Reversed and Remanded and Majority and Dissenting Opinions filed February 15, 2011.

In The

Fourteenth Court of Appeals

NO. 14-09-00704-CR

ANIBAL VASQUEZ, Appellant

V.

STATE OF TEXAS, Appellee

On Appeal from the 268th District Court
Fort Bend County, Texas
Trial Court Cause No. 50647

MAJORITY OPINION

Appellant Anibal Vasquez appeals his conviction for aggravated robbery, challenging the sufficiency of the evidence supporting his conviction and asserting jury charge error. Finding the trial court reversibly erred in overruling appellant's objection to the application paragraph in the jury charge for the guilt/innocence phase, we reverse and remand.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant, a construction worker, and two of his roommates, Alexis Martinez and Edwin Maldonado, drove to the Cinco Ranch area of Fort Bend County, where new homes were under construction. There, they encountered the complainant, Jenny Funez-Guevara, who operated a mobile taco business. When Martinez and Maldonado saw the taco truck, they exited their vehicle, a maroon Suburban, and flagged it down. The complainant got out of the taco truck to serve the men while her employee remained inside. Martinez and Maldonado brandished firearms at the complainant and her employee, and ordered the complainant to get into the taco truck. The complainant, Martinez, and Maldonado all entered the truck. Martinez and Maldonado took the woman's cash and jewelry and then forced the complainant to drive away with all of them still inside. Martinez later took over driving because the complainant was too distraught to operate the truck.

After a few minutes, Martinez stopped the taco truck. He and Maldonado exited the truck, telling the complainant to drive away and not to look back. The two men then entered the Suburban, which was being driven by appellant. The complainant looked through the taco truck's rear-view mirror, saw appellant, and wrote down the license-plate number of the Suburban. She then left the scene and contacted law-enforcement officers.

Appellant testified at trial that after Martinez and Maldonado got out of the Suburban, he left and drove to a construction site to ask for work. According to appellant, he took the Suburban with him, leaving Martinez and Maldonado behind, and while he was looking for work nearby he saw Martinez with a woman at the taco truck. Appellant stated that when he returned to the taco truck's location, the truck was leaving, and appellant thought that Martinez and Maldonado were inside the truck. Appellant testified that he did not think it strange that Martinez and Maldonado would be inside the truck and that appellant followed the truck for about five minutes until the truck stopped and the men

rejoined him in the Suburban. No other witnesses offered testimony about appellant's whereabouts during the time the other two men were in the taco truck.

Police officers later found the three men driving the Suburban and pulled it over. Martinez jumped out of the vehicle when it stopped, throwing a gun as he ran. Maldonado and appellant remained in the vehicle and were apprehended without incident. Law-enforcement officers apprehended Martinez after a foot chase. Approximately $500 and another firearm were recovered from the center console of the Suburban. The complainant identified all three men in a field lineup.

Appellant was transported to a police station, where Detective Mark Williams interviewed him in Spanish because appellant speaks little English. Appellant waived his *Miranda* rights[1] and eventually gave a confession, which was recorded. Detective Williams then typed the written confession in English, had a jailer read the confession to appellant in Spanish, and then read it to appellant in Spanish himself. Appellant signed and initialed the written confession.

A jury found appellant guilty of aggravated robbery and assessed punishment at nineteen years' confinement. Appellant raises two issues in this appeal.

SUFFICIENCY OF THE EVIDENCE

In his first issue, appellant asserts the evidence is factually insufficient to support his conviction; he claims the evidence is so weak as to make the conviction manifestly unjust. He argues the evidence is weak because: (1) the complainant never saw appellant in the proximity of the other parties to the crime before or during the armed robbery; (2) after the other parties left the taco truck, their guns were not visible; (3) appellant did not lead officers on a high-speed chase and stopped the Suburban when a police officer activated his emergency lights; and (4) the confession appellant signed is not valid because he did not understand its contents.

[1] *See Miranda v. Arizona*, 384 U.S. 436 (1966).

Standard of Review

Appellant raises a factual-sufficiency challenge. A majority of the judges of the Court of Criminal Appeals have determined that "the *Jackson v. Virginia* legal-sufficiency standard is the only standard that a reviewing court should apply in determining whether the evidence is sufficient to support each element of a criminal offense that the State is required to prove beyond a reasonable doubt." *Brooks v. State*, 323 S.W.3d 893, 894–95 (Tex. Crim. App. 2010) (plurality op.) (Hervey, J., joined by Keller, P.J., Keasler, and Cochran, JJ.); *id.*, 323 S.W.3d at 912–13 (Cochran, J., concurring, joined by Womack, J.) (same conclusion as plurality).[2] Therefore, in analyzing appellant's challenge to the factual sufficiency of the evidence, we will apply the *Jackson v. Virginia* standard of review.

