NO. 12-11-00147-CR
12-11-00148-CR
12-11-00149-CR

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

JOHN DEWAYNE WILLIAMS, APPELLANT	***§***	***APPEALS FROM THE 114TH***
V.	***§***	***JUDICIAL DISTRICT COURT***
THE STATE OF TEXAS, APPELLEE	***§***	***SMITH COUNTY, TEXAS***

MEMORANDUM OPINION

John Dewayne Williams appeals his convictions for robbery and aggravated robbery. He raises five issues on appeal. We modify the judgments of the trial court as to the robbery convictions, and affirm as modified. We affirm the aggravated robbery conviction.

BACKGROUND[1]

On January 9, 2008, Mary Cleveland was working as a cashier at a Just a Dollar store in Tyler, Texas, near closing time. A black male entered the store and purchased mints. He left the store and returned shortly thereafter, asking for a refund. Cleveland explained that she could not provide a refund. The man handed her a note demanding money, although she was not sure exactly what the note said. The man stated that he had a gun and reached for the gun by slightly pulling his shirt aside while reaching inside his pocket. However, he never exposed the gun.

[1] Appellant received notice of an appointment for appellate counsel after the expiration of the time to file his notice of appeal, and the Texas Court of Criminal Appeals allowed Appellant to file an out-of-time appeal. *See **Ex parte Williams***, No. AP-76,528, AP-76,529, AP-76,530, 2011 WL 1288252, at *1 (Tex. Crim. App. Apr. 6, 2011) (per curiam).

Cleveland handed the robber the money, and he told her to go the back of the store. She complied, and the robber then fled the scene.

On January 15, 2008, Leticia Perez was working as a cashier at a Family Dollar store in Tyler, Texas, near closing time. A black male entered the store and purchased juice. He then wanted change for a dollar. Perez told the man that she could not do that, and he purchased candy instead. Shortly thereafter, while the cash register was open, he reached for the register drawer and grabbed the cash. Perez alerted the manager. During this time, the robber grabbed his waistband as if he was reaching for a weapon. When the manager came, the robber stated, "I have what I need, so I might as well kill you both." Perez ran to the back of the store as the man escaped.

On January 21, 2008, Angelica Parker was working as a cashier at a Dollar General store, in Tyler, Texas, near closing time. A black male entered the store, attempted to purchase breath mints, and then slid Parker a note. The note stated that this was a robbery, and demanded that Parker hand the robber all the five, ten, and twenty dollar bills from the cash register. The man reached for a gun. Parker said that she never saw the robber pull out the gun, but that she could see the outline of the gun. He told her to go to the back of the store, and that if she turned around, he would shoot her. The robber fled the store.

Each of the three victims viewed photo lineups and ultimately identified Appellant as the person who robbed her. Parker initially could not identify Appellant, but identified him in a subsequent lineup. She admitted that she had engaged in internet research and saw Appellant's photo. Cleveland identified Appellant first from a single photo presented by detectives, but also identified him in a subsequent photo lineup. Perez did not recognize Appellant in the initial photo lineup, but later that same day, she looked at the lineup again and positively identified Appellant as the robber.

Appellant was apprehended and charged with aggravated robbery in three separate indictments. The indictments included allegations that Appellant used or exhibited a deadly weapon during the commission of the crimes and that he had two prior sequential final felony convictions. Appellant entered a not guilty plea for each offense, and waived his right to a jury trial. A bench trial was held in all three cases during the same proceedings. Among other witnesses, the victims recounted their stories, and all three positively identified Appellant as the robber.

In two of the cases, the trial court found that Appellant did not use or exhibit a deadly weapon during those robberies and therefore found him guilty of the lesser included offense of robbery.[2] However, with regard to the Parker robbery, the trial court found that Appellant used or exhibited a deadly weapon during the commission of that offense and accordingly, found him guilty of aggravated robbery.[3] Due to the enhancements, Appellant was sentenced to thirty years of imprisonment on each robbery charge. Appellant was sentenced to life imprisonment for the aggravated robbery charge. This appeal followed.

