In The
Court of Appeals
Sixth Appellate District of Texas at Texarkana

No. 06-08-00093-CR

TAURUS DEMETRICK BLAKEMORE, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the Fourth Judicial District Court
Rusk County, Texas
Trial Court No. CR07-027

Before Morriss, C.J., Carter and Moseley, JJ.
Memorandum Opinion by Justice Moseley

MEMORANDUM OPINION

A jury found Taurus Demetrick Blakemore guilty of robbery, as charged in the indictment. During a separate bench trial on punishment, the tribunal found the enhancement allegations contained in the indictment to be "true" and sentenced Blakemore to sixty years' imprisonment. On appeal, Blakemore contends that the trial court erred by submitting a lesser-included offense instruction to the jury.[1] We overrule this issue and affirm the trial court's judgment.

I. A Jury Charge Should Set Forth the Applicable Law, Without Further Comment.

A jury charge should set forth the law applicable to the case, without expressing any opinion the trial court may have regarding the weight of the evidence and without summarizing any testimony or otherwise discussing the evidence presented. TEX. CODE CRIM. PROC. ANN. art. 36.14 (Vernon 2007). When a claim of an error in the jury charge is brought forth on appeal, the reviewing court must first determine if there was indeed error in the trial court's charge. *Abdnor v. State*, 871 S.W.2d 726, 731 (Tex. Crim. App. 1994). If the complained-of portion does not constitute error, our review process ends. *Thompson v. State*, 227 S.W.3d 153, 163–64 (Tex. App.—Houston [1st Dist.] 2006, pet. ref'd); *Barfield v. State*, 202 S.W.3d 912, 916 (Tex. App.—Texarkana 2006, pet. ref'd); *McIlroy v. State*, 188 S.W.3d 789, 797–98 (Tex. App.—Fort Worth 2006, no pet.). However, if we find that error existed in the jury charge, we must next ascertain whether the appellant

[1]With Blakemore having been convicted of the greater offense of robbery rather than the lesser-included offense of theft (as opposed to the reverse situation), the charge as tendered to the jury seems a distinction without a difference. In other words, even if it were error to have included the lesser-included offense instruction, the harm to Blakemore is difficult to comprehend.

preserved that error at trial; this must be done in order to determine the degree of harm that must be shown before the error requires reversal of the trial court's judgment. If the appellant did not preserve the error by raising an objection to it at trial, the "appropriate standard [of review] is the one for fundamental error in the charge." *Jimenez v. State*, 32 S.W.3d 233, 239 (Tex. Crim. App. 2000); *see Stokes v. State*, 74 S.W.3d 48, 50 (Tex. App.—Texarkana 2002, pet. ref'd). This standard prohibits reversal of the trial court's judgment "unless the error appearing from the record was calculated to injure the rights of the defendant, or unless it appears from the record that the defendant has not had a fair and impartial trial." TEX. CODE CRIM. PROC. ANN. art. 36.19 (Vernon 2006); *see Abdnor*, 871 S.W.2d at 732; *Bradshaw v. State*, 244 S.W.3d 490, 497–98 (Tex. App.—Texarkana 2007, pet. ref'd). If, on the other hand, the error was preserved at trial by timely objection, we must see only whether "some harm" accrued to the defendant as a result of the error. *Jimenez*, 32 S.W.3d at 237; *see also Remsburg v. State*, 219 S.W.3d 541, 547 (Tex. App.—Texarkana 2007, pet. ref'd). This latter standard permits reversal of the trial court's judgment for any nonstructural error unless we were convinced, beyond a reasonable doubt, that the error did not contribute to the appellant's conviction or punishment. *Remsburg*, 219 S.W.3d at 547. Under either standard for harm, the degree of harm demonstrated by the appellant must be actual, not merely theoretical. *Almanza*, 686 S.W.2d 157, 174 (Tex. Crim. App. 1985) (op. on reh'g); *Taylor v. State*, 146 S.W.3d 801, 804 (Tex. App.—Texarkana 2004, pet. ref'd).

II. Does the Jury Charge Contain Error?

The Defendant contends that the trial court erred by submitting an instruction on the lesser-included offense of theft over his trial objection.[2] To constitute a lesser-included crime, an offense must (1) be established by proof of the same or less than all of the facts required to establish the commission of the offense charged; (2) differ from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property, or public interest suffices to establish the crime's commission; (3) differ from the offense charged only in the respect that it requires a lesser culpable mental state to establish the crime's commission; or (4) consist of an attempt to commit the offense charged or an otherwise included offense. TEX. CODE CRIM. PROC. ANN. art. 37.09 (Vernon 2006). This first step of the analysis is done by referencing the elements of the offense as defined by the pleadings (specifically, the indictment) in the case, *not* by reference to the evidence admitted at trial. *Hall v. State*, 225 S.W.3d 524, 535 (Tex. Crim. App. 2007). The second step of the analysis requires a review of the evidence admitted at trial to determine whether there is any evidence (even a mere scintilla of evidence will suffice) to support a jury's finding that the accused was guilty only of the lesser-included offense. *Id.* at 535–36.

To prove robbery, the State must show that the accused (1) while in the course of committing theft, (2) with intent to obtain or maintain control of that stolen property, and (3) either

[2] The Defendant's objection at trial (but not on appeal) seemed more to direct his complaint at the characterization in the charge of theft as being a misdemeanor than to the inclusion of the lesser-included offense instruction itself.

(a) intentionally or knowingly or recklessly caused bodily injury to someone or (b) intentionally or knowingly threatened or placed another in fear of imminent bodily injury or death. TEX. PENAL CODE ANN. § 29.02 (Vernon 2003). To prove theft, the State must present evidence that shows the accused (1) unlawfully, (2) appropriated property, (3) with intent to deprive the owner of that property. TEX. PENAL CODE ANN. § 31.03(a) (Vernon Supp. 2008).

Because the typical robbery case requires the State to prove the accused committed an underlying theft, theft is usually (but not always) a lesser-included offense of robbery. *See, e.g.*, *Jones v. State*, 984 S.W.2d 254, 257–58 (Tex. Crim. App. 1998); *Bignall v. State*, 887 S.W.2d 21, 23–25 (Tex. Crim. App. 1994); *Earls v. State*, 707 S.W.2d 82, 84 (Tex. Crim. App. 1986).[3] However, whether theft would be a lesser-included offense in this case necessarily turns on the allegations included in the indictment. *Hall*, 225 S.W.3d at 535; *Campbell*, 571 S.W.2d at 161–62.

In this case, the indictment alleged that the Defendant:

> while in the course of committing theft of property and with intent to obtain or maintain control of said property, intentionally or knowingly threaten[ed] or place[d] Orn Snguon in fear of imminent bodily injury or death by pointing an object that appeared to be a firearm at and in the direction of the said Orn Snguon . . . .

Because the alleged aggravating circumstances that increased the seriousness of the underlying offense to robbery were alleged to have been committed by the Defendant during the course of

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[3]One occasion when theft would *not* be a lesser-included offense of robbery is when the underlying theft was not alleged to have been "completed" because the accused failed to gain control of the property. *See Campbell v. State*, 571 S.W.2d 161, 161–62 (Tex. Crim. App. 1978) (State's robbery case depended on proof of "completed" theft; appellant was therefore entitled to instruction on lesser-included offense of theft), *overruled*, *Hall*, 225 S.W.3d 524.

committing a theft, it follows that the language in the indictment necessarily included the allegation that he either completed the underlying theft or attempted to complete an underlying theft. Because the State's indictment could be satisfied with proof of a completed underlying theft, theft could be considered a lesser-included offense of robbery in this case—if there was also some evidence adduced at trial to support such a lesser-included offense instruction.

Snguon testified that on December 4, 2006, a man came into the Reklaw Food Store (where Snguon works) and proceeded to the checkout counter to purchase a soft drink. Once the man got to the counter, he drew a BB gun, pointed it at Snguon's chest, threatened to shoot the gun, ordered the latter to open up the cash register and hand over money from it. Snguon, however, realized that the gun was not real and began struggling with the robber. During the struggle, the robber took some of the money from the cash register. The two continued to fight, but the robber eventually escaped from the premises.

The Defendant called Tony Linnerman (Tony) and Sondra Linnerman (Sondra) as witnesses. Tony testified that, on the occasion described above, he was outside the Reklaw store in Rusk County when he saw a store clerk fighting with a man wearing a hooded sweatshirt. Tony saw that the clerk had a toy rifle in his hands and was using it to hit the man in the sweatshirt. Eventually, the sweatshirt-wearing man ran out of the store, got into a car, and left the scene.

Sondra testified that she had also been at the Reklaw store at the same time and observed the man who ran the store chasing another man around the store, hitting the latter with a "little plastic

rifle." She also testified that she saw Snguon retrieve the gun from a car, thus suggesting that it had been Snguon (and not the Defendant) who had introduced the toy BB gun into the fracas.

The Linnermans' testimonies, if believed, would support the conclusions that the store clerk was the sole aggressor in the tussle and that the Defendant had not introduced the BB gun into the altercation. Snguon's testimony, if believed, would support the conclusion that the Defendant completed a theft by stealing money from the cash register. Therefore, there was at least the required scintilla of evidence which would support a conclusion by the jury that the Defendant was guilty of a completed theft but not a robbery.

Therefore, because the language of the indictment at least encompassed the possibility of an underlying completed theft, and because there was evidence to support Blakemore's conviction for an underlying completed theft, we conclude the trial court did not err by instructing the jury on that lesser-included offense of robbery in this case. We overrule the Defendant's sole appellate issue and affirm the trial court's judgment.

Bailey C. Moseley
Justice

Date Submitted: August 15, 2008
Date Decided: August 25, 2008

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