Under this standard of review, we view the evidence in the light most favorable to the verdict. *Wesbrook v. State*, 29 S.W.3d 103, 111 (Tex. Crim. App. 2000). The issue on appeal is not whether we, as a court, believe the State's evidence or believe that appellant's evidence outweighs the State's evidence. *Wicker v. State*, 667 S.W.2d 137, 143 (Tex. Crim. App. 1984). The verdict may not be overturned unless it is irrational or unsupported by proof beyond a reasonable doubt. *Matson v. State*, 819 S.W.2d 839, 846 (Tex. Crim. App. 1991). The trier of fact "is the sole judge of the credibility of the witnesses and of the strength of the evidence." *Fuentes v. State*, 991 S.W.2d 267, 271 (Tex. Crim. App. 1999). The trier of fact may choose to believe or disbelieve any portion of the witnesses' testimony. *Sharp v. State*, 707 S.W.2d 611, 614 (Tex. Crim. App. 1986). When faced with conflicting evidence, we presume the trier of fact resolved conflicts in favor of the prevailing party. *Turro v. State*, 867 S.W.2d 43, 47 (Tex. Crim. App. 1993).

[2] Nonetheless, this does not alter the constitutional authority of the intermediate courts of appeals to evaluate and rule on questions of fact. *See* TEX. CONST. art. V, § 6(a) ("[T]he decision of [courts of appeals] shall be conclusive on all questions of fact brought before them on appeal or error").

Therefore, if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, we must affirm. *McDuff v. State*, 939 S.W.2d 607, 614 (Tex. Crim. App. 1997).

Appellant's Presence at the End of the Armed Robbery and Lack of Visibility of the Weapons when Martinez and Maldonado Exited the Taco Truck

We measure the sufficiency of the evidence by the elements of the offense as defined by a hypothetically correct jury charge. *See Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997). A person commits the offense of aggravated robbery if, in the course of committing theft and with intent to obtain or maintain control of the property, he uses or exhibits a deadly weapon and either intentionally or knowingly threatens or places another in fear of imminent bodily injury or death. *See* TEX. PENAL CODE ANN. §§ 29.02(a), 29.03(a)(2) (West 2003). Under the law of parties, a person is criminally responsible for an offense committed by the conduct of another if, acting with intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense. *See* TEX. PEN. CODE ANN. § 7.02(a)(2) (West 2003). In reviewing the evidence regarding appellant's culpability under the law of parties, this court may look to events occurring before, during, and after the commission of the offense, and may rely upon actions of the defendant which show an understanding and common design to do the prohibited act. *Ransom v. State*, 920 S.W.2d 288, 302 (Tex. Crim. App. 1994). Party status may be proved by circumstantial evidence. *Id.*

The complainant testified that she did not see appellant before or during the armed robbery and believed only two men were involved until the robbers entered the Suburban. After the robbery was complete, the complainant saw appellant waiting outside the Suburban and driving the Suburban away from the scene. She testified that Martinez's and Maldonado's weapons were not visible when they left the taco truck. Trooper Glen Welters, the law-enforcement officer that searched the Suburban, testified that after

arresting Maldonado and appellant, he found $510 and a gun in the center console of the Suburban, next to the driver's seat.

Appellant testified that he followed the taco truck for about five minutes. He drove the robbers away from the scene of the crime. The proceeds of the robbery and one of the weapons used in the robbery were stowed within inches of his person. And appellant later confessed, both on video and in writing, to Detective Williams.

Mere presence at the scene of the offense does not establish guilt as a party to the offense. *Porter v. State*, 634 S.W.2d 846, 849 (Tex. Crim. App. 1982). Presence at the scene, however, is a circumstance tending to prove guilt which, 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). The evidence presented was not merely that appellant was present at the scene and gave a ride to his friends. Appellant himself said he followed the complainant's taco truck, and appellant later confessed to the crime. Money and a gun were found in his immediate vicinity shortly after the robbery.

The jury is the sole judge of witness credibility and the weight of the evidence. *Fuentes v. State*, 991 S.W.2d 267, 271 (Tex. Crim. App. 1999). When the record contains conflicting evidence, this court presumes the trier of fact resolved any such conflict in favor of the prevailing party. *Id*. We conclude that a rational trier of fact could have found beyond a reasonable doubt that Martinez and Maldonado committed aggravated robbery and that appellant, acting with intent to promote or assist the commission of aggravated robbery, solicited, encouraged, directed, aided, or attempted to aid Martinez and Maldonado to commit aggravated robbery.