SUFFICIENCY OF THE EVIDENCE

In his first issue, Appellant argues that there is legally insufficient evidence to support his conviction for aggravated robbery in appellate cause number 12-11-00148-CR, trial court cause number 114-330-09 (the Parker robbery). In his second issue, Appellant contends that there is legally insufficient evidence to support the finding that he used or exhibited a deadly weapon during the Parker robbery. In his third issue, Appellant contends that there is legally insufficient evidence to establish his identity as the robber in all three cases. Since all of these issues are presented as challenges to the sufficiency of the evidence, we discuss them together.

Standard of Review

Legal sufficiency is the constitutional minimum required by the Due Process Clause of the Fourteenth Amendment to sustain a criminal conviction. *See* ***Jackson v. Virginia***, 443 U.S. 307, 315–16, 99 S. Ct. 2781, 2786–87, 61 L. Ed. 2d 560 (1979); *see also* ***Brooks v. State***, 323 S.W.3d 893, 912 (Tex. Crim. App. 2010) (plurality op.). When reviewing the sufficiency of the evidence, we view all of the evidence in the light most favorable to the verdict to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *See* ***Jackson***, 443 U.S. at 320, 99 S. Ct. at 2789; ***Brooks***, 323 S.W.3d at 899.

We defer to the trier of fact's responsibility to resolve conflicts in testimony, weigh evidence, and draw reasonable inferences from basic facts to ultimate facts. ***Jackson***, 443 U.S. at 319, 99 S. Ct. at 2789; ***Brooks***, 323 S.W.3d at 899. Each fact need not point directly and

[2] These two cases are appellate cause number 12-11-00147-CR, trial court cause number 114-329-09 (the Cleveland robbery), and appellate cause number 12-11-00149-CR, trial court cause number 114-331-09 (the Perez robbery).

[3] The aggravated robbery charge is the robbery against Parker at the Dollar General store (appellate cause number 12-11-00148-CR, trial court cause number 114-330-09).

independently to the guilt of the appellant, as long as the cumulative force of all the incriminating circumstances is sufficient to support the conviction. ***Hooper v. State***, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007).

Under this standard, a reviewing court does not sit as a thirteenth juror and may not substitute its judgment for that of the fact finder by reevaluating the weight and credibility of the evidence. *See* ***Brooks***, 323 S.W.3d at 899; ***Dewberry v. State***, 4 S.W.3d 735, 740 (Tex. Crim. App. 1999). Instead, a reviewing court defers to the fact finder's resolution of conflicting evidence unless that resolution is not rational in light of the burden of proof. *See* ***Brooks***, 323 S.W.3d at 899–900. The duty of a reviewing court is to ensure that the evidence presented actually supports a conclusion that the defendant committed the crime. *See* ***Williams v. State***, 235 S.W.3d 742, 750 (Tex. Crim. App. 2007). In reviewing the sufficiency of the evidence, we consider all of the evidence, admissible and inadmissible. ***Johnson v. State***, 967 S.W.2d 410, 412 (Tex. Crim. App. 1998).

Deadly Weapon

Appellant argues that the evidence is legally insufficient to support the trial court's finding that he used or exhibited a deadly weapon in the Parker robbery because he did not brandish the firearm and Parker did not see it.

1. Applicable Law

A person commits the offense of robbery if, in the course of committing theft and with intent to obtain and maintain control of property, that person "(1) intentionally, knowingly, or recklessly causes bodily injury to another; or (2) 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). The offense becomes aggravated robbery if the person committing the robbery uses or exhibits a deadly weapon. ***Id.*** § 29.03(a)(2) (West 2011). A firearm is a deadly weapon per se. ***Id.*** § 1.07(a)(17)(A) (West 2011). Generally, the state is not required to produce a deadly weapon to prove that it was used in the commission of a robbery. *See, e.g.*, ***Victor v. State***, 874 S.W.2d 748, 751 (Tex. App.—Houston [1st Dist.] 1994, pet. ref d). Furthermore, because a firearm is a deadly weapon per se, it is not necessary to prove that a firearm is capable of causing death, either in the manner of its actual use or in the manner of its intended use. *See* ***Thomas v. State***, 821 S.W.2d 616, 620 (Tex. Crim. App. 1991). The state must simply prove the object was a firearm. ***Id.***

A person uses or exhibits a deadly weapon under the aggravated robbery statute if he employs the weapon in any manner that facilitates the associated felony. ***McCain v. State***, 22 S.W.3d 497, 502 (Tex. Crim. App. 2000). The weapon need not necessarily be fully exposed to the victim in order for the defendant to use or exhibit the weapon. *See* ***McCain***, 22 S.W.3d at 503 (holding partial exposure of butcher knife in defendant's back pocket was legally sufficient to support finding that knife was used in facilitating the underlying robbery because knife's presence was used by defendant to instill apprehension in victim, which reduced likelihood of resistance during encounter). Indeed, in appropriate cases, the evidence has been held to be legally sufficient to support the use or exhibition of a deadly weapon finding even if the victim never actually saw a weapon. *See* ***Herring v. State***, 202 S.W.3d 764, 765-66 (Tex. Crim. App. 2006) (statement by robber that he had knife and would kill victim sufficient to support finding that robber used knife even though victim never saw the knife); ***Webber v. State***, 757 S.W.2d 51, 54 (Tex. App.—Houston [14th Dist.] 1988, pet. ref'd) (holding evidence that assailant threatened to kill victim coupled with menacing gesture while placing hand on "something" inside shirt sufficient to support use of deadly weapon finding). When the weapon used in the robbery is alleged to be a handgun, it is not necessary for the victim to see the entire weapon or any particular part of it to identify it as a pistol. ***Jones v. State***, 810 S.W.2d 824, 826-27 (Tex. App.—Houston [14th Dist.] 1991, no pet.) (holding threat to kill bank employee along with display of butt end of pistol sufficient to support use of deadly weapon finding); ***Davis v. State***, 796 S.W.2d 813, 817 (Tex. App.—Dallas 1990, pet. ref'd) (same).

2. <u>Discussion</u>

The evidence shows that Appellant entered the store and asked Parker for change to make a phone call on the pay phone. Parker stated that she could not open the register without a sale. Appellant attempted to purchase breath mints, pulled out money to pay for the mints, and then slid Parker a note. The note stated it was a robbery, and the note ordered Parker to hand him the five, ten, and twenty dollar bills from the register. Parker testified that she asked Appellant if he was serious, and he replied that he was. Parker testified that Appellant reached for a gun that he had underneath his shirt. She testified that Appellant grabbed the handle and that she was scared. After Parker handed Appellant the money from the register, Appellant told her to walk to the back of the store. Appellant told her that if she turned around, he would shoot her.

On cross examination, Parker admitted that when she spoke to Officer Pitts, the police

officer who initially responded to the scene, she did not tell him that Appellant said he would shoot her if she turned around. She told Officer Pitts that she never saw the weapon, but could see the outline of the gun underneath Appellant's shirt. When she spoke with Detective Mathews and Detective Mobley later on, she stated that she saw Appellant lift his shirt and that she could see the gun. The video surveillance tape was admitted into evidence. The video does not show that Appellant lifted his shirt, and does not show a weapon. However, the video shows Appellant reaching for an object in his shirt, but the contours of the object are not visible due to the video's low clarity. The video also shows Appellant and Parker looking down at the object through his shirt while Appellant held it to show the outline of the object. During her cross examination, Parker reiterated that (1) she saw the outline of the gun, (2) Appellant indicated that he had a gun and reached for it, (3) she was scared for her life, (4) after taking the cash, Appellant told her to go to the back of the store, and (5) he told her he would shoot her if she turned around.

On redirect examination, Parker stated that Appellant did not lift his shirt, but that Appellant was wearing a white t-shirt, that he pulled on it, and that she could clearly see the outline of what appeared to be a gun.

