Affirmed and Memorandum Opinion filed September 14, 2017.

In The

Fourteenth Court of Appeals

NO. 14-16-00380-CR

DAVID LAMAR GREEN, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 338th District Court
Harris County, Texas
Trial Court Cause No. 1404645

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

A jury convicted appellant David Lamar Green of the felony offense of conducting a horse race without a racetrack license when appellant knew or reasonably should have known that another person was betting on the partial or final outcome of the race. The trial court sentenced him to two years of probation and a $1,000 fine. In two issues on appeal, appellant contends that (1) the evidence is

insufficient to support the jury's verdict; and (2) he is outside the class of individuals that the statute was intended to prosecute. We affirm.

I. Background

Authorities investigated two unlicensed horse racing tracks called El Herradero Ranch and Cheques Downs in Harris County, Texas, between November 2012 and October 2013. Undercover officers visited the tracks on seven or eight different occasions during the investigation. Although the racetracks did not have house wagering and had signs posted that "betting" was not allowed, officers observed open and pervasive hand-to-hand wagering between spectators on the outcomes of the races.

Undercover officers observed appellant working security for the racetracks on several occasions during the investigation. At the time, appellant was volunteering as an unpaid reserve deputy for the Fort Bend County Constable. A state trooper ran security operations for the racetrack and approached appellant and other reserve officers about working security on race days. Appellant and the other reserve officers wore their official uniforms, including their badges and guns, while working security.

Authorities shut down the racetracks in October 2013, arresting the racetrack owners as well as a number of reserve officers who worked security for the racetracks, including appellant.

Appellant was charged with conducting a horse race without having a racetrack license from the Texas Racing Commission, when appellant knew or reasonably should have known that another person was betting on the final outcome of the race. Although appellant argued that he did not personally conduct the races or have the intent to assist in doing so, a jury convicted appellant as charged. On April 20, 2016, the trial court assessed punishment at two years' confinement and a

fine of $1,000. The trial court, however, suspended the sentence and placed appellant on community supervision for two years; required appellant to surrender his law enforcement license; and ordered appellant to serve 15 days in the Harris County Jail. Appellant timely appealed.

II. Analysis

Appellant raises two issues: (1) whether the jury verdict of guilty should be set aside because the evidence was insufficient to support a finding that Green aided or attempted to aid racetrack owners in violation of Texas Racing Act, and that he did so with the intent to promote or assist the commission of the offense; and (2) whether appellant was outside of the class of individuals that section 14.16 was intended to prosecute. We consider these issues below in reverse order.

A. Standards of Review

1. Statutory Construction

Statutory construction is a question of law. *Harris v. State*, 359 S.W.3d 625, 629 (Tex. Crim. App. 2011). In construing a statute, we look first to the statute's literal text, and we read words and phrases in context and construe them according to rules of grammar and usage. *Id.* We must presume that every word in a statute has been used for a purpose and that each word, phrase, clause, and sentence should be given effect if reasonably possible. *Id.* Where the statute is clear and unambiguous, the legislature must be understood to mean what it has expressed, and it is not for the courts to add or subtract from such a statute. *Boykin v. State*, 818 S.W.2d 782, 785 (Tex. Crim. App. 1991); *Uyamadu v. State*, 359 S.W.3d 753, 758 (Tex. App.—Houston [14th Dist.] 2011, pet. ref'd).

2. Legal Sufficiency

When reviewing the legal sufficiency of the evidence, we consider all of the evidence in the light most favorable to the verdict to determine whether, based on

that evidence and the reasonable inferences therefrom, a jury was rationally justified in finding guilt beyond a reasonable doubt. *Temple v. State*, 390 S.W.3d 341, 360 (Tex. Crim. App. 2013). In making this review, we consider all evidence in the record, whether it was admissible or inadmissible. *Winfrey v. State*, 393 S.W.3d 763, 767 (Tex. Crim. App. 2013).

We defer to the jury's resolution or reconciliation of conflicts in the evidence, and we draw all reasonable inferences from the evidence in favor of the verdict. *Isassi v. State*, 330 S.W.3d 633, 638 (Tex. Crim. App. 2010). In conducting a sufficiency review, we do not engage in a second evaluation of the weight and credibility of the evidence, but only ensure the jury reached a rational decision. *Young v. State*, 358 S.W.3d 790, 801 (Tex. App.—Houston [14th Dist.] 2012, pet. ref'd). Our duty as a reviewing court is to ensure that the evidence presented actually supports a conclusion that the appellant committed the crime that was charged. *Williams v. State*, 235 S.W.3d 742, 750 (Tex. Crim. App. 2007).

B. Law of Parties

Appellant was charged with the offense of "racing without a license." *See* Tex. Rev. Civ. Stat. Ann. art. 179e, § 14.16. Section 14.16 provides that a person commits the offense of racing without a license if the person (1) conducts a horse or greyhound race without a racetrack license; and (2) knows or reasonably should know that another person is betting on the final or partial outcome of the race. *Id.* § 14.16(a). A violation of section 14.16 is a third-degree felony. *Id.* § 14.16(b).

The jury charge allowed for the appellant to be convicted as the primary actor, but also included an instruction on the law of parties. 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, the person solicits, encourages, directs, aids, or attempts to aid the other person to commit the

offense. Tex. Penal Code Ann. § 7.02(a)(2) (Vernon 2011). As applied in this case, the jury was charged that appellant could be found guilty if, with the intent to promote or assist the commission of the offense, appellant solicited, encouraged, directed, aided, or attempted to aid the race track owners to commit the offense.

The jury found appellant guilty and was not required to specify whether it determined that appellant violated the statute as a primary actor or as a party. *See Leza v. State*, 351 S.W.3d 344, 357 (Tex. Crim. App. 2011) ("Where, as is the case here, the evidence is compelling that an accused is guilty of every constituent element of the alleged penal offense—*either* as a principal actor *or* under some theory of party liability—but there remains evidentiary play with respect to his precise role in that offense, we think it would be plainly absurd to require the jury to acquit the accused unless it can unanimously determine his status as a principal actor or a party and, if the latter, what his exact party accountability might be.").

Appellant contends in his second issue that he falls outside the class of individuals targeted by the statute. Appellant argues that section 14.16 "is intended to be applied to owners of racing facilities that conduct wagering on the outcomes of races they conduct without first obtaining a racetrack license from the Texas Racing Commission," and that the section "does not apply to [appellant] who was acting within the scope of his job as a security officer."

Appellant's argument lacks merit because the jury charge allowed conviction of appellant as a party to the offense. Whether the statute was intended to prosecute persons other than the owner of the racetrack is not relevant to our analysis; the jury was required to find only that, acting with the intent to promote or assist the commission of the offense, appellant solicited, encouraged, directed, aided, or attempted to aid the racetrack owner or the peace officer in charge of security for the racetrack to commit the offense. Nothing in the language of section 14.16 of the

Texas Racing Act or section 7.02(a) of the Texas Penal Code prohibits application of the law of parties to the offense of racing without a license. *See generally* Tex. Rev. Civ. Stat. art. 179e, § 14.16; Tex. Penal Code § 7.02(a)(2); *see also In re State ex rel. Weeks*, 391 S.W.3d 117, 124 (Tex. Crim. App. 2013) (orig. proceeding) ("Party liability is as much an element of an offense as the enumerated elements prescribed in a statute that defines a particular crime."). Appellant's second issue is overruled.

C. Legal Sufficiency

Appellant contends in his first issue that the evidence was legally insufficient to support the jury's verdict that appellant aided or attempted to aid the race track owners' violation of the Texas Racing Act.

This court interpreted the "racing without a license" statute in *Hurd v. State*, 495 S.W.3d 592, 596–97 (Tex. App.—Houston [14th Dist.] 2016, no pet.). The court, after considering all of the evidence in the light most favorable to the verdict, concluded that the evidence was legally sufficient to support a finding that Hurd committed the offense of racing without a license as a party to the offense. Accordingly, the Court determined it need not address the sufficiency of the evidence to establish Hurd's guilt as the primary actor. *See id.* (citing *Hoang v. State*, 263 S.W.3d 18, 19 (Tex. App.—Houston [1st Dist.] 2006, pet. ref'd)).

When a party is not the primary actor, the State must prove conduct constituting an offense plus an act by the defendant done with the intent to promote or assist such conduct. *Beier v. State*, 687 S.W.2d 2, 3 (Tex. Crim. App. 1985). Party participation may be shown by events occurring before, during, and after the commission of the offense, and may be demonstrated by actions showing an understanding and common design to do the prohibited act. *Salinas v. State*, 163 S.W.3d 734, 739–40 (Tex. Crim. App. 2005). Circumstantial evidence may be used

to prove one is a party to an offense. *Powell v. State*, 194 S.W.3d 503, 506 (Tex. Crim. App. 2006).

Here, the jury heard evidence establishing that appellant, with the intent to promote or assist in the commission of the Texas Racing Act violation, solicited, encouraged, directed, aided, or attempted to aid the owners in the commission of the offense. Evidence adduced at trial showed that appellant was working security on several occasions when undercover agents visited El Herradero and Cheques Downs. Appellant wore his full reserve deputy uniform, including his badge and his gun, on those occasions. Appellant's duties included checking individuals as they came into the property to ensure that no outside alcoholic beverages were brought in; directing people about the racetrack; and generally keeping the peace.

