

Opinion issued December 15, 2011



In The
Court of Appeals
For The
First District of Texas

NO. 01-10-00797-CR

RASSIUM STEPHON FRANKLIN, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the 185th District Court
Harris County, Texas
Trial Court Case No. 1243477**

MEMORANDUM OPINION

Appellant, Rassium Stephon Franklin, was charged by indictment with aggravated robbery.¹ Appellant pleaded not guilty. The jury found him guilty and

¹ See TEX. PENAL CODE ANN. §§ 29.02(a), 29.03(a) (Vernon 2011), § 31.03(a) (Vernon Supp. 2011).

assessed punishment at six years in prison and a \$1,000 fine. In three issues, appellant argues (1) the non-accomplice-witness evidence was insufficient to corroborate the accomplice witness's testimony that appellant was involved in the commission of the crime and (2) the evidence is insufficient to support the jury's guilty verdict.

We affirm.

Background

Amir Khan and his wife operate a Citgo gas station in Humble, Texas. Around 10:00 p.m. on December 2, 2009, Khan was alone in the station's convenience store. It was almost closing time, and he had already cleaned the restrooms for the night.

Around this time, a Buick Cutlass pulled into the station and stopped at a gas pump. Cameron Davis exited the front-passenger side of the vehicle and entered the convenience store. Davis gave Khan ten one-dollar bills for gas. Khan opened the register and began counting the money. When he finished counting, he saw Davis had moved to the side of the counter and could see into the register. Khan put the money in the register and closed it.

Davis then asked to use the restroom. Khan gave Davis the keys for the restroom. When Davis came out, he informed Khan that the toilet was not working properly. Davis then left to fill the car with gas.

After Khan saw the car leave, he went into the restroom to fix the toilet. It was clogged with toilet paper, and the water valve had been shut off. As Khan was fixing the toilet, the power to the building went off. He rushed out of the restroom, and found two black males in the convenience store. One pointed a gun at him and ordered him to the ground. Khan became afraid for his life and pleaded for the man with the gun not to shoot him. The armed man told him to go to the register and open it. Khan went to the register but explained it could not be opened with the power off. The two black men told a third black man to turn the power back on. Khan saw that this third man was Davis.

Davis restored power to the building. Khan opened the register. The power was subsequently turned back off. The armed man took the money and Davis took many packs of cigarettes. The three men left. A few minutes later, Khan used his cell phone to call the police.

Surveillance video footage of the premises shows the Cutlass pulling into the station, Davis exiting the car and entering the convenience store, Davis putting gasoline into the car, the car leaving the property and then backing up onto the property, and the car parking along the side of the convenience store. The videos stop at the time the power to the building was turned off. Based on the surveillance video footage, Officer S. Martin, a police officer with the Humble Police Department, obtained a description of the vehicle involved in the crime.

The next evening, appellant and Davis were driving in the Cutlass. According to Davis, they decided to drive by the Citgo to see if there were any police officers there. As they passed through the area, Officer Martin saw the vehicle, which matched the depiction of the vehicle in the surveillance video. Officer Martin followed the vehicle until he observed a traffic violation, and pulled the car over. He then took appellant and Davis into custody.

Detective E. Squier, also with the Humble Police Department, conducted the custodial interrogation of both appellant and Davis. Appellant admitted to being at the scene of the crime and acknowledged the car was his girlfriend's, but denied any involvement. Detective Squier asserted there were only three people in the car and asked appellant who the third person was. Appellant told Detective Squier he did not know who the other guy was.

Davis confessed to the crime. He identified appellant as the one who pointed the weapon at Khan and took the money. According to Davis, the three men divided the money and cigarettes later that night. He was charged with aggravated robbery for the offense. Subsequently, Davis entered into an agreement with State prosecutors to testify against appellant in exchange for a recommended sentence between probation and 15 years in prison.

