In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-15-00295-CR

JEFFERY ALLEN BROCHU, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

On Appeal from the 66th District Court
Hill County, Texas
Trial Court No. 37,326; Honorable Lee Harris, Presiding

July 12, 2017

MEMORANDUM OPINION

Before QUINN, C.J., and CAMPBELL and PIRTLE, JJ.

Following a plea of not guilty, Appellant, Jeffery Allen Brochu, was convicted by a jury of aggravated robbery (robbery involving the use or exhibition of a deadly weapon) and sentenced to twenty years confinement.[1] By a sole issue, Appellant contends the

[1] TEX. PENAL CODE ANN. § 29.03(a)(2) (West 2011). An offense under this section is a felony of the second degree. *Id.* at § 29.02(b).

evidence is insufficient to support his conviction.[2] The State counters by contending that, under the law of parties, the evidence is sufficient to establish Appellant's guilt. We affirm.

BACKGROUND

According to the victim, at approximately 4:30 a.m. on April 10, 2012, he awoke to a knock on his door. He looked out the window and saw a black male he did not recognize. He stepped outside through a separate door to determine what the individual wanted. He then realized the individual was with another male, Appellant, whom he did recognize from prior dealings in his salvage business. At the time, Appellant was holding what appeared to be a long, black rifle, and the unknown male, later identified as Joel Todd Hawkins, had a handgun tucked into his waistband. According to the victim, Hawkins was the one who had knocked on his door.

Once the victim stepped outside, Appellant pressed the end of the rifle barrel into the victim's abdomen and demanded money. Appellant's wife looked out the window and realized her husband was being robbed. She awoke Appellant's seventeen-year-old son and instructed him to call the police. He exited the home through a window and called 911; after which, officers were dispatched to the scene on a robbery/home invasion in progress call.

[2] Originally appealed to the Tenth Court of Appeals, this appeal was transferred to this court by the Texas Supreme Court pursuant to its docket equalization efforts. TEX. GOV'T CODE ANN. § 73.001 (West 2013). Should a conflict exist between precedent of the Tenth Court of Appeals and this court on any relevant issue, this appeal will be decided in accordance with the precedent of the transferor court. TEX. R. APP. P. 41.3.

In the meantime, while the victim's wife gathered some money from her purse to give to the would-be robbers, Appellant and the victim struggled over the rifle and a fight spilled into the home. The victim testified that during this episode, Appellant kept threatening to kill him and he was scared. Once sirens could be heard, Appellant took the money being offered and he and Hawkins fled in different directions. While fleeing, Appellant dropped a clip from the rifle. Officers later retrieved that clip and concluded that it belonged to a paintball gun or airsoft gun.

Once the police arrived, they established a perimeter around the crime scene, and within a short period of time, two suspects were apprehended at different locations. While the suspects were handcuffed and detained, the victim was taken by patrol car to each location where he identified the suspects as the men who had robbed him. The victim identified Appellant as the man who threatened him and who entered his home without his consent.

Hawkins later confessed to the aggravated robbery and accepted a plea bargain for fifteen years confinement. Appellant, however, elected to go to trial before a jury. Although Hawkins did not testify in Appellant's trial, Captain Clay Sparks, one of the investigating officers, testified that Hawkins told him that during the robbery, he was in possession of a handgun he had received from Appellant and that it was a "black, small-caliber revolver, .22 to .25 caliber, with white or pearl handles." Hawkins also told the officer that he had gotten rid of the handgun by throwing it away during his flight from the robbery. The handgun was never recovered by the police and a facsimile was not presented to the jury. Following presentation of evidence, the jury was charged

regarding the offenses of robbery, aggravated robbery, and the law of parties. Appellant was convicted of aggravated robbery and this appeal followed.

APPLICABLE LAW

A person commits the offense of robbery if, in the course of committing theft and with intent to obtain or maintain control of the property, he intentionally or knowingly threatens or places another in fear of imminent bodily injury or death. TEX. PENAL CODE ANN. § 29.02(a)(2) (West 2011).[3] The offense becomes aggravated if the person uses or exhibits a deadly weapon. *Id.* at § 29.03(a)(2) (West 2011). A deadly weapon is defined as "a firearm or anything manifestly designed, made, or adapted for the purpose of inflicting death or serious bodily injury." *Id.* at § 1.07(a)(17)(A) (West Supp. 2016). Therefore, by definition, a firearm is a deadly weapon.

Under the law of parties, "[a] person is criminally responsible as a party to an offense if: the offense is committed by his own conduct, by the conduct of another for which he is criminally responsible, or by both." *Id.* at § 7.01(a) (West 2011); *Adames v. State*, 353 S.W.3d 854, 862 (Tex. Crim. App. 2011). 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 in the commission of the offense." TEX. PENAL CODE ANN. § 7.02(a)(2) (West 2011); *Adames*, 353 S.W.3d at 862.

