

Affirmed and Memorandum Opinion filed March 24, 2011



In The

Fourteenth Court of Appeals

NO. 14-10-00578-CR

KENDRICK D. JOHNSON, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the 351st District Court
Harris County, Texas
Trial Court Cause No. 1265280**

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

Appellant Kendrick Johnson entered a plea of not guilty to the offense of aggravated robbery. The trial court found him guilty and assessed punishment at confinement for twenty years in the Institutional Division of the Texas Department of Criminal Justice. In a single issue appellant contends the evidence is legally insufficient to support his conviction for aggravated robbery. We affirm.

Background

On August 22, 2008, April Bell finished her shift as a bartender at approximately 2:00 a.m. and drove to her friend Diana Rincon's apartment to pick up her dog. Bell arrived at approximately 3:00 a.m. and visited with Rincon in the apartment complex parking lot while the dog ran around prior to Bell's drive home. Bell was standing outside her car talking with Rincon, who was sitting inside Bell's car. As they were talking, a white sedan drove into the parking lot. The white car stopped and two black males exited the vehicle. One of the men walked up behind Bell, grabbed her cellular phone from her hand, and held a gun to her side. The other man moved Rincon from the driver's seat of Bell's car and sat behind the steering wheel. Bell, who is 5'5" tall, described the man holding the gun to her as being a few inches taller, with a light complexion, and tattoos on his neck. Bell identified appellant as the man who held the gun to her side.

The other man found the keys to Bell's car and drove away in it. In the vehicle, Bell had a laptop computer, a Wii game console, clothing, cash, her passport, and social security card. Bell memorized the license plate of the car in which the men had arrived and reported it to the police. Appellant was apprehended within two weeks of the robbery. Bell positively identified appellant in a photo spread after his arrest.

Rincon testified similarly to Bell about the robbery, but her out-of-court identification of appellant in the photo spread was tentative. At trial Rincon positively identified appellant as the man who held the gun to Bell.

Officer Richard Nieto of the Houston Police Department testified that he showed the photo spread to Bell and Rincon and that each independently identified appellant as the man who had held the gun on Bell. Officer Nieto placed appellant's photograph in a grid with five other photographs of people with similar characteristics. He showed the photo spread to each woman separately. Bell positively identified appellant, and Rincon tentatively identified him.

Sufficiency of the Evidence

In a single issue appellant challenges the sufficiency of the evidence to support his conviction. Specifically, appellant argues that the evidence was tainted by the suggestive identification process.

In evaluating the legal sufficiency of the evidence to support a criminal conviction, we view all of the evidence in the light most favorable to the verdict and determine whether a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). The trier of fact is the exclusive judge of the credibility of the witnesses and of the weight to be given their testimony, and it is the exclusive province of the trier of fact to reconcile conflicts in the evidence. *Mosley v. State*, 983 S.W.2d 249, 254 (Tex. Crim. App. 1998). Hence, we do not reevaluate the weight and credibility of all the evidence or substitute our judgment for the fact finder's. *King v. State*, 29 S.W.3d 556, 562 (Tex. Crim. App. 2000).

A person commits the offense of robbery if, in the course of committing theft and with the intent to obtain and maintain control of property, that person (1) intentionally, knowingly, or recklessly causes bodily injury to another; or (2) intentionally or knowingly threatens or places another in fear of imminent bodily injury or death. Tex. Penal Code Ann. § 29.02. The offense becomes aggravated robbery if the person committing the robbery uses or exhibits a deadly weapon. *Id.* § 29.03(a)(2).

Bell testified that she was afraid that the man with the gun would injure or kill her. She reported the license plate number of the vehicle, which led to the apprehension of appellant. Bell positively identified appellant in the photo spread. Both women positively identified appellant at trial. Both women also testified that they saw appellant hold a gun to Bell's side.

Appellant argues that the photo spread procedure was impermissibly suggestive because appellant was the only individual in the photo spread who had tattoos. In a

sufficiency review, however, a reviewing court must consider all evidence, whether properly or improperly admitted at trial, that the fact finder was permitted to consider. *Moff v. State*, 131 S.W.3d 485, 488–89 (Tex. Crim. App. 2004). The testimony of a single eyewitness is sufficient to support a felony conviction for aggravated robbery. *See Johnson v. State*, 176 S.W.3d 74, 77–78 (Tex. App.—Houston [1st Dist.] 2004, pet. ref’d). Therefore, on this record, a rational trier of fact could have found the elements of the offense beyond a reasonable doubt. *See id.* at 77. Appellant’s sole issue is overruled.

The judgment of the trial court is affirmed.

PER CURIAM

Panel consists of Chief Justice Hedges and Justices Frost and Christopher.

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