

**Affirmed and Memorandum Opinion filed September 12, 2017.**



**In The**

**Fourteenth Court of Appeals**

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**NO. 14-16-00364-CR**

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**NICHOLAS BLAIR WINFREY, Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

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**On Appeal from the 182nd District Court  
Harris County, Texas  
Trial Court Cause No. 1418021**

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

Appellant Nicholas Winfrey was convicted of aggravated robbery and sentenced to 45 years' confinement. He appeals his conviction, raising four issues.

First, appellant argues the trial court erred by denying his trial counsel's motion to withdraw. Without a developed record of counsel's reasons to withdraw, we conclude the trial court did not abuse its discretion in denying counsel's motion. Second, appellant argues the trial court violated the Confrontation Clause by limiting

his cross-examination of the complainant to exclude evidence regarding the complainant's immigration status. We do not address the merits of this issue because it was not preserved for our review.

Third, appellant argues the trial court erred in denying appellant's motion for instructed verdict because the evidence was insufficient to prove his conduct placing the complainant in fear occurred in the course of committing theft. In his fourth issue, appellant challenges the sufficiency of the evidence for the same reason. We conclude there is sufficient evidence of the theft element because even though appellant did not take or demand property, circumstantial evidence that he approached the complainant with a gun and told him to "shut up," together with evidence that appellant did not know the complainant, is sufficient for a rational jury to conclude appellant acted in the course of committing theft. We therefore affirm.

### **BACKGROUND**

On the night of February 14, 2014, appellant and his girlfriend were driving home when the car started smoking. The girlfriend drove to the house of the complainant, who was a mechanic and had worked on her car before. The girlfriend parked in front of the complainant's house and knocked on the front door while appellant waited in the car. The complainant came out of his house to look at the girlfriend's car. Appellant was no longer inside the car. While the complainant was checking the car, appellant approached from the neighbor's house and pointed a gun at the complainant. The complainant testified he had never seen appellant before that night and that he thought appellant was robbing him.

The girlfriend testified the complainant started screaming for help and that appellant told him to "shut up." A physical struggle between appellant and the complainant ensued. The complainant's daughter was in the house and came outside when she heard the screams. When the daughter saw the struggle, she grabbed a

pole and hit appellant in the head. The complainant was then able to grab the gun from appellant. The girlfriend and appellant got in her car and drove away. A passerby witnessed the altercation and called the police to report a robbery. Within minutes, the police arrived. The police located the girlfriend, who provided appellant's location. Appellant was found with a head injury.

On the morning of trial, appellant's appointed counsel filed a motion to withdraw, asserting two grounds. First, counsel was unable to communicate with appellant effectively. Second, appellant made a serious, imminent threat of violence towards counsel, which resulted in a breakdown of the attorney-client relationship. A different judge heard the motion and denied it.

During trial, appellant attempted to cross-examine the complainant regarding the complainant's criminal history and his status as an illegal immigrant. Appellant argued that part of his defense was that the complainant had a motive to lie about not owning the gun, because, if arrested, the complainant would be committing a federal crime by possessing a gun due to his status as an illegal immigrant. In summarizing his argument for admission of the complainant's criminal history and his immigration status, appellant's counsel stated he was "basically trying to attack the complainant for his veracity for telling the truth." Appellant argued that excluding this evidence would hinder his defense. The State's response was that the complainant's criminal history and immigration status were not admissible for impeachment under the Rules of Evidence.

The trial court expressed to counsel that there were other ways to bring out on cross-examination that the complainant had a motive to lie about the gun, such as asking whether the complainant had a license to carry. Before making a final ruling, the trial court said the complainant's immigration status was certainly prejudicial. The trial court allowed appellant's counsel to make an offer of proof, and the

complainant testified he was in the country illegally. After the offer, the trial court sustained the State's objection to cross-examination regarding the complainant's criminal history and immigration status.

The jury convicted appellant of aggravated robbery. Appellant pled "true" to the enhancement paragraph and the trial court sentenced him to 45 years' confinement. This appeal followed.

### ANALYSIS

In his third and fourth issues, appellant challenges the legal sufficiency of the evidence. A successful challenge to the legal sufficiency of the evidence results in an acquittal, not a new trial. *See Tibbs v. Florida*, 457 U.S. 31, 41–42 (1982). We begin by addressing appellant's third and fourth issues because success on these issues would afford him the greatest relief. *See* Tex. R. App. P. 43.3; *Campbell v. State*, 125 S.W.3d 1, 4 n.1 (Tex. App.—Houston [14th Dist.] 2002, no pet.) (stating reviewing court should first address complaints that would afford the greatest relief).

#### **I. The evidence is legally sufficient to support appellant's conviction.**

In appellant's third issue, he argues the trial court erred in denying his motion for instructed verdict because the evidence was insufficient to prove that he acted in the course of committing theft. In appellant's fourth issue, he challenges the legal sufficiency of the evidence for the same reason. A challenge to the trial court's ruling on a directed verdict is treated as a challenge to the legal sufficiency of the evidence. *Williams v. State*, 937 S.W.2d 479, 482 (Tex. Crim. App. 1996). We therefore address these issues together.

#### **A. Standard of review and applicable law**

When reviewing the sufficiency of the evidence, we determine "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier

of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Johnson v. State*, 364 S.W.3d 292, 293–94 (Tex. Crim. App. 2012) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). The jury is the sole judge of the credibility of the witnesses and the weight to afford testimony. *Montgomery v. State*, 369 S.W.3d 188, 192 (Tex. Crim. App. 2012). The jury may reasonably infer facts from the evidence as it sees fit. *Price v. State*, 502 S.W.3d 278, 281 (Tex. App.—Houston [14th Dist.] 2016, no pet.). Circumstantial evidence alone can be sufficient to establish guilt. *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007). Intent is usually proven by circumstantial evidence. *Edwards v. State*, 497 S.W.3d 147, 157 (Tex. App.—Houston [1st Dist.] 2016, pet. ref’d).

A person commits aggravated robbery “if in the course of committing theft . . . and with intent to obtain or maintain control of property, he . . . intentionally or knowingly threatens or places another in fear of imminent bodily injury or death” and uses or exhibits a deadly weapon. Tex. Penal Code Ann. §§ 29.02(a), 29.03(a)(2) (West 2011). A firearm is a deadly weapon. *Id.* § 107(a)(17) (West Supp. 2015). “‘In the course of committing theft’ means conduct that occurs in an attempt to commit, during the commission, or in immediate flight after the attempt or commission of theft.” *Id.* at 29.01(1). Actually committing theft is not a requirement. *King v. State*, 157 S.W.3d 873, 874 (Tex. App.—Houston [14th Dist.] 2005, pet. ref’d). Neither is it necessary that the actor make a specific demand for money or property. *Id.*

**B. A rational jury could infer from the evidence that appellant acted in the course of committing theft.**

After reviewing the record, we conclude there is sufficient evidence from which the jury could infer that appellant, while in the course of committing theft, placed the complainant in fear. The complainant operated his business out of his

home. The complainant testified he had never seen appellant before the night of the incident. On that night, appellant got out of the car and went into the neighbor's yard while his girlfriend was knocking on the complainant's front door. Both the girlfriend and the complainant testified that while the complainant was checking the girlfriend's car, appellant came from the neighbor's house pointing a gun at the complainant. The girlfriend testified the complainant put his hands up and screamed for help, and appellant told the complainant to "shut up." The complainant testified that appellant wore a glove on the hand that was pointing the gun. This evidence is sufficient to prove appellant acted in the course of committing theft. *See King*, 157 S.W.3d at 875 (holding evidence that defendant entered store with accomplice, pointed gun at store owner whom he did not know, threatened to kill, shot, and then fled sufficient to show defendant intended to commit theft). As noted above, a specific demand for money or property is not required. *Id.*

Appellant relies on *Thomas v. State* to argue the evidence is insufficient. 807 S.W.2d 803 (Tex. App.—Houston [1st Dist.] 1991, pet. ref'd) (holding evidence insufficient on theft element of robbery). *Thomas* is distinguishable, however, because that case concerned the evidence necessary to corroborate an extrajudicial admission. *Id.* at 805. Moreover, the complainant in *Thomas* was found dead while wearing jewelry, and a purse was nearby with its contents (including cocaine) still intact. *Id.* at 805. Testimony also revealed that the defendant knew the complainant through drug dealings. *Id.*; *see King*, 157 S.W.3d at 875 (distinguishing *Thomas*).

Appellant's case is more like *King*. *See* 157 S.W.3d at 874. Viewing the evidence in the light most favorable to the verdict, we conclude a rational jury could have found beyond a reasonable doubt that appellant acted in the course of committing theft. *See id.* We therefore overrule appellant's third and fourth issues.

