Opinion issued June 23, 2011

In The
Court of Appeals
For The
First District of Texas

No. 01-10-00381-CR

JOSE ALBERTO GARCIA, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 174th District Court
Harris County, Texas
Trial Court Cause No. 1246876

MEMORANDUM OPINION

Appellant, Jose Alberto Garcia, was convicted by a jury of the felony offense of robbery.[1] The trial court assessed his punishment at 12 years in prison. In two issues, appellant contends that the evidence is legally insufficient to

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[1] *See* TEX. PENAL CODE ANN. § 29.02(a)(1) (West 2003)

establish his guilt and that the trial court erred by excluding community supervision from the punishment range. We conclude that the evidence is sufficient and that the trial court properly assessed appellant's punishment. We affirm.

Background

One evening in December, the complainant took his puppy for a walk. While waiting at an intersection, he saw two young Hispanic men walking towards him from across the street. One of the men was slender, and the other was slightly heavier-set; they both wore dark, hooded sweatshirts with the hoods raised around their heads. After they had crossed the street, the complainant made eye contact with the slender man, who was now about two feet away. The complainant asked them, "How are y'all doing this evening?" One of the men said something that the complainant did not understand. The men moved in close to the complainant and walked past him.

Just as he looked back to see what his puppy was doing, the complainant was shoved from behind and fell face down into the grass. One of the men demanded, "Give me your money, or we're going to kill you." The complainant responded, "I don't have any money." He felt a hand reach into his back pocket, searching for his billfold, which he had left at home. Instead, one of the men took his cell phone.

One of the men then kicked the complainant in the back, and the complainant began to fight back. He rolled over and kicked the man standing near his feet. The complainant stood up and swung his fist at one of the men. The other man hit the complainant's head, knocking him onto his knees. For a moment, he was dizzy, and he felt blood run into his eye. The complainant stood up again and then saw both men running away.

The complainant found his puppy, returned home, and called the police. He gave a physical description of the two men. When the police arrived, he repeated his descriptions, and paramedics transported him to the hospital.

One week later, the police called the complainant and asked him to come to the police station. Once there, he was presented with a photo array, and he identified appellant as the slender man he had made eye contact with before he was robbed. Appellant was later charged with robbery.

Prior to trial, appellant initially elected to have the jury assess his punishment in the event of his conviction. However, immediately prior to the guilt–innocence phase of trial, appellant elected instead to have the trial court assess his punishment. Appellant's counsel stated that because of appellant's prior felony convictions, only the trial court could give appellant probation. The court responded that it was unsure whether appellant would be eligible for probation following a jury conviction. Appellant's counsel contended that because the

present case did not involve an aggravated offense, the court could still "theoretically" give probation. The court stated, "I'll listen to it. There are no guarantees."

During the guilt–innocence phase of trial, the complainant testified that he saw appellant along with another man immediately before he was robbed. The complainant admitted that he did not know which man took his phone, kicked him in the back, or hit him on the head. Additionally, an eyewitness testified that he drove by during the robbery. He saw the complainant and two Hispanic men clustered near the corner of the intersection. About a foot away from the complainant, the skinnier man stood, bent over. The larger man had his arms around the complainant. The eyewitness testified that, based on his personal experience observing fights, he had no doubt that the complainant was engaged in a fight with both men.

At the beginning of the punishment phase of trial, appellant stipulated to the following evidence: In 2002, he was convicted of possessing marijuana, and he received 20 days in county jail. The same year, he was also placed on two-year deferred adjudication for delivering cocaine and evading arrest. The next year, those offenses were adjudicated, and he received nine months in state jail. Appellant also was convicted of driving while intoxicated, and he received 30 days in county jail. In 2007, he was convicted of theft, and he received one year in

county jail. During closing arguments, appellant's trial counsel contended that, despite appellant's lack of success with deferred adjudication, appellant's testimony concerning a change in attitude indicated that he would be a good candidate for probation. In response, the State argued that probation was inappropriate because appellant continued to deny that he committed the robbery and because appellant had failed to complete deferred adjudicated in the past.

Sufficiency of the Evidence

In his first issue, appellant contends that the evidence is legally insufficient to sustain his conviction.

A. Standard of Review

An appellate court reviews legal and factual sufficiency challenges using the same standard of review. *Griego v. State*, No. PD-1226-10, 2011 WL 1662378, at *1 (Tex. Crim. App. May 4, 2011); *Ervin v. State*, 331 S.W.3d 49, 52–56 (Tex. App.—Houston [1st Dist.] 2010, pet. ref'd) (construing majority holding of *Brooks v. State*, 323 S.W.3d 893, 912, 926 (Tex. Crim. App. 2010)). Under this standard, evidence is insufficient to support a conviction if, considering all record evidence in the light most favorable to the verdict, a factfinder could not have rationally found that each essential element of the charged offense was proven beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979); *In re Winship*, 397 U.S. 358, 361, 90 S. Ct. 1068, 1071 (1970);

Brooks, 323 S.W.3d at 899 (plurality op.); *Laster v. State*, 275 S.W.3d 512, 517 (Tex. Crim. App. 2009). Evidence is insufficient under this standard in four circumstances: (1) the record contains no evidence probative of an element of the offense; (2) the record contains a mere "modicum" of evidence probative of an element of the offense; (3) the evidence conclusively establishes a reasonable doubt; or (4) the acts alleged do not constitute the criminal offense charged. *See Jackson*, 443 U.S. at 314, 318 n.11, 320, 99 S. Ct. at 2786, 2789 & n.11; *Laster*, 275 S.W.3d at 518; *Williams v. State*, 235 S.W.3d 742, 750 (Tex. Crim. App. 2007). If an appellate court finds the evidence insufficient under this standard, it must reverse the judgment and enter an order of acquittal. *See Tibbs v. Florida*, 457 U.S. 31, 41, 102 S. Ct. 2211, 2218 (1982).

An appellate court determines whether the necessary inferences are reasonable based upon the combined and cumulative force of all the evidence viewed in the light most favorable to the verdict. *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007) (quoting *Hooper v. State*, 214 S.W.3d 9, 16–17 (Tex. Crim. App. 2007)). An appellate court defers to the factfinder's evaluation of the credibility of the evidence and the weight to give the evidence. *Williams*, 235 S.W.3d at 750. In viewing the record, a court treats direct and circumstantial evidence equally: circumstantial evidence can be as probative as direct evidence,

and circumstantial evidence alone can be sufficient to establish guilt. *Clayton*, 235 S.W.3d at 778 (quoting *Hooper*, 214 S.W.3d at 13).

B. Analysis

Appellant does not dispute that the complainant was robbed[2] or that he was standing a foot away while it happened. Rather, appellant contends that, on the evidence presented, it is plausible to conclude that he was present at the scene but did not participate in the robbery.

Mere presence at the scene of the offense does not establish the defendant's guilt as a party to the offense. *Porter v. State,* 634 S.W.2d 846, 849 (Tex. Crim. App. 1982). However, presence at the scene is a circumstance tending to prove guilt that, when combined with other facts, may suffice to show that the accused was a participant. *Valdez v. State*, 623 S.W.2d 317, 321 (Tex. Crim. App. 1979). Likewise, "while flight alone will not support a guilty verdict, evidence of flight from the scene of a crime is a circumstance from which an inference of guilt may be drawn." *Id.*

All the evidence presented indicates that both men participated in the robbery. The complainant testified that appellant and another man approached

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

together, both wearing similar dark hooded sweatshirts. He also testified that after being shoved to the ground, one of men threatened, "Give me your money, or *we*'re going to kill you." (Emphasis added.) This threat and the pair's approaching together indicate that both men were acting together in committing the robbery. Consistent with the threat, the eyewitness testified that he saw both men fighting with the complainant. Finally, the complainant testified that after his phone was taken, he saw both men flee the scene together. *See id.*

Based on the combined and cumulative force of this evidence viewed in the light most favorable to the verdict, we hold that the jury could have rationally concluded that appellant committed the robbery. *See Clayton*, 235 S.W.3d at 778, *Hooper*, 214 S.W.3d at 16–17.

We overrule appellant's first issue.

Exclusion of Community Supervision from Punishment Range

In his second issue, appellant contends that the trial court erred by excluding community supervision from the range of his punishment. Appellant asserts that the trial court misapprehended the punishment range and that, therefore, non-constitutional error occurred. *See Mendez v. State*, 212 S.W.3d 382, 388–90 (Tex. App.—Austin 2006, pet. ref'd).

A. Applicable Law

Robbery, being a second-degree felony, is punishable by imprisonment for a term of 2 to 20 years and a fine of up to $10,000. TEX. PENAL CODE ANN. § 12.33, 29.02(b) (West Supp. 2010). A jury may recommend community supervision only if the defendant has no prior felony conviction. TEX. CODE CRIM. PROC. art. 42.12 § 4(e) (West Supp. 2010). However, "[a] judge, in the best interest of justice, the public, and the defendant, after conviction . . . , may suspend the imposition of the sentence and place the defendant on community supervision . . . ." *Id.* art. 42.12 § 3(a).

Due process requires trial judges to be neutral and detached in assessing punishment. *See Brumit v. State*, 206 S.W.3d 639, 645 (Tex. Crim. App. 2006). A trial court denies a defendant due process if it arbitrarily refuses to consider the entire range of punishment. *See id.*; *McClenan v. State*, 661 S.W.2d 108, 110 (Tex. Crim. App. 1983); *Jaenicke v. State*, 109 S.W.3d 793, 796 (Tex. App.—Houston [1st Dist.] 2003, pet. ref'd). Absent a clear showing to the contrary, we presume that the trial court was neutral and detached in assessing an appellant's punishment and that the trial court considered the full range of punishment. *See Brumit*, 206 S.W.3d at 645; *Jaenicke*, 109 S.W.3d at 796.

B. Analysis

The record does not support appellant's contention that the trial court misapprehended the applicable range of punishment. Although the trial court was initially unsure whether probation was available following a jury conviction, appellant's trial counsel stated that probation was available under the circumstances of the present case because it did not involve an aggravated offense. *See* TEX. CODE CRIM. PROC. art. 42.12 § 3g(a). The trial court then responded, "I'll listen to it. There are no guarantees." During closing arguments, appellant's trial counsel argued that appellant's change in attitude demonstrated that appellant was a good candidate for probation. Rather than contend that appellant was ineligible for probation, the State responded by arguing that probation was inappropriate in the present case because appellant had not taken responsibility for committing the robbery and because appellant had failed to complete deferred adjudication in the past. Nothing in the record indicates that the trial court failed to consider both the law and the relevant facts neutrally. Appellant's punishment was within the applicable range.

We conclude that the trial court considered the entire range of punishment, including probation.

We overrule appellant's second issue.

Conclusion

We affirm the judgment of the trial court.

Leslie B. Yates
Justice

Panel consists of Justices Keyes, Higley, and Yates.[3]

Do not publish. TEX. R. APP. P. 47.2(b).

[3] The Honorable Leslie Brock Yates, former Justice of the Fourteenth Court of Appeals, participating by assignment.