The Cutlass involved in the crime was owned by Jasmine Johnson, appellant's girlfriend at the time of the offense. Johnson testified at trial that she

had given appellant her car to use on the evening of December 2. She testified that Davis was with appellant when she last saw him. She also testified that appellant had her car the next day when he was arrested. She retrieved her car later from an impound lot.

Non-Accomplice-Witness Evidence

In his second issue, appellant argues the non-accomplice-witness evidence was insufficient to corroborate Davis's testimony that appellant was involved in the commission of the crime.

A. Standard of Review & Applicable Law

“A conviction cannot be had upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the offense committed; and corroboration is not sufficient if it merely shows the commission of the offense.” TEX. CODE CRIM. PROC. ANN. art. 38.14 (Vernon 2005). In conducting this review, we must eliminate the accomplice witness's testimony from consideration and then examine the remaining evidence to determine whether there is evidence that tends to connect the defendant with the offense. *McDuff v. State*, 939 S.W.2d 607, 612 (Tex. Crim. App. 1997). The non-accomplice evidence does not need to be, by itself, sufficient to establish guilt beyond a reasonable doubt, nor does the evidence have to directly link the accused to the commission of the offense. *Dowthitt v. State*, 931 S.W.2d 244, 249 (Tex. Crim.

App. 1996). Instead, there need only be some non-accomplice evidence that tends to connect the appellant to the commission of the offense. *McDuff*, 939 S.W.2d at 613.

“While the accused’s mere presence in the company of the accomplice before, during, and after the commission of the offense is insufficient by itself to corroborate accomplice testimony, evidence of such presence, coupled with other suspicious circumstances, may tend to connect the accused to the offense.” *Dowthitt*, 931 S.W.2d at 249. The cumulative weight of suspicious circumstances may tend to connect the accused to the charged offense, even if no circumstances are sufficient to do so individually. *Yost v. State*, 222 S.W.3d 865, 872 (Tex. App.—Houston [14th Dist.] 2007, pet. ref’d).

B. Analysis

It is undisputed by the parties that Davis was an accomplice witness, and the trial court instructed the jury accordingly. *See Smith v. State*, 332 S.W.3d 425, 439 (Tex. Crim. App. 2011) (holding person who has been indicted for same or lesser-included offense is accomplice witness as matter of law). We determine, then, whether there was some evidence, other than Davis’s testimony, connecting appellant to the commission of the offense.

Appellant admitted to Deputy Squier that he was present at the scene of the crime. He said they were in his girlfriend’s car and acknowledged that that they

got gas. The surveillance video footage of the events just before the commission of the crime shows Davis filling the car with gas. Davis returned to the car, and the car left the premises. The car then stopped and drove in reverse back onto the Citgo premises. The car was parked in a place where it could not be seen by Khan while Khan was inside the convenience store. This was also near the box containing the power switch for the building. The video footage shows Davis exiting the vehicle from the front passenger-side seat and another male exiting from the rear passenger-side seat. Davis then approached the box with the power switch as the driver began to exit the vehicle. Khan testified that the robbery occurred just after the power was turned off.

The surveillance video footage shows that, immediately prior to the robbery, the only people on the premises were Khan and the occupants of appellant's girlfriend's car. The video footage of the area by the power switch shows that the rear driver's-side seat was unoccupied. During appellant's custodial interrogation, Detective Squier asserted there were only three people in the car and asked appellant who the third person was. Appellant told Detective Squier he did not know who the other guy was, indicating that there were in fact only three people in the car. Khan testified that three people were involved in the robbery.

We hold that the cumulative weight of this non-accomplice evidence tends to connect appellant to the commission of the offense. We overrule appellant's second issue.

Sufficiency of the Evidence

In his first and third issues, appellant argues the evidence is insufficient to support the jury's finding of guilt.²

A. Standard of Review

This Court reviews sufficiency-of-the-evidence challenges applying the same standard of review, regardless of whether an appellant presents the challenge as a legal or a factual sufficiency challenge. *See Ervin v. State*, 331 S.W.3d 49, 53–54 (Tex. App.—Houston [1st Dist.] 2010, pet. ref'd) (construing majority holding of *Brooks v. State*, 323 S.W.3d 893 (Tex. Crim. App. 2010)). This standard of review is the standard enunciated in *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979). *See id.* Pursuant to this standard, evidence is insufficient to support a conviction if, considering all the record evidence in the light most favorable to the verdict, no rational fact finder could have found that each essential element of the charged offense was proven beyond a reasonable

² Appellant states in his first issue that the evidence was legally and factually insufficient to support the jury's finding of guilt. He states in his third issue that the trial court erred in denying his motion for instructed verdict. As appellant acknowledges, a complaint on appeal about the denial of an instructed verdict is treated as a challenge to the legal sufficiency of the evidence to support the conviction. *See Canales v. State*, 98 S.W.3d 690, 693 (Tex. Crim. App. 2003). Accordingly, we consider these issues together.

doubt. *See Jackson*, 443 U.S. at 319, 99 S. Ct. at 2789; *In re Winship*, 397 U.S. 358, 361, 90 S. Ct. 1068, 1071 (1970); *Laster v. State*, 275 S.W.3d 512, 517 (Tex. Crim. App. 2009); *Williams v. State*, 235 S.W.3d 742, 750 (Tex. Crim. App. 2007). We can hold evidence to be insufficient under the *Jackson* standard in two circumstances: (1) the record contains no evidence, or merely a “modicum” of evidence, probative of an element of the offense, or (2) the evidence conclusively establishes a reasonable doubt. *See Jackson*, 443 U.S. at 314, 318 n. 11, 320, 99 S. Ct. at 2786, 2789 n.11; *see also Laster*, 275 S.W.3d at 518; *Williams*, 235 S.W.3d at 750.

The sufficiency-of-the-evidence standard gives full play to the responsibility of the fact finder to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. *See Jackson*, 443 U.S. at 319, 99 S. Ct. at 2789; *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007). An appellate court presumes that the fact finder resolved any conflicts in the evidence in favor of the verdict and defers to that resolution, provided that the resolution is rational. *See Jackson*, 443 U.S. at 326, 99 S. Ct. at 2793. In viewing the record, direct and circumstantial evidence are treated equally; circumstantial evidence is as probative as direct evidence in establishing the guilt of an actor, and circumstantial evidence alone can be sufficient to establish guilt. *Clayton*, 235 S.W.3d at 778. Finally, the “cumulative force” of all the

circumstantial evidence can be sufficient for a jury to find the accused guilty beyond a reasonable doubt. *See Powell v. State*, 194 S.W.3d 503, 507 (Tex. Crim. App. 2006).

B. Analysis

As it applies to appellant, a person commits aggravated robbery if he commits robbery and he uses or exhibits a deadly weapon. TEX. PENAL CODE ANN. § 29.03(a)(2) (Vernon 2011). As it applies to appellant, a person commits robbery if, in the course of committing theft with the 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) (Vernon 2011). A person commits theft if he unlawfully appropriates property with intent to deprive the owner of property. *Id.* § 31.03(a) (Vernon Supp. 2011).

In addition the evidence reviewed in considering the non-accomplice evidence, we have the testimony of Davis. He identified appellant as the one who pointed the weapon at Khan. Appellant pointed the gun at Khan when Khan came out of the bathroom. Khan became afraid for his life and pleaded for appellant not to shoot him. Appellant told him to go to the register and open it. Khan went to the register but explained it could not be opened with the power off. Appellant and Marcus told Davis to turn the power back on. Davis restored power to the

building. Khan opened the register. The power was subsequently turned back off. Appellant took the money and Davis took many packs of cigarettes.

We hold there is sufficient evidence to support the jury's finding of guilt. We overrule appellant first and third issues.

Conclusion

We affirm the judgment of the trial court.

Laura Carter Higley
Justice

Panel consists of Justices Keyes, Higley, and Massengale.

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