

Opinion issued August 4, 2011



In The
Court of Appeals
For The
First District of Texas

NOS. 10-00536-CR, 10-00537-CR, 10-00538-CR

CHRISTOPHER G. TOLBERT, Appellant
V.
THE STATE OF TEXAS, Appellee

**On Appeal from the 12th District Court
Grimes County, Texas
Trial Court Case No. 16,604 (Counts I, II, III)**

MEMORANDUM OPINION

A jury convicted appellant Christopher G. Tolbert on three counts of aggravated robbery, a first degree felony. *See* TEX. PENAL CODE ANN. § 29.03 (West 2011). The trial court assessed punishment at 60 years in prison on each

count, to run concurrently. On appeal, Tolbert challenges the legal sufficiency of the evidence to show that he robbed a bank. He also claims the trial court erred by taking judicial notice of an incomplete presentence investigation report. We affirm the convictions.

Background

On a Thursday afternoon in August, a black man wearing gloves, a long-sleeved shirt, and a green or yellow reflective vest entered the First National Bank of Anderson. It was approximately 15 minutes before the bank was scheduled to close. The man wore sunglasses, and his head was wrapped in a bandana and covered with a cap. He carried a piece of PVC pipe and had a black trash bag tucked into his waistband. He approached lobby teller Shellie Coronado, pointed a semiautomatic gun at her face, and demanded money. Then he demanded money from each of the other two lobby tellers, Rachel Wells and Dawn Polansky, as he held them at gunpoint. They each gave him money.

The next day an investigator showed a photographic lineup to each of the tellers. Coronado and Polansky immediately identified Tolbert as the robber. Wells identified someone other than Tolbert, though she testified at trial that she had narrowed her choices down to Tolbert and the person she chose. All three tellers identified Tolbert in open court as the man who robbed them.

At trial, the State introduced additional evidence linking Tolbert to the crime, including videorecordings and testimony from witnesses placing Tolbert near the bank before and after the robbery, and also connecting him to a co-conspirator who was tried separately. On cross-examination of the witnesses—particularly the bank tellers—defense counsel focused on discrepancies among their contemporaneous descriptions and later recollections of the robber.

The jury found Tolbert guilty on each of three counts of aggravated robbery. At the punishment phase, the State offered testimony from the probation officer who prepared the presentence investigation report. The probation officer testified that the report was incomplete as to Tolbert’s social history because Tolbert refused to cooperate.

Analysis

I. Legal sufficiency

In his first issue, Tolbert contends that the evidence was legally insufficient to prove that he was the robber. Tolbert argues that the lack of physical evidence connecting him to the crime and the discrepancies in the witnesses’ testimony make the evidence legally insufficient.

When evaluating the legal sufficiency of the evidence, we view the evidence in the light most favorable to the verdict and determine whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable

doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979); *Drichas v. State*, 175 S.W.3d 795, 798 (Tex. Crim. App. 2005). The standard is the same for both direct and circumstantial evidence cases. *King v. State*, 895 S.W.2d 701, 703 (Tex. Crim. App. 1995). We do not resolve any conflict of fact, weigh any evidence, or evaluate the credibility of any witnesses, as this is the function of the trier of fact. *See Dewberry v. State*, 4 S.W.3d 735, 740 (Tex. Crim. App. 1999). The testimony of a single eyewitness may constitute legally sufficient evidence to support a conviction. *Davis v. State*, 177 S.W.3d 355, 359 (Tex. App.—Houston [1st Dist.] 2005, no pet.) (citing *Aguilar v. State*, 468 S.W.2d 75, 77 (Tex. Crim. App. 1971)).

A person commits aggravated robbery when he commits robbery and uses or exhibits a deadly weapon. TEX. PENAL CODE ANN. § 29.03. A person commits robbery 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. *Id.* § 29.02(a)(2) (West 2011). A person commits theft if he unlawfully appropriates property with the intent to deprive the owner of the property. *Id.* § 31.03(a) (West 2011).

Tolbert argues on appeal that the lack of physical evidence makes the evidence legally insufficient to support his conviction. But the three complainants in this case positively and unequivocally identified Tolbert in court as the robber,

and the jury had before it photographic evidence taken at the time of the robbery. This evidence is legally sufficient to support Tolbert's conviction. *See Davis*, 177 S.W.3d at 359. Tolbert also argues that the conflicting evidence, particularly regarding the descriptions of the robber, make the evidence legally insufficient to support his conviction. However, it is the jury that resolves conflicting evidence. *See Dewberry*, 4 S.W.3d at 740. Viewing the evidence in the light most favorable to the verdict, we conclude that a rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *See Jackson*, 443 U.S. at 319, 99 S. Ct. at 2789; *Drichas*, 175 S.W.3d at 798. We overrule Tolbert's first issue.

II. Judicial notice of presentence investigation report

In his second issue, Tolbert argues that the trial court erred by taking judicial notice of the presentence investigation report, which was incomplete. The taking of judicial notice is within the discretion of the trial court and will not be overturned absent an abuse of that discretion. *See Figueroa v. State*, 250 S.W.3d 490, 504 (Tex. App.—Austin 2008, pet. ref'd); *Rodriguez v. State*, 90 S.W.3d 340, 359 (Tex. App.—El Paso 2001, pet. ref'd). Absent an objection, a trial court may take judicial notice of facts included in the PSI. *Brewer v. State*, No. 1270-03, 2004 WL 3093224, at *3 (Tex. Crim. App. May 19, 2004) (mem. op., not designated for publication). As explained by the Court of Criminal Appeals:

The purpose of compiling a PSI is to fully inform the trial court of the circumstances of the offense, the defendant's background, education, prior offenses, and prospects for rehabilitation, and the harm, if any, caused to the victim of a crime. There would be little purpose in compiling this report if the trial judge cannot rely upon the information contained within it. Because the Texas Legislature gave the defendant an explicit statutory right and opportunity to object to the factual accuracy of its contents and to correct any mistakes or misstatements, it surely intended that the trial judge would rely upon unobjected-to facts contained within that PSI when assessing an appropriate punishment. Therefore, we hold that a trial judge may take judicial notice of unobjected-to facts contained within a PSI Thus, if either the State or the defendant requests the trial court to take judicial notice of some fact contained within the PSI, and the opposing party (who has previously had an opportunity to review that report) does not object to the accuracy of that fact, the trial court's act of taking judicial notice dispenses with the need for any further, formal proof of the fact. The PSI report need not be formally introduced into evidence.

Id. at *3–*4. Although Tolbert argues that the PSI report was incomplete, at trial he did not object to the accuracy of any facts included in it, and he makes no such argument on appeal. He does not state the critical information that is missing or how any deficiency in the report constitutes reversible error. We hold that Tolbert has presented nothing for review, and we overrule Tolbert's second issue.

Conclusion

We affirm the judgments of the trial court.

Michael Massengale
Justice

Panel consists of Justices Jennings, Bland, and Massengale.

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