In determining whether Appellant participated as a party, the jury was free to consider the events occurring before, during, and after the commission of the offense,

[3] Appellant does not challenge these elements.

and it was entitled to rely on any conduct of Appellant which showed an understanding and common design to commit the crime. *See Ransom v. State*, 920 S.W.2d 288, 302 (Tex. Crim. App. 1994); *Jackson v. State*, 487 S.W.3d 648, 655 (Tex. App.—Texarkana 2016, no pet.); *Love v. State*, 199 S.W.3d 447, 453 (Tex. App.—Houston [1st Dist.] 2006, pet. ref'd). Additionally, the State need not plead the law of parties in the indictment. *Sorto v. State*, 173 S.W.3d 469, 476 (Tex. Crim. App. 2005)*, cert. denied*, 548 U.S. 926, 126 S. Ct. 2982, 165 L. Ed. 2d 989 (2006); *Marable v. State*, 85 S.W.3d 287, 287 (Tex. Crim. App. 2002).

STANDARD OF REVIEW

The only standard that a reviewing court should apply in determining whether the evidence is sufficient to support each element of a criminal offense the State is required to prove beyond a reasonable doubt is the standard set forth in *Jackson v. Virginia*, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). *Brooks v. State,* 323 S.W.3d 893, 912 (Tex. Crim. App. 2010). In determining whether the evidence is legally sufficient to support a conviction, this court considers all the evidence in the light most favorable to the verdict and determines whether, based on that evidence and reasonable inferences to be drawn therefrom, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Winfrey v. State*, 393 S.W.3d 763, 768 (Tex. Crim. App. 2013); *Lucio v. State*, 351 S.W.3d 878, 894 (Tex. Crim. App. 2011). In applying this standard, we must keep in mind that the jury is the sole judge of the credibility of witnesses and the weight to be given to their testimony, and the reviewing court must not usurp this role by substituting its own judgment for that of the jury. TEX. CODE CRIM. PROC. ANN. art. 38.04 (West 1979); *Montgomery v. State*, 369 S.W.3d 188,

192 (Tex. Crim. App. 2012); *Brooks,* 323 S.W.3d at 899; *Lancon v. State*, 253 S.W.3d 699, 707 (Tex. Crim. App. 2008). It is unnecessary for every fact to point directly and independently to the guilt of the accused; it is enough if the finding of guilt is warranted by the cumulative force of all the incriminating evidence. *Winfrey*, 393 S.W.3d at 768. In our review, we must evaluate all of the evidence in the record, both direct and circumstantial, whether admissible or inadmissible. *Dewberry v. State*, 4 S.W.3d 735, 740 (Tex. Crim. App. 1999), *cert. denied*, 529 U.S. 1131, 120 S. Ct. 2008, 146 L. Ed. 2d 958 (2000).

We measure the legal sufficiency of the evidence by the elements of the offense as defined by a hypothetically correct jury charge. *Villarreal v. State*, 286 S.W.3d 321, 327 (Tex. Crim. App. 2009); *Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997). "Such a charge [is] one that accurately sets out the law, is authorized by the indictment, does not unnecessarily increase the State's burden of proof or unnecessarily restrict the State's theories of liability, and adequately describes the particular offense for which the defendant was tried." *Malik*, 953 S.W.2d at 240.

Although mere presence at the scene of an offense alone is not sufficient under the law of parties to support a conviction, it may be sufficient when combined with other circumstances. *Ahrens v. State*, 43 S.W.3d 630, 634 (Tex. App.—Houston [1st Dist.] 2001, pet. ref'd). When evidence shows that the defendant was physically present during the commission of the offense and that the defendant encouraged or aided the crime's commission by either words, agreement, or other affirmative and supportive conduct, the evidence is sufficient to support a conviction under the law of parties. *King v. State*, 29 S.W.3d 556, 564 (Tex. Crim. App. 2000).

ANALYSIS

Here, the indictment alleged that, in the course of committing the offense of theft, Appellant placed the victim in "fear of imminent bodily injury or death," and he did "then and there use or exhibit a deadly weapon, to wit: a handgun." Appellant contends the State did not meet its burden of showing he personally used a "handgun" during the commission of the offense because the testimony only established that he brandished a "rifle" (ultimately shown to have been nothing more than a paintball gun) during the robbery. In response, the State contends the record supports the jury's verdict based on the law of parties. Specifically, the State contends Appellant aided or assisted Hawkins in the commission of the robbery and that the "gun" in Hawkins's waistband was a "handgun" used in the commission of that robbery.