Lack of a High-Speed Chase

To support his insufficiency argument appellant points to evidence showing that he did not lead law enforcement officers on a high-speed chase or attempt to flee, and that he stopped when a police officer put on his emergency lights. Nevertheless, failing to flee

does not indicate either guilt or innocence in a completed robbery because the appellant could have chosen to stop for any number of reasons. Appellant testified he stopped because he "had not done anything." But the jury is the judge of witness credibility and could have accepted or rejected appellant's testimony. *See id.*

Appellant's Claim That He Did Not Understand His Confession

Detective Williams testified that he speaks Spanish proficiently because he learned Spanish before he learned English, but he is not comfortable writing the Spanish language. Appellant and Detective Williams conversed in Spanish at the jail after appellant was apprehended. This interview was videotaped, and the video recording was admitted into evidence. Appellant testified he had no trouble understanding what Detective Williams said.

Detective Williams testified that after appellant confessed, he prepared a brief statement in English for appellant to sign. After giving the statement to a jail employee for her to translate orally, Detective Williams left the room. He then returned to the room, read the statement to appellant in Spanish, and asked for appellant's signature. Appellant signed the statement.

Appellant now asserts he did not understand his written confession. At trial, he stated that he did not hear key facts contained in the statement. He further argued that the jail employee did a poor job of translating.

The recording of Detective Williams and appellant discussing the charged offense was admitted into evidence and, at trial, appellant could have requested that the jury hear a translation of the video. Furthermore, appellant never referred to the video either as impeachment or direct evidence of his claim that he did not understand. The jury was left to determine the credibility of the witnesses and the weight of the signed confession. *See id.* Based upon the evidence provided, a reasonable jury could have found appellant understood his confession when he signed it.

For the above reasons, we conclude the evidence is sufficient to support appellant's conviction for aggravated robbery and we overrule appellant's first issue.

JURY-CHARGE ERROR

In his second issue, appellant contends the trial court erred because it did not properly instruct the jury on the law of parties in the application portion of the jury charge. Appellant asserts that the trial court erred because it failed to apply the law of parties to the facts of the case in the application portion of the jury charge.

In the abstract portion of the jury charge, the trial court described the law of parties in general. In the application portion of the jury charge (paragraph IV) that immediately followed the abstract portion of the charge, the trial court instructed the jury as follows:

> Now bearing in mind the foregoing instructions, if you find from the evidence beyond a reasonable doubt, that on or about November 14th, 2008, in Fort Bend County, Texas, the defendant, Anibel [sic] Vasquez, *acting alone or as a party (as herein defined)*, while in the course of committing theft of property owned by Jenny Funez-Guevara, and with the intent to obtain or maintain control of the property, intentionally or knowingly threatened or placed Jenny Funez-Guevara in fear of imminent bodily injury or death, and the defendant did then and there use or exhibit a deadly weapon, to wit: a firearm, then you will find the defendant "Guilty" of the charge of Aggravated Robbery as alleged in the indictment.
>
> Unless you so find beyond a reasonable doubt, or if you have a reasonable doubt thereof, you will acquit the defendant and say by your verdict "Not Guilty."

(emphasis added). The trial court erred by failing to apply the law of parties to the facts of the case in the application portion of the charge. *See McFarland v. State*, 928 S.W.2d 482, 515 (Tex. Crim. App. 1996), *overruled on other grounds by Mosley v. State*, 983 S.W.2d 249, 263 (Tex. Crim. App. 1998); *Johnson v. State*, 739 S.W.2d 299, 303–05 (Tex. Crim. App. 1987); *Romo v. State*, 568 S.W.2d 298, 302–03 (Tex. Crim. App. 1977) (op. on reh'g); *Ruiz v. State*, 766 S.W.2d 324, 326–27 (Tex. App.—Houston [14th Dist.] 1989, no pet.). To determine the appropriate harm analysis for this error, we must decide whether

appellant preserved error in the trial court. *See Hutch v. State*, 922 S.W.2d 166, 170–71 (Tex. Crim. App. 1996).

Preservation of Error

In pertinent part, the following colloquy occurred during the charge conference:

[Counsel for Appellant]: I have an objection and a change I would request in the application paragraph.

. . .

[Counsel for the State]: What is your proposal and objection?

[Counsel for Appellant]: I believe — Paragraph Four, I believe the correct application is, first of all, they just have as defined. I believe the proper one is either the defendant while in the course of committing theft of property, and then or that Alexis Martinez did intentionally and knowingly while in the course of committing theft of property, and that the defendant participating with the intent to promote, assist, acting — whatever that language is in there — did aid, assist, etcetera.

[Counsel for the State]: That language is indirectly in there because it says as a party, and that is in Paragraph Three where it talks about all the definitions about how someone acts as a party.

[Counsel for Appellant]: I've always seen them where the defendant intentionally and knowingly and the defendant did act —

[Counsel for the State]: The way you're doing it is more likely to narrow it down and potentially be more incorrect.

