

Affirmed and Memorandum Opinion filed July 18, 2017.



In The

Fourteenth Court of Appeals

NO. 14-16-00294-CR

CARLOS RODRIGUEZ, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the 209th District Court
Harris County, Texas
Trial Court Cause No. 1304032**

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

Appellant Carlos Rodriguez appeals his conviction for aggravated robbery. In a single issue, he argues that there is legally insufficient evidence that he was the person who committed the robbery.

We affirm.

Background

On the night of July 16, 2009, Michael Gross and his roommate were walking home from a nearby gas station. A tan or champagne-colored Buick approached from the opposite direction, then made a U-turn to drive up beside Gross and the roommate. The driver of the car yelled, “Give us what you got.” Gross and the roommate began to run away and the car pursued them; at some point, the roommate jumped a fence, leaving Gross alone.

The car stopped close to Gross and the driver held a knife out the car’s window, pointed at Gross. The driver demanded Gross’s wallet, which Gross gave him. At that point, the passenger “c[a]me up over the hood of the front part of the car with a bat,” according to Gross. The passenger hit Gross’s leg with the bat hard enough that Gross believed his leg to be broken. The passenger also tried to hit Gross in the face with the bat, but Gross was able to deflect the swing. The driver got out of the car and stabbed or cut Gross’s arm and hand. However, the driver failed to put the Buick in park when he exited the car, which began to roll down the street. The two robbers left Gross to chase after the car, and they drove off.

Gross described both the driver and the passenger to police. He described the passenger as a Hispanic male with short-cut hair who was heavier-set than the driver. Three weeks after the robbery, Sergeant Rivera, the investigating police officer, showed Gross a photo array, and Gross identified a photo of appellant as the passenger who had hit him with the bat.

Appellant was indicted on a charge of aggravated robbery with a deadly weapon.

Before trial, appellant moved to suppress Gross’s out-of-court identification and in-court identification of appellant due to an impermissibly suggestive pretrial

identification procedure. The trial court held a suppression hearing, at which Gross was the sole testifying witness. Defense counsel argued that the photo array police showed to Gross was unduly suggestive because it showed photographs of five other men who did not resemble appellant, leading appellant's photograph to "stand out" to Gross. The trial court denied the motion, finding that the photospread was not suggestive. The trial court then asked Gross if he could identify the passenger in the courtroom; Gross identified appellant. The court further found that Gross's identification was not a tainted identification based upon the lineup, which the court previously found was not suggestive.

Appellant pled not guilty to the charge of aggravated robbery, and the case was tried to a jury.

At trial, Gross testified and identified appellant as the passenger who hit Gross with the bat during the robbery. Gross said that the street where he was robbed was well-lit and that he was looking right into the passenger's face when the passenger hit him with the bat. The State also introduced the photo array from which Gross had identified appellant.

Another trial witness, Jeryl Hicks, testified that he had been the victim of an attempted robbery the same night as Gross's robbery, roughly three miles away. Hicks said he was attempting to withdraw cash at an ATM when he was approached by a beige four-door sedan. The car stopped, the driver got out, wielding a knife, and told Hicks to "[g]ive [him] the money." Hicks refused, claiming he was having trouble with the machine. The passenger got out of the car and began hitting the windshield of Hicks's car with a baseball bat. The two would-be robbers eventually returned to their car and drove off. Hicks called the police and gave them a partial

license plate number from the car.¹ Hicks described the passenger as a “medium build, Hispanic male [with] short hair.”

As he had done with Gross, Sergeant Rivera also showed Hicks a photo array. While Hicks was able to identify the driver of the car, he could not identify any photo as the passenger. At trial, Hicks was initially uncertain whether appellant was the passenger, but upon further questioning stated that appellant was the passenger.

The driver, Saul Palacios, testified at trial and admitted that he committed the two robberies of Gross and Hicks. Palacios admitted that he had a passenger with him who had a baseball bat; Palacios refused to identify the passenger by name because he “ain’t that type of person,” but Palacios stated that appellant was not with him when Palacios committed the robberies. The State then recalled Sergeant Rivera, who testified that he spoke with Palacios in 2009 and, in that interview, Palacios told Sergeant Rivera that he was with appellant on July 16.

The jury found appellant guilty of aggravated robbery and assessed his punishment at thirty years’ confinement. The trial court signed a judgment in accord with the jury’s verdict, and this appeal timely followed.

Analysis

In his sole issue on appeal, appellant argues that there was legally insufficient evidence that appellant was the person who committed the aggravated robbery against Gross as charged in the indictment, or the person who committed the extraneous robbery against Hicks.²

¹ From the partial license plate number provided by Hicks, police were able to identify the owners of a 2002 Buick, which was registered to the driver’s parents.

² The evidence regarding Hicks’s robbery—an extraneous offense—was admitted for purposes of establishing identity. *See* Tex. R. Evid. 404. The State did not rely on Hicks’s robbery to enhance appellant’s sentence.

A. Standard of review and governing law

We apply a legal-sufficiency standard of review 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. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *Temple v. State*, 390 S.W.3d 341, 360 (Tex. Crim. App. 2013). Under this standard, we examine all the evidence adduced at trial in the light most favorable to the verdict to determine whether a jury was rationally justified in finding guilt beyond a reasonable doubt. *Temple*, 390 S.W.3d at 360; *Criff v. State*, 438 S.W.3d 134, 136-37 (Tex. App.—Houston [14th Dist.] 2014, pet. ref’d). This standard applies to both direct and circumstantial evidence. *Criff*, 438 S.W.3d at 137. Accordingly, we will uphold the jury’s verdict unless a rational factfinder must have had a reasonable doubt as to any essential element. *Laster v. State*, 275 S.W.3d 512, 518 (Tex. Crim. App. 2009); *West v. State*, 406 S.W.3d 748, 756 (Tex. App.—Houston [14th Dist.] 2013, pet. ref’d).

Appellant was charged with, and convicted of, aggravated robbery. A person commits robbery if, in the course of committing theft, he intentionally, knowingly, or recklessly causes bodily injury to another or intentionally or knowingly threatens or places another in fear of imminent bodily injury or death. Tex. Penal Code § 29.02(a). A person commits theft if he unlawfully appropriates property with the intent to deprive the owner of property. *Id.* § 31.03. A person commits aggravated robbery if he commits robbery and uses or exhibits a deadly weapon. *Id.* § 29.03. To obtain a conviction, the State must prove, *inter alia*, that the defendant is the person who committed the charged offense. *Johnson v. State*, 673 S.W.2d 190, 196 (Tex. Crim. App. 1984); *Broussard v. State*, No. 01-05-00245-CR, 2005 WL 3315276, at *2 (Tex. App.—Houston [1st Dist.] Dec. 8, 2005, pet. ref’d) (mem. op., not designated for publication).

B. Sufficiency of the evidence as to appellant's identity

Appellant's sole issue on appeal challenges the evidentiary sufficiency of the jury's finding that appellant was in fact the vehicle's passenger who committed the charged offense. Thus, appellant challenges only one element of the charged offense. He does not challenge the legal sufficiency of the evidence to support his conviction generally, nor does he challenge any other element of the offense besides identity. According to appellant, no rational jury could have found that he committed the offense of aggravated robbery with a deadly weapon beyond a reasonable doubt because the evidence linking him to the robbery was unreliable due to conflicting testimony regarding the identification procedure.

Gross testified that a police officer called him at work and asked if Gross could meet him at home that evening. Gross agreed, and met the officer, who had a "binder with some photos." The officer showed Gross a couple of pages and asked if Gross could pick out the two men Gross had previously described as the robbers. When questioned during trial, Gross was uncertain how many pages he was shown, but he said there were "about four or five pages" or maybe "five or six pages," with six photos on each page. The officer told Gross to identify the robbers if he could, but that if Gross did not see them, then Gross did not have to pick anyone. Gross identified a photo of Palacios as the driver and identified a photo of appellant as the passenger.

Appellant asserts that Sergeant Rivera's trial testimony varied from Gross's testimony in a significant way. In contrast to Gross's testimony that he reviewed several pages of photos, Sergeant Rivera testified that he showed Gross only two pages of photographs in a manila envelope.

Appellant argues that Gross's and Sergeant Rivera's differing recollections of the number of photos Sergeant Rivera asked Gross to view was a conflict of such

magnitude that no rational factfinder would have concluded that the State met its burden to prove beyond a reasonable doubt that appellant was the person who committed the charged offense. Appellant claims that no rational juror would have accepted Gross's description of the process, and ultimate identification of appellant, after hearing Sergeant Rivera's testimony. We disagree. The jury heard testimony regarding the identification procedures Sergeant Rivera used and also considered defense counsel's argument that the procedures differed from Gross's recollection, thus rendering the State's witnesses' identification of appellant unreliable. As the sole factfinder, the jury determines how much weight and credibility to afford the witnesses' testimony and we defer to those resolutions. *See Crooks v. State*, No. 01-12-00996-CR, 2014 WL 4344842, at *2-3 (Tex. App.—Houston [1st Dist.] Aug. 29, 2014, pet. ref'd) (mem. op., not designated for publication) (rejecting appellant's argument that evidence was insufficient because the "only evidence linking him to the robbery . . . was unreliable due to the impermissibly suggestive identification procedures," since jury heard testimony regarding the identification procedures and it was jury's role to resolve witnesses' testimony).

It is well-established that the testimony of a sole witness to an offense may constitute sufficient evidence to support a conviction. *See Aguilar v. State*, 468 S.W.2d 75, 77 (Tex. Crim. App. 1971) (upholding conviction for assault with intent to murder where only one witness saw defendant with gun); *see also Criff*, 438 S.W.3d at 137; *Johnson v. State*, 176 S.W.3d 74, 77 (Tex. App.—Houston [1st Dist.] 2004, pet. ref'd) (holding evidence legally sufficient to sustain aggravated robbery conviction where complainant testified appellant robbed her at knife-point, complainant identified appellant in photographic lineup, and complainant identified appellant in court).

Gross testified and identified appellant as the passenger with the bat. The State also introduced, and the trial court admitted, Gross's pretrial identification. Gross testified that the street where he was robbed was well-lit and that he was looking right in the passenger's face when the passenger hit him with the bat. On cross-examination, Gross stated that he was "absolutely positive" that appellant was the man who hit him with the bat.³

Gross's identification of appellant was corroborated, moreover, by Palacios's testimony. Palacios admitted he committed the two robberies of Gross and Hicks, along with an unnamed passenger who carried a baseball bat. Though Palacios would not identify the passenger by name, the State recalled Sergeant Rivera, who testified that Palacios had told Sergeant Rivera that Palacios was with appellant on the night in question.

We conclude that this evidence identifying appellant as one of the robbers is sufficient to prove identity. *See Aguilar*, 468 S.W.2d at 77; *Criff*, 438 S.W.3d at 138; *Johnson*, 176 S.W.3d at 77.

To the extent that appellant suggests that minor discrepancies in witnesses' recollections of the identification procedure, like number of pages, render a photo array unduly suggestive, such an argument would go to admissibility, not sufficiency of the evidence, and appellant does not challenge on appeal the admission of Gross's

³ Appellant's counsel impeached Gross's testimony that he had consistently identified appellant as the passenger in the Buick. The defense questioned Officer Williams, who created the offense report after Gross's robbery. Officer Williams's report stated that the person with the knife had short hair, which would match appellant's appearance, and the person with the baseball bat had longer hair, which would match Palacios's appearance. However, it was the jury's role to reconcile any conflicts, contradictions, or inconsistencies in the evidence. *See Miller v. State*, No. 14-04-00632-CR, 2005 WL 2978963, at *3 (Tex. App.—Houston [14th Dist.] Nov. 8, 2005, pet. ref'd) (mem. op., not designated for publication). We presume that when faced with conflicting evidence, the jury resolved any conflicts in favor of the prevailing party. *Martinez v. State*, Nos. 14-09-00144-CR, 14-09-00145-CR, 2010 WL 2573822, at *4 (Tex. App.—Houston [14th Dist.] June 29, 2010, pet. ref'd) (mem. op., not designated for publication).

pre-trial or in-court identification. *See Solomon v. State*, 469 S.W.3d 641, 643 (Tex. App.—Houston [14th Dist.] 2015, no pet.) (“We employ a two-step analysis to test the admissibility of an identification: 1) whether the out-of-court identification procedure was impermissibly suggestive; and 2) whether that suggestive procedure gave rise to a very substantial likelihood of irreparable misidentification.”) (internal quotation omitted).⁴

In his brief, appellant also states that the trial court should have been presented with Sergeant Rivera’s testimony during the suppression hearing before the court ruled on the motion to suppress. However, appellant does not challenge the trial court’s denial of the motion to suppress. Also, the only objection defense counsel made when the State offered the photo array into evidence was to “authenticity as well as proper predicate,” which the trial court overruled, a ruling appellant does not challenge on appeal. For these reasons, and because appellant does not identify the matter as an issue on appeal or present authority or argument explaining who erred and why, we reject appellant’s suggestion as a basis to support reversal of the judgment. The bottom line is that the jury heard all the testimony appellant contends is conflicting, and it resolved any conflicts in accordance with its right to weigh the

⁴ To be sure, the content of a photographic lineup or the manner in which it is administered can be considered impermissibly suggestive and thus potentially inadmissible as violative of a defendant’s due process rights. *See Barley v. State*, 906 S.W.2d 27, 33 (Tex. Crim. App. 1995). Appellant, however, does not contend on appeal that the content of the photo array was unduly suggestive or that Sergeant Rivera conducted the photo array in a suggestive manner. *See Withers v. State*, 902 S.W.2d 122, 125 (Tex. App.—Houston [1st Dist.] 1995, pet. ref’d.) (emphasis added) (“A lineup is considered unduly suggestive if other participants are greatly dissimilar in appearance from the suspect.”); *Barley*, 906 S.W.2d at 33. Moreover, the Constitution generally protects a defendant against a conviction based on evidence of questionable reliability, not by prohibiting its introduction, but by affording the defendant the means to persuade the jury that the evidence should be discounted as unworthy of credit. *Perry v. New Hampshire*, 565 U.S. 228, 237 (2012). During closing argument, appellant had the opportunity to argue, and did argue, that the identification evidence was not credible. The present record does not show a due process deprivation.

evidence and decide credibility questions. *See Hosseini v. State*, 447 S.W.3d 359, 363 (Tex. App.—Houston [14th Dist.] 2014, no pet.).

Viewing all the evidence presented to the factfinder in the light most favorable to the verdict, we conclude that a rational jury could have found beyond a reasonable doubt that appellant committed the offense of aggravated robbery with a deadly weapon.⁵ *See Criff*, 438 S.W.3d at 138. Accordingly, we hold that the evidence is sufficient to support appellant’s conviction.

Finally, appellant argues that Hicks’s identification of appellant as one of the robbers in the extraneous robbery was not proven beyond a reasonable doubt. We need not address appellant’s argument. Even if Hicks’s testimony was insufficient to prove beyond a reasonable doubt that appellant committed the *extraneous* robbery, that would have no bearing on the sufficiency of the evidence to support appellant’s conviction of *Gross’s* robbery, since we have already concluded that there was sufficient evidence. *Cf. Rodger v. State*, No. 01-96-00257-CR, 1998 WL 22038, at *3 (Tex. App.—Houston [1st Dist.] Jan. 22, 1998, pet. ref’d) (not designated for publication) (“Because we have already held that the evidence is sufficient to support a finding that the appellant was guilty as a principal, we need not address the sufficiency of the evidence under the law of parties.”).

⁵ Though appellant does not challenge any element of the charged offense other than identity, we conclude that Gross’s testimony is sufficient evidence to support every element of the offense of aggravated robbery. Gross testified that the robbers took his wallet, that he was hit so hard he believed his leg was broken, and that he felt threatened and was in fear of seriously bodily injury or death when the robbers were holding the baseball bat and knife. *See* Tex. Penal Code §§ 29.02 (person commits robbery when he causes or threatens to cause bodily injury while committing theft), 29.03 (person commits aggravated robbery when he uses or exhibits a deadly weapon while committing robbery), 31.03 (person commits theft when he unlawfully appropriates another’s property); *English v. State*, 171 S.W.3d 625, 628 (Tex. App.—Houston [14th Dist.] 2005, no pet.) (baseball bat is deadly weapon when swung at victim’s head, when used to cause bodily injury, and when victim felt “extremely afraid”).

Conclusion

Having rejected each argument made in appellant's brief, we overrule his sole issue on appeal. We affirm the trial court's judgment.

/s/ Kevin Jewell
Justice

Panel consists of Justices Christopher, Busby, and Jewell.
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