To support his argument that the State failed to establish criminal responsibility under the law of parties, Appellant asserts the trial court erred in admitting hearsay statements from Hawkins's confession through the testimony of Captain Sparks. During his testimony, Captain Sparks testified, without objection, as follows:

> Q. As far as you know, only Joel Hawkins was the person that had a handgun; is that right?
>
> A. Yes, according - - yes.
>
> Q. All the evidence points to - - the only person who had a handgun was Joel Todd Hawkins, correct?
>
> A. That's correct at the time of the offense, but prior to that, according to Joel Hawkins' confession, the defendant gave him the weapon.

Captain Sparks further testified, again without objection, that Hawkins described the gun as "a black, small-caliber revolver, .22 to .25 caliber, with white or pearl handles."

Hawkins further told Captain Sparks that he disposed of the gun after the robbery and the police were unable to recover the weapon.

Inadmissible hearsay admitted without objection may not be denied probative value merely because it is hearsay. TEX. R. EVID. 802. Additionally, a challenge to admission of inadmissible hearsay must be preserved at trial for appellate review. TEX. R. APP. P. 33.1(a)(1); *Brewer v. State*, 367 S.W.3d 251, 253 (Tex. Crim. App. 2012). Because Appellant did not object to the presentation of this testimony, we must give it evidentiary weight.

By specifying the type of deadly weapon, the State increased its burden of proof and was bound to prove that a "handgun" was used or exhibited during the robbery. *Curry v. State*, 30 S.W.3d 394, 405 (Tex. Crim. App. 2000); *Emmitt v. State*, No. 06-16-00069-CR, 2017 Tex. App. LEXIS 1171, at *4-5 (Tex. App.—Texarkana Feb. 10, 2017, pet. ref'd) (mem. op., not designated for publication). A "handgun" has been statutorily defined as "any *firearm* that is designed, made, or adapted to be fired with one hand." TEX. PENAL CODE ANN. § 46.01(5) (West Supp. 2016) (emphasis added). Additionally, a "firearm" has been statutorily defined as "any device designed, made, or adapted to expel a projectile through a barrel by using the energy generated by an explosion or burning substance or any device readily convertible to that use." *Id.* at § 46.01(3). While the State did not offer direct testimony concerning whether the "gun" used by Hawkins was a "firearm," it did offer testimony that the weapon was a "handgun," implying that it was a firearm by definition and that it was a "small-caliber revolver, .22 to .25 caliber," circumstantially indicating it to be a firearm. As such, the evidence was sufficient to establish that the gun used by Hawkins was a handgun.

Additionally, under the law of parties, the State was required to show that at the time of the offense, Appellant and Hawkins were acting together, each contributing some part towards the execution of a common purpose. *Minton v. State*, 485 S.W.3d 655, 661 (Tex. App.—Amarillo 2016, pet. ref'd) (citing *Wooden v. State*, 101 S.W.3d 542, 546 (Tex. App.—Fort Worth 2003, pet. ref'd)). Intent to assist or promote may be inferred from the acts, words, and conduct of the defendant and from the circumstances in which the offense occurred. *Roberts v. State,* 319 S.W.3d 37, 39 (Tex. App.—San Antonio 2010, pet. ref'd). Circumstantial evidence may be used to prove party status. *Escobar v. State*, 28 S.W.3d 767, 774 (Tex. App.—Corpus Christi 2000, pet. ref'd).

Here, a witness testified that, immediately prior to the incident in question, Appellant asked the witness to take him and Hawkins to the victim's house. The witness testified that during this encounter Hawkins dropped a "little black gun . . . like a little old revolver," then picked it up and returned it to his waistband. Furthermore, the victim testified that Hawkins brandished a gun in his waistband several times during the course of the robbery, as if to draw the victim's attention to the fact that he had a gun and could use it. Additionally, the victim's son testified that Hawkins kept raising his shirt and revealing the handgun while gesturing to it during the robbery. The record also reflects that the victim, his wife, and the victim's son were all scared when Hawkins gestured toward the gun tucked into his waistband as Appellant demanded money. Where, as here, the evidence showed that Appellant and Hawkins were acting together to extract money from the victim by threatening or placing the victim in fear of imminent bodily injury or death, and Hawkins did use or exhibit a handgun during the course of that robbery, criminal responsibility for the use of that handgun is attributed to Appellant

under the law of parties. As such, the evidence was legally sufficient to support Appellant's conviction as to the offense of aggravated robbery. Appellant's sole issue is overruled.

CONCLUSION

The trial court's judgment is affirmed.

Patrick A. Pirtle
Justice

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