Affirmed and Opinion filed October 28, 1999.

In The

Fourteenth Court of Appeals

NO. 14-97-00857-CR

MARLOUS BARNARD FERGUSON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 337th District Court
Harris County, Texas
Trial Court Cause No. 737,368

O P I N I O N

Appellant was convicted by a jury of aggravated robbery and sentenced to 40 years in the Institutional Division of the Texas Department of Criminal Justice. Appellant challenges his conviction in three points of error. We affirm.

Background

Annette Beard, a parole officer from the Texas Department of Criminal Justice, parked her Ