Affirmed and Memorandum Opinion filed August 19, 2010.

In The

Fourteenth Court of Appeals

NO. 14-09-00065-CR

BILL RASHAD JONES, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 77th District Court
Limestone County, Texas
Trial Court Cause No. 11433-A

M E M O R A N D U M O P I N I O N

Appellant, Bill Rashad Jones, appeals his conviction for aggravated robbery. In three issues, appellant contends (1) the evidence is factually insufficient to support the verdict, (2) the trial court erred in denying his motion for mistrial, and (3) the trial court erred in permitting a late-declared witness to testify. Because all dispositive issues are settled in law, we issue this memorandum opinion and affirm. *See* Tex. R. App. P. 47.4.[1]

[1] This appeal was transferred to this court from the Tenth Court of Appeals. In cases transferred from one court of appeals to another, the transferee court must decide the case in accordance with the precedent of the transferor court if the transferee court's decision would have been inconsistent with the precedent of the transferor court. *See* Tex. R. App. P. 41.3.

BACKGROUND

On October 3, 2007, Christopher Van Winkle was working as a clerk at the Double D Convenience Store in Mexia, Texas. Near closing time, he was placing the day's cash receipts in the safe at the store. At this time, an individual later identified as appellant entered the store and appeared to have difficulty opening the ice cream freezer. Van Winkle walked over to appellant to assist him with the freezer. As Van Winkle approached, appellant placed a gun at the back of Van Winkle's head and ordered him to the backroom, where appellant attempted to bind Van Winkle's hands with "zip-ties." Another man, later identified as Danny Williams, entered the store after Van Winkle was ordered to the backroom and helped appellant tie Van Winkle's hands.

The day after the robbery, maintenance workers found a back pack containing a handgun behind a hedge. Law enforcement authorities recovered DNA from the zip-ties used to bind Van Winkle's hands. The DNA on the ties was consistent with that of Danny Williams. When Williams was arrested and informed that his DNA matched that on the zip-ties, he agreed to testify against appellant in exchange for a ten-year sentence. Williams testified that he and appellant planned the convenience store robbery in advance. Appellant prepared a back pack with the zip-ties and the gun and directed the robbery. At trial, Van Winkle identified appellant as the man who held the firearm during the robbery. Further, the State produced videotape from the store's security system that showed appellant committing the robbery.

In his defense, appellant presented the testimony of several alibi witnesses. Those witnesses testified that, on the night of the robbery, appellant attended church choir practice until approximately 8:00 or 8:30 p.m. One of the witnesses drove appellant to the home of Jason Forge. Forge testified that appellant came to his home at around 9:00 the night of the robbery and did not leave until the next morning when he went to work.

A jury convicted appellant of aggravated robbery. During the punishment phase of trial, appellant admitted that he committed the robbery. Appellant was sentenced to twenty years' confinement. This appeal followed.

FACTUAL SUFFICIENCY OF THE EVIDENCE

In his first issue, appellant contends the evidence is factually insufficient to support his conviction. In examining a factual-sufficiency challenge, we review all the evidence in a neutral light and set aside the verdict only if (1) the evidence is so weak that the verdict seems clearly wrong or manifestly unjust or (2) the verdict is against the great weight and preponderance of the evidence. *See Marshall v. State*, 210 S.W.3d 618, 625 (Tex. Crim. App. 2006); *Watson v. State*, 204 S.W.3d 404, 414–15 (Tex. Crim. App. 2006).

Appellant claims this case is "nearly on all fours" with *Ward v. State*, 48 S.W.3d 383 (Tex. App.—Waco 2001, pet. ref'd). In that case, the court of appeals concluded the evidence was factually insufficient to support a jury's finding that the defendant was guilty of robbery. *Id.* at 391. Four of the defendant's fellow employees testified that he was working on the day of the robbery, and time cards corroborated their testimony. *Id.* at 390–91. Two of the eyewitnesses who identified the defendant as the robber saw the perpetrator for only a brief period of time, the third eyewitness was on medication for a mental condition, and another eyewitness identified someone other than the defendant. *Id.* at 391.

Appellant contends the sizeable evidence contrary to guilt cannot be resolved here just as in *Ward.* Unlike *Ward*, however, the testimony of the alibi witnesses in this case was not corroborated by evidence of time cards or other evidence. *See id.* at 390–91. In this case, the testimony of the accomplice and the complainant is corroborated by the video of the store's security system showing appellant committing the robbery. Therefore, the evidence of guilt is not so obviously weak as to undermine confidence in the jury's determination or so greatly outweighed by contrary proof as to indicate that a manifest injustice has occurred. We overrule appellant's first issue.

MOTION FOR MISTRIAL AFTER *ALLEN* CHARGE

In his second issue, appellant contends the trial court erred in denying his motion for mistrial after the jury determined it was unable to reach a verdict. The record reflects that the jury received the court's charge on the afternoon of October 29, 2008. The jury deliberated for a period of time then sent a note to the court stating it was "deadlocked nine to three." The trial court read the note to appellant, his attorney, and the State's attorney and stated its inclination to read an *Allen* charge to the jury.[2] Appellant's attorney stated he had no objection to the court's reading of an *Allen* charge to the jury. After receiving the *Allen* charge, the jury continued to deliberate, but was unable to reach a verdict that night. The jury was recessed shortly after 6:00 p.m. and instructed to return by 9:00 the next morning.

The next morning the jury continued to deliberate and sent several notes to the court requesting the testimony of the complainant. Through a series of notes between the court and the jury, a portion of the complainant's testimony was read to the jury. At approximately 11:55 a.m., the jury sent out another note stating it was "deadlocked eleven to one." At this time, appellant moved for a mistrial. The court initially stated that it would bring the jurors into the courtroom and ask each of them if they were unable to reach a verdict. If each of the jurors stated they could not reach a verdict, the court expressed her intent to declare a mistrial and set the case for retrial in January. After some discussion with both attorneys, the decision was made to send the jurors to lunch and instruct them to engage in a short deliberation following the lunch break. The court stated that, if the jury was unable to reach a verdict after lunch, the court would declare a mistrial. Appellant's attorney did not object to the decision to send the jury to lunch. Following the lunch recess, the jury continued to deliberate and reached a verdict.

[2] An *Allen* charge consists of supplemental jury instructions that urge deadlocked juries to keep in mind the impression the evidence has made on the other jurors and reminds them of their duty to decide the case if they can do so. *See Allen v. United States*, 164 U.S. 492, 501–502 (1896).

A trial court may in its discretion discharge a jury "where it has been kept together for such time as to render it altogether improbable that it can agree." Tex. Code Crim. Proc. art. 36.31 (Vernon 2006); *Guidry v. State*, 9 S.W.3d 133, 155 (Tex. Crim. App. 1999). To determine whether the court has abused its discretion in this regard, we consider several factors including the length of the trial, the amount of evidence admitted, and the nature and complexities of the case. *See Jackson v. State*, 17 S.W.3d 664, 676–77 (Tex. Crim. App. 2000).

The testimony in this case spanned one and one-half days. The State's evidence consisted of the complainant's testimony, the accomplice testimony, the testimony of the responding and arresting officers, DNA testimony, and video from the store's security system. Appellant's evidence consisted of alibi testimony that appellant was somewhere else at the time of the robbery. The jury deliberated approximately three hours the first day, three hours the next morning, and an undetermined amount of time following the lunch recess. Before the lunch recess the jury sent several notes regarding disputed testimony. These requests indicate that the jurors were not at a deliberate standstill but were actively considering the relevant evidence. *See Howard v. State*, 941 S.W.2d 102, 122 (Tex. Crim. App. 1996). Considering the evidence presented at trial, sending the jury back for further deliberation after it had deliberated for approximately three hours the night before, and two and a half hours that morning, was well within reason. Because the trial court did not abuse its discretion, we overrule appellant's second issue.

ADMISSION OF ACCOMPLICE TESTIMONY

In his third issue, appellant contends the trial court erred in failing to exclude the testimony of Danny Williams. In the week before trial, the State obtained DNA test results that revealed DNA consistent with that of Williams on the zip-ties used to bind the complainant. When Williams was informed that his DNA matched that of samples taken from the zip-ties he entered into a plea bargain agreement with the State in exchange for his testimony against appellant. Before trial, appellant sought to exclude Williams's testimony on the ground that the State had not listed him as a witness more than twenty

days before trial. Appellant argued that Williams's testimony changed the complexion of his defense and he did not have adequate time to prepare. The State responded that appellant had subpoenaed Williams to testify and the State did not anticipate calling him as a witness until the DNA results were returned. Appellant conceded that the State was not responsible for the delay in the test results. The trial court denied appellant's motion to exclude Williams's testimony and his motion for continuance.

We consider two factors when determining whether the trial court abused its discretion in allowing an undisclosed witness to testify: (1) whether the prosecutor acted in bad faith in failing to provide the defense with the witness's name; and (2) whether the defendant could have reasonably anticipated that the witness would testify despite the State's failure to disclose the name. *Cureton v. State*, 800 S.W.2d 259, 262 (Tex. App.—Houston [14th Dist.] 1990, no pet.). Absent a defendant's ability to show these factors on appeal, the trial court's decision permitting the testimony will not be disturbed. *Castaneda v. State*, 28 S.W.3d 216, 223 (Tex. App.—El Paso 2000, pet. ref'd).

In determining whether the State acted in bad faith, we consider whether the defense shows that the State intended to deceive and whether the State's notice left the defense adequate time to prepare. *See Nobles v. State*, 843 S.W.2d 503, 515 (Tex. Crim. App. 1992). Similarly, in determining whether the defense could have anticipated the State's witness, we examine (1) the degree of surprise to the defendant, (2) the degree of disadvantage inherent in that surprise, and (3) the degree to which the trial court was able to remedy that surprise. *See Martinez v. State*, 131 S.W.3d 22, 29 (Tex. App.—San Antonio 2003, no pet.).

Appellant concedes that the State did not act in bad faith. The DNA results were delayed from the lab, and Williams decided to testify on behalf of the State only after learning of those results. In examining whether appellant could have anticipated the State's witness, we note that Williams had been subpoenaed by appellant, but appellant claims Williams changed his testimony after being informed of the DNA results. The State told appellant several days prior to trial that it planned to call Williams to testify.

Therefore, appellant was afforded time to remedy the surprise and was able to do so by calling several alibi witnesses to testify on appellant's behalf. In such a case, defense counsel should anticipate the possibility that an accomplice could become a witness, "as it is not uncommon for a co-defendant to turn State's evidence, for a favorable deal." *Vasquez v. State*, 67 S.W.3d 229, 240 (Tex. Crim. App. 2002). Appellant has not shown that the trial court abused its discretion in permitting Williams to testify. We overrule appellant's third issue.

We affirm the judgment of the trial court.

/s/ Charles W. Seymore
Justice

Panel consists of Justices Yates, Seymore, and Brown.
Do Not Publish — Tex. R. App. P. 47.2(b).