Appellant argues that the cases cited by the State are distinguishable because those cases do not "involve the lead investigator testifying that it was not possible for the complaining witness to see what she believes she saw due to the review of the video evidence." First, we note that Detective Mobley's testimony was not that it was impossible for Parker to see the weapon based on the contents of the video. He testified only that the video does not show the nature of the object Appellant reached for, but that it appears that he reached for an object. Also, the video itself shows that Appellant reached for an object, but the quality of the video makes it impossible to determine what the object was. Nevertheless, Parker testified that she believed the item was a firearm. The menacing gesture of reaching for the gun, along with Appellant's threat to shoot her if she turned around to look at him during the conclusion of the robbery, and Parker's statements that she could see the outline of the gun through Appellant's white t-shirt present legally sufficient evidence to support the finding that Appellant used or exhibited a firearm during the commission of the offense. *See* ***Herring***, 202 S.W.3d at 765-66 (statement by robber that he had knife and would kill victim sufficient to support finding that robber used knife even though victim never saw the knife).

Identity of Appellant

Appellant also challenges the sufficiency of the evidence to support his identity as the robber in all three cases.

1. Applicable Law

The testimony of a single eyewitness can be enough to support a conviction. ***Aguilar v. State***, 468 S.W.2d 75, 77 (Tex. Crim. App. 1971). The jury alone decides whether to believe eyewitness testimony, and the jury alone resolves conflicts or inconsistencies in the evidence, even in the face of physical evidence that could be interpreted in a manner that tends to exculpate the accused. ***Bradley v. State***, 359 S.W.3d 912, 917 (Tex. App.—Houston [14th Dist.] 2012, pet. ref'd); ***Harmon v. State***, 167 S.W.3d 610, 613–14 (Tex. App.—Houston [14th Dist.] 2005, pet. ref'd) (holding evidence sufficient to support aggravated robbery conviction in case where a single victim witness identified robber in both a photographic lineup and in person at trial, despite lack of fingerprints, DNA, currency or other proceeds from the robbery, or recovery of a weapon used in robbery). Likewise, the jury may find guilt without any physical evidence linking the accused to the crime. ***Bradley***, 359 S.W.3d at 917.

2. Discussion

First, Appellant argues that the photographic lineups are unreliable. However, in a sufficiency review, we consider all the evidence, even if the evidence is inadmissible. ***Johnson***, 967 S.W.2d at 412. He also argues that the victims gave contradictory descriptions of his appearance, and concentrates specifically on the accusations by the victims that the perpetrator had tattoos under his eyes and scars on his face, among other distinguishing characteristics. According to Appellant, he does not have scars on his face or tattoos under his eyes. He also provided alibi evidence concerning his whereabouts during the robberies. Alibi is a question of fact, and it is within the province of the factfinder, here, the trial court, to reject this defensive theory and believe other testimony. ***Ford v. State***, 509 S.W.2d 317, 318 (Tex. Crim. App. 1974). Finally, he argues that there is a lack of fingerprint evidence connecting him to the crime. Specifically, he points out that during one of the robberies, Appellant purchased candy, and a package that may have been the candy wrapper was recovered near the scene shortly after the crime transpired. Fingerprints were discovered on the package. The fingerprints did not match Appellant's. Also, currency left behind and touched by Appellant at one of the robberies was not tested for fingerprints.

Even assuming all of these statements are taken as true, we review the evidence in the light most favorable to the verdict. Conflicts in the evidence are resolved by the trier of fact. These conflicts go to the weight of the evidence. The victims of the robbery identified Appellant as the person that robbed them, both in photo lineups and at the trial itself. This fact is to be afforded great weight, and is sufficient to support the identity of Appellant as the perpetrator of the robberies in question. ***Garcia v. State***, 563 S.W.2d 925, 928 (Tex. Crim. App. 1978) (positive identification of a defendant as the perpetrator is sufficient to support a conviction); ***Haywood v. State***, 507 S.W.2d 756, 758 (Tex. Crim. App. 1974) (positive identification of defendant as robber is to be given "great weight"); ***Aguilar v. State***, 468 S.W.2d at 77. Because the trial court, as the trier of fact in this bench trial, reasonably could have found that Appellant was the perpetrator of these robberies, the evidence of identity is legally sufficient to support the verdict.

Appellant's first, second, and third issues are overruled.

ADMISSIBILITY OF EXTRANEOUS OFFENSE EVIDENCE

In his fourth issue, Appellant argues that the trial court erred when it admitted improper character evidence against him.

Standard of Review and Applicable Law

We review a trial court's ruling on the admissibility of extraneous offense evidence under the abuse of discretion standard. ***Prible v. State***, 175 S.W.3d 724, 731 (Tex. Crim. App. 2005). Under Texas Rule of Evidence 404(b), evidence of other crimes, wrongs, or acts is not admissible to prove an individual's character or to show action in conformity with that character. TEX. R. EVID. 404(b). However, a trial court may admit extraneous offense evidence for other reasons, such as proof of identity or to rebut a defensive theory. *See* ***id.***; *see also* ***De La Paz v. State***, 279 S.W.3d 336, 344–47 (Tex. Crim. App. 2009).

An extraneous offense may be admissible to prove identity only when the identity of the perpetrator is at issue in the case. ***Page v. State***, 213 S.W.3d 332, 336 (Tex. Crim. App. 2006); ***Lane v. State***, 933 S.W.2d 504, 519 (Tex. Crim. App. 1996). Evidence of a defendant's particular modus operandi is a recognized exception to the general rule precluding extraneous offense evidence, if the modus operandi evidence tends to prove a material fact at issue, other than propensity. ***Owens v. State***, 827 S.W.2d 911, 915 (Tex. Crim. App. 1992). When extraneous offense evidence is introduced to prove identity by comparing common characteristics, the

evidence must be so similar to the charged offense that the offenses illustrate the defendant's "distinctive and idiosyncratic manner of committing criminal acts." ***Page***, 213 S.W.3d at 336 (quoting ***Martin v. State***, 173 S.W.3d 463, 468 (Tex. Crim. App. 2005)); ***Owens***, 827 S.W.2d at 915.

Extraneous offense evidence offered to prove identity is also subject to a Rule 403 analysis. ***Page***, 213 S.W.3d at 336. This means that the probative value of the evidence must not be substantially outweighed by the danger of unfair prejudice. ***Id***.

Discussion

The State offered evidence of an extraneous robbery at a Fast Food Store in Tyler that occurred in 2007. The robber, identified by the victim as Appellant, handed the cashier a note that ordered her to hand him all of the five and ten dollar bills, and to proceed to the back of the store. Appellant objected to the evidence at trial. There is no question that identity was at issue in the instant cases. On appeal, Appellant argues that the only purpose of the evidence is to show that because he had committed robberies in the past, he likely committed the robberies at issue in the present cases.

All of the robberies, including the extraneous offense, occurred at night in Tyler, Texas convenience stores or "dollar" stores. The perpetrator in all of the crimes compelled the victims to retreat to the back of the store. In three of the four robberies, the perpetrator handed a handwritten note to the cashier demanding cash. In two of the robberies, Appellant's note identified the denomination of cash that he sought. We cannot say that it was an abuse of discretion to admit this evidence. Moreover, in the Rule 403 component of the analysis, any prejudicial effect of the evidence is mitigated here by the fact that the trial was a bench trial. "[W]hen a case is tried to a trial court rather than to a jury, the danger that the trier of fact will consider extraneous offense evidence for anything other than the limited purpose for which it is admitted is reduced, and the likelihood that the extraneous evidence will unfairly prejudice the defendant is diminished." ***Corley v. State***, 987 S.W.2d 615, 621 (Tex. App.—Austin 1999, no pet.). Therefore, any prejudicial effect of the evidence is minimal, and the trial court's decision to admit the evidence was within the zone of reasonable disagreement.

Appellant's fourth issue is overruled.

JUDGMENT

In his fifth issue, Appellant argues that the trial court's judgments should be modified to correctly reflect the proceedings below. The State has joined Appellant in this request.

As a general rule, when an oral pronouncement of sentence and a written judgment differ, the oral pronouncement controls. ***Ex parte Madding***, 70 S.W.3d 131, 135 (Tex. Crim. App. 2002). Further, when it has the necessary information before it, an appellate court may correct a trial court's written judgment to reflect its oral pronouncement. ***Thompson v. State***, 108 S.W.3d 287, 290 (Tex. Crim. App.2003); ***Ingram v. State***, 261 S.W.3d 749, 754 (Tex. App.—Tyler 2008, no pet.). The Texas Rules of Appellate Procedure expressly authorize us to modify the judgment of the trial court. TEX. R. APP. P. 43.2.

Within a week of the trial's conclusion, each judgment was amended and a judgment nunc pro tunc was entered. In each case, the first written judgment reflected a plea agreement. The terms of the plea bargain were eliminated in the judgments nunc pro tunc to accurately reflect the proceedings at the trial court and to correct clerical errors.

Nevertheless, other errors remain in the judgment. In the trial court's written judgment nunc pro tunc in cause number 12-11-00147-CR (trial court cause number 114-0329-09), the trial court reflected that Appellant pleaded "true" to only one enhancement, when he in fact pleaded "true" to each enhancement paragraph. In cause numbers 12-11-00147-CR (trial court cause number 114-0329-09) and 12-11-00149-CR (trial court cause number 114-0331-09), the judgments nunc pro tunc of the trial court incorrectly reflect that Appellant was found guilty under Texas Penal Code Section 29.03, which is the section for aggravated robbery. The trial court actually found Appellant guilty of robbery under Section 29.02.

Appellant's fifth issue is sustained.

DISPOSITION

We have overruled Appellant's first, second, third, and fourth issues. However, we have sustained Appellant's fifth issue. Accordingly, we ***modify*** the judgment nunc pro tunc of the trial court in cause number 12-11-00147-CR (trial court cause number 114-0329-09) to reflect that Appellant pleaded true to both enhancement paragraphs and that he was convicted under Texas Penal Code Section 29.02 for robbery, and ***affirm*** as modified.

We also ***modify*** the judgment nunc pro tunc of the trial court in cause number

12-11-00149-CR (trial court cause number 114-0331-09) to reflect that Appellant was convicted under Texas Penal Code Section 29.02 for robbery, and ***affirm*** as modified.

We ***affirm*** the trial court's judgment nunc pro tunc in cause number 12-11-00148-CR (trial court cause number 114-0330-09).

SAM GRIFFITH
Justice

Opinion delivered July 31, 2012.
Panel consisted of Worthen, C.J., Griffith, J., and Hoyle, J.

(DO NOT PUBLISH)

COURT OF APPEALS
TWELFTH COURT OF APPEALS DISTRICT OF TEXAS
JUDGMENT

JULY 31, 2012

NOS. 12-11-00147-CR
12-11-00148-CR
12-11-00149-CR

JOHN DEWAYNE WILLIAMS,
Appellant
V.
THE STATE OF TEXAS,
Appellee

Appeals from the 114th Judicial District Court of
Smith County, Texas. (Tr.Ct.Nos. 114-0329-09; 114-0330-09; 114-0331-09)

THESE CAUSES came to be heard on the appellate record and briefs filed herein, and the same being considered, it is the opinion of this court that the judgments of the trial court below should be modified and as modified, affirmed.

It is therefore ORDERED, ADJUDGED and DECREED that

(1) the judgment nunc pro tunc of the trial court in cause number 12-11-00147-CR (trial court cause number 114-0329-09) be **modified** to reflect that

Appellant pleaded true to both enhancement paragraphs and that he was convicted under Texas Penal Code Section 29.02 for robbery, and **affirm** as modified;

(2) the trial court's judgment nunc pro tunc in cause number 12-11-00148-CR (trial court cause number 114-0330-09) is **affirmed**; and

(3) the judgment nunc pro tunc of the trial court in cause number 12-11-00149-CR (trial court cause number 114-0331-09) be **modified** to reflect that Appellant was convicted under Texas Penal Code Section 29.02 for robbery, and **affirm** as modified.

It is further ORDERED that this decision be certified to the trial court below for observance.

Sam Griffith, Justice.

Panel consisted of Worthen, C.J., Griffith, J., and Hoyle, J.