When asked how appellant helped in conducting the races, the undercover officer testified that appellant and the other security officers maintained a "command presence and provided security." The undercover officer further testified that the uniformed security officers were beneficial to the profitability of racetracks and to the "legitimacy" of the racetracks. Moreover, a jury reasonably could have concluded that appellant's uniformed presence in a cash-filled environment facilitated hand-to-hand cash betting, thereby aiding in the creation of an atmosphere for the underlying element of the offense (betting on the outcome of the races) to take place. Additionally, the jury could have relied on the fact that appellant himself solicited, encouraged, aided, or attempted to aid in the private wagering even if, as here, the undercover agent did not see appellant giving instructions to anyone else. These actions, taken together, support a finding that appellant aided or attempted to aid the owners in conducting a horse race without a racing license where others were betting on the outcome of the race.

The evidence further supports a finding that appellant undertook these actions

with the intent to promote or assist in the commission of the Texas Racing Act violation because there is evidence that appellant was aware of and encouraged the illegal betting at the racetrack.

Appellant asserts that his case is distinguishable from the court's prior interpretation of this statute and application of law of parties in *Hurd*. Appellant claims that here, unlike in *Hurd*, the undercover officer testified that he did not see appellant giving any instructions or directions to patrons or anyone else. However, an undercover officer testified that spectators openly exchanged their money where the appellant was standing. The jury could have relied on this evidence to conclude the betting was open, pervasive, and easily detectible. Similar to the evidence in *Hurd*, the jury also could have relied on this evidence to conclude appellant had knowledge of the private wagering going on around him. Additionally, the same undercover officer testified that appellant himself engaged in a bet on a race with the undercover officer. The undercover officer testified that he approached appellant prior to a race, and asked appellant "which one he liked," and appellant picked a horse. Following the race, the same undercover officer paid appellant twenty dollars for the bet owed for losing the race. On the undercover video surveillance, appellant can be seen placing money in his pocket. This is factually similar to *Hurd* where the undercover officer discussed the amount each had bet on a race. *See* 495 S.W.3d at 598.

Appellant received no instructions regarding where to stand either during or between races; in fact, undercover officers observed him instructing another uniformed officer as to his placement. Testimony was provided that appellant did not attempt to dissuade or stop him or anyone else from betting. We conclude that a reasonable jury could have relied on this evidence to conclude that (1) appellant was aware of and encouraged hand-to-hand betting; and (2) appellant thereby acted

with the intent to promote or assist in the commission of the Texas Racing Act violation.

These circumstances distinguish this case from *Rivera v. State*, 507 S.W.3d 844, 857–58 & nn. 6–7 (Tex. App.—Houston [1st Dist.] 2016, pet. ref'd), which also arose from the prosecution of an off-duty police officer working an extra job as security at El Herradero Ranch.[1] In *Rivera*, unlike this case, "[t]here was no evidence . . . that appellant affirmatively encouraged any of the patrons at El Herradero Ranch to engage in betting on the horse races." *Id.* at n. 7. Of importance to the outcome in *Rivera* was the absence of evidence "how appellant and one or more of the parties acted together to contribute to the execution of a common purpose of committing the offense." *Id*. at 858. At most, the *Rivera* court said, "appellant was present at a horse race at which betting was occurring." *Id*. The same cannot be said of appellant in the present case.

Based on the foregoing, we conclude the evidence is legally sufficient to support the jury's verdict that appellant aided or attempted to aid the owners' violation of the Texas Racing Act and did so with the intent to promote or assist the commission of the offense. As in *Hurd*, appellant's conviction does not rest on proof of appellant's status within an enterprise that merely had criminal potential. *See* 495 S.W.3d at 599. Rather, appellant's conviction rests on evidence of his actions as a security officer coupled with evidence that he affirmatively encouraged and engaged in hand-to-hand betting. *See Hurd*, 495 S.W.3d at 598 (citing *Beier*, 687 S.W.2d at 4). Appellant's first issue is overruled.

[1] Appellant does not dispute that the property owner conducted horse races at El Herradero Ranch without a license and knew or reasonably should have known that another person was betting on the final or partial outcome of the races. *Cf. Rivera*, 507 S.W.3d at 858 n.6. Rather, appellant contends there is no evidence that appellant himself (1) solicited, encouraged, directed, aided, or attempted to aid in the commission of the offense; or (2) had knowledge of personal bets occurring between patrons "that were not easily detectable."

III. Conclusion

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

/s/ John Donovan
Justice

Panel consists of Justices Boyce, Donovan, and Jewell.
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