[Trial court]: Objection overruled. Your suggestion is denied.

In his objection, appellant's counsel identified the application portion of the charge. Appellant's counsel noted that the application paragraph referred to the general statement of the law of parties in the abstract portion of the jury charge. Appellant's counsel requested that the trial court apply the law of parties to the facts of the case in the

application portion. The State asserted that the mere reference to the abstract portion was sufficient, suggesting that the trial court did not need to apply the law of parties to the facts of the case in the application portion. The trial court overruled appellant's objection and declined to act on his suggestion that the trial court apply the law of parties to the facts of the case in the application portion. Under applicable precedent, appellant preserved error. *See Johnson*, 739 S.W.2d at 300, 303–05 (holding that appellant preserved error regarding complaint that trial court failed to apply law of parties to facts of case in application paragraph, in case in which appellant objected that the jury charge failed "'to allege the specific acts that the State is relying on to make him a party. It does not say depending on solicitation, encouragement, direction, aid or attempt to aid one Mr. Clifford in the commission of this offense'"); *Black v. State*, 723 S.W.2d 674, 674–75 (Tex. Crim. App. 1986) (holding that appellant preserved error regarding complaint that trial court failed to apply law of parties to facts of case in application paragraph, in case in which appellant objected that the jury charge "fails to apply the law to the specific facts as the definitions pertain to . . . the law of parties"); *Ruiz*, 766 S.W.2d at 326–27 (holding that appellant preserved error regarding complaint that trial court failed to apply law of parties to facts of case in application paragraph, in case in which appellant asserted "that the trial court's failure to apply the law of parties to the facts would be reversible error").[3]

[3] In concluding that appellant failed to preserve error, our dissenting colleague relies on this court's opinion in *Villareal v. State*. *See* 116 S.W.3d 74 (Tex. App.—Houston [14th Dist.] 2001, no pet.). But, in that case, after a colloquy in which the trial court indicated it did not understand what appellant was requesting regarding the application paragraph in the jury charge, the trial court asked appellant's counsel to specify what he was requesting. *See id*. at 82–83. In response, appellant's counsel stated that "[w]e're going to object to the—to the name of Officer Fernando Salvadar being part of the charge as far as parties is concerned . . . [because he was] [n]ot charged or indicted." *Id*. at 83. When asked to tell the court what his objection was to the application paragraph, the *Villareal* appellant stated only that he was objecting to the charge's reference to Officer Salvadar. *See id*. Unlike the situation presented in the case under review, this is not an objection to the trial court's failure to apply the law of parties to the facts of the case in the application paragraph of the charge. Therefore, the *Villareal* case is not on point. The dissent's conclusion that appellant failed to preserve error is incorrect.

Analysis

Because appellant objected to the charge error in question, the "some harm" analysis applies. *See Hutch*, 922 S.W.2d at 170–71; *Johnson*, 739 S.W.2d at 303–05; *Ruiz*, 766 S.W.2d at 326–27. There was evidence at trial that appellant was guilty of aggravated robbery under the law of parties. As the State concedes in its appellate brief, there was no evidence at trial that appellant was guilty of this offense as a principal, and the State's theory, as argued in closing, was that appellant was guilty as a party because he was the driver of the getaway vehicle.[4] Under these circumstances, the trial court reversibly erred by overruling appellant's objection to the trial court's failure to apply the law of parties to the facts of the case in the application portion of the charge.[5] *See Johnson*, 739 S.W.2d at 303–05; *Ruiz*, 766 S.W.2d at 326–27. Appellant's second issue is sustained.

Accordingly, the trial court's judgment is reversed and this case is remanded for a new trial.

/s/ Kem Thompson Frost
Justice

Panel consists of Justices Anderson, Frost, and Brown. (Anderson, J., dissenting).

Publish — TEX. R. APP. P. 47.2(b).

---

[4] Even if there had been some evidence of appellant's guilt as a principal, it still would be clear that appellant's guilt as a party was the prosecution theory best supported by the evidence and the theory advanced by the State during closing argument. This would be sufficient to place this case within the scope of the line of cases cited herein. *See Johnson*, 739 S.W.2d at 303–05; *Ruiz*, 766 S.W.2d at 326–27.

[5] If appellant had not objected to this error, then this error would not have been reversible because it would not have resulted in egregious harm to appellant through the denial of "a fair and impartial trial." *See Marvis v. State*, 36 S.W.3d 878, 879–80 (Tex. Crim. App. 2001); *Ransom*, 920 S.W.2d at 302–03; *Romo*, 568 S.W.2d 302–03. But, appellant objected to this error, and courts have held that, under the circumstances presented in the case under review, this error is reversible under the "some harm" analysis. *See Johnson*, 739 S.W.2d at 303–05; *Ruiz*, 766 S.W.2d at 326–27.