## **II. The trial court did not abuse its discretion in denying counsel's motion to withdraw.**

In his first issue, appellant challenges the trial court's denial of his counsel's motion to withdraw. We review a trial court's denial of a motion to withdraw for an abuse of discretion. *King v. State*, 29 S.W.3d 556, 566 (Tex. Crim. App. 2000). The right to counsel may not be manipulated so as to obstruct the judicial process or interfere with the administration of justice. *Id.* Personality conflicts are not valid grounds for withdrawal. *Id.*

Here, appellant's appointed counsel filed a motion on the morning of trial asserting two grounds for withdrawal: (1) counsel was unable to communicate with appellant effectively, and (2) appellant made a serious, imminent threat of violence toward counsel, which resulted in a breakdown in the attorney-client relationship. The motion was heard by another judge. The record does not reveal any details of the threat, nor is there any testimony from appellant that he was dissatisfied with counsel's performance. Without such evidence, the record shows only a personality conflict, which is not a valid ground for withdrawal. *See id.* Moreover, appellant does not show he suffered any prejudice from counsel's representation. Under these circumstances, we conclude the trial court did not abuse its discretion. *See id.* We overrule appellant's first issue.

## **III. Appellant did not preserve his Confrontation Clause challenge to the exclusion of cross-examination on the complainant's immigration status.**

In appellant's second issue, he argues the trial court violated the Confrontation Clause by limiting his cross-examination of the complainant to exclude evidence regarding the complainant's immigration status. The State argues appellant did not preserve this issue on Confrontation Clause grounds.

To preserve error for appellate review, a complaint must be timely and

sufficiently specific to make the trial court aware of the complaint, unless the specific grounds were apparent from the context. Tex. R. App. P. 33.1; *Wright v. State*, 374 S.W.3d 564, 575 (Tex. App.—Houston [14th Dist.] 2012, pet. ref’d). The purpose of this rule is to give the trial court and the opposing party the opportunity to correct the error or remove the basis for the objection. *Reyna v. State*, 168 S.W.3d 173, 179 (Tex. Crim. App. 2005). To preserve error on the exclusion of evidence, the proponent is required to make an offer of proof and obtain a ruling. Tex. R. Evid. 103(a)(2). A general argument that encompasses both the Texas Rules of Evidence and the Confrontation Clause is not sufficiently specific to preserve error on Confrontation Clause grounds. *Reyna*, 168 S.W.3d at 179 (holding argument that evidence should be admitted for “credibility” did not preserve error on Confrontation Clause grounds).

Here, appellant did not mention confrontation, much less argue that the Confrontation Clause demanded the admission of evidence regarding the complainant’s immigration status. Appellant’s general arguments that he wanted to attack the complainant for his truth and veracity could refer to either the Rules of Evidence or the Confrontation Clause.

Because appellant did not articulate to the trial court his argument that the Confrontation Clause demanded admission of the complainant’s immigration status, the trial court did not have the opportunity to rule on that argument. *See Reyna*, 168 S.W.3d at 179. We conclude appellant’s challenge to the trial court’s limitation of the complainant’s cross-examination was not preserved on Confrontation Clause grounds.

Within this issue, appellant argues the complainant’s immigration status was relevant. To the extent he is raising this issue under the Rules of Evidence, we conclude it was within the zone of reasonable disagreement for the trial court to



conclude the complainant's immigration status was not relevant. The Court of Criminal Appeals has held generally that a party is not entitled to impeach a witness on a collateral matter, and the Supreme Court of Texas has applied this general prohibition to evidence of a witness's immigration status. *See TXI Transp. Co. v. Hughes*, 306 S.W.3d 230, 241–42 (Tex. 2010) (holding witness's immigration status was an irrelevant, collateral matter and inadmissible under Tex. R. Evid. 608(b) as a specific instance of conduct); *Ramirez v. State*, 802 S.W.2d 674, 675 (Tex. Crim. App. 1990).

A witness's immigration status may be relevant, however, if it is logically connected to a motive to lie. *Sansom v. State*, 292 S.W.3d 112, 119–21 (Tex. App.—Houston [14th Dist.] 2008, pet. ref'd). In *Sansom*, the defendant was charged with sexually assaulting two of his step-daughters. *Id.* The allegations were made the same year the defendant sought a divorce from his wife, who was a witness. *Id.* If the two divorced, the wife faced deportation. *Id.* The defense argued that because the wife faced deportation, the children had a motive to fabricate the offenses. *Id.* This Court concluded the trial court abused its discretion in limiting cross-examination to exclude the wife's immigration status. *Id.*

In this case, by contrast, there was no logical reason why the complainant would fabricate the robbery because of his immigration status. The complainant and appellant did not know each other, and there was no evidence the complainant had any animus toward appellant. It was not an abuse of discretion for the trial court to conclude that the probative value of the complainant's immigration status was substantially outweighed by the danger of unfair prejudice. *See* Tex. R. Evid. 403. We therefore overrule appellant's second issue.

## CONCLUSION

Having overruled each of appellant's issues, we affirm the trial court's judgment.

/s/ J. Brett Busby  
Justice

Panel consists of Chief Justice Frost and Justices Jamison and Busby.  
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