the school she attended was nearby. Jones later admitted she had dropped out of school and had not been attending school for several months. Jones testified that only she and Rodriguez lived at the house, but Rodriguez testified that another young woman also lived there. Although Jones testified that Rodriguez did not work while she was living with her, Rodriguez testified that she was working. She admitted that she had been laid off but could not recall when.

With respect to the excursion to get dinner, Rodriguez testified that Jones and Olivares returned with food after she had gotten out of bed. At trial, Jones testified that she, Olivares, and Rodriguez's friend went to a fast food restaurant to

pick up food. When Sgt. Urie testified, however, he stated that Jones initially said that Rodriguez had gone with the other three.

As to facts of the crime, Jones testified that Olivares's brother fired between four and five times: once at the floor, once at Rodriguez's head, and three times at her. With respect to the shots aimed at her, she testified that the gun did not discharge but went, "click, click, click." Rodriguez recalled hearing two shots, once in the living room and once at her head. In regards to how they were tied up, Jones said that she and Rodriguez were tied up together, while Rodriguez testified that they were tied up separately.

Sgt. Urie's testimony also revealed several inconsistencies in the statements Jones and Rodriguez made to the police. Rodriguez first told Sgt. Urie that Jones was her niece, but later she admitted that they were not related. Sgt. Urie further testified that Rodriguez changed her story about her connection to Olivares. First, she indicated to Sgt. Urie that Olivares was her boyfriend, she said that she had seen him at a store several days before the incident, and then she told him that Olivares had been working in her house.

Despite these discrepancies, the testimony of Jones and Rodriguez at trial and the statements they made to Officer Agee and Sgt. Urie about the assault were fairly consistent. Jones and Rodriguez recalled some of the details differently, but both testified that Olivares's brother had a gun that looked like a revolver, that he

fired it at the ground, that Olivares tied them up, that Olivares was going into and out of the room containing stolen property, that his brother was yelling, swearing, and pointing the gun at them, and that Olivares's brother shot Rodriguez before fleeing the scene.

Olivares's challenges to the factual sufficiency of the evidence are based on the credibility of the witnesses and the weight given to their testimony—issues on which this Court must defer to the factfinder. *See Lancon*, 253 S.W.3d at 705. There was sufficient evidence to sustain Olivares's conviction because there was testimony that established the essential elements of aggravated assault with a deadly weapon. *Sosa v. State*, 177 S.W.3d 227, 231–232 (Tex. App.—Houston [1st Dist.] 2005, no pet.) (holding that evidence that defendant committed aggravated assault was sufficient where eyewitnesses testified that defendant's accomplice pointed gun at complainant); *see also Padilla v. State*, 254 S.W.3d 585, 590 (Tex. App.—Eastland 2008, pet. ref'd) (holding that the victim's testimony about aggravated assault was sufficient). In any event, the jury was free to believe or disbelieve the testimony of any witness in whole or in part. *See Lancon*, 253 S.W.3d 707.

B. Physical evidence

Olivares also contends that the evidence is factually insufficient because there was no corroborating physical evidence admitted at trial. Although Officer

Agee did not collect any physical evidence at the scene, both Jones and Rodriguez identified Olivares as their attacker in open court and in the photo array prepared by Sgt. Urie. And although no weapon was found, there was undisputed testimony that Olivares's brother shot Rodriguez in the head. Both Jones and Rodriguez gave a similar description of the size, appearance, and type of gun used, and they both testified that Olivares's brother threatened them with it. Rodriguez testified: "I was scared because they came into the house that I was living in and pointed a gun at me." Jones testified that Olivares's brother pointed the gun at her and pulled the trigger three times: "After [Rodriguez] got shot, he pointed the gun at me and it went click. He did it three times, but it didn't shoot. It just went click, click, click." At trial, the hospital records documenting a gunshot wound to her head corroborated Rodriguez's testimony. She further testified that the bullet was still in her scalp.

Although Olivares contends that the lack of physical evidence so undermines the jury's verdict that it is manifestly unjust, the evidence presented at trial was sufficient to sustain his conviction for aggravated assault. *See Jackson*, 443 U.S. at 319, 99 S. Ct. 2789; *Sosa*, 177 S.W.3d at 231–232. The testimony of Jones and Rodriguez is sufficient to support a guilty verdict because the victim's testimony alone, despite the lack of physical evidence, is sufficient to sustain the jury's conviction. *See Sosa v. State*, 177 S.W.3d at 231–232.

C. Lesser-included offense

Finally, Olivares argues that the jury's verdict was manifestly unjust because he was found not guilty of aggravated robbery, but "based on the same caliber of testimony," the jury convicted him of the lesser-included offense of aggravated assault. Olivares does not challenge the jury instruction on the lesser-included offense; he merely argues that because the jury did not believe Rodriguez when she testified that her property was stolen, the jury could not believe her testimony in regard to the assault.

A jury may convict a defendant of 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. ANN. art. 37.09. There is no rule that would require the jury to completely disregard the testimony of a witness who lied or made inconsistent statements on the witness stand. *See Lancon*, 253 S.W.3d at 707. Indeed, the jury is always free to believe or disbelieve the testimony of any witness in whole or in part. *See id.*

Considering all of the evidence adduced at trial in the light most favorable to the prosecution, we conclude that a rational trier of fact could have found beyond a reasonable doubt that Olivares committed the essential elements of the crime of aggravated assault. We therefore hold that the evidence was not factually insufficient to support the conviction, and we overrule Olivares's sole issue.

Conclusion

We affirm the judgment of the trial court.

Michael Massengale
Justice

Panel consists of Chief Justice Radack and Justices Massengale and Cox.*

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* The Honorable Lonnie Cox, Judge of the 56th District Court of Galveston County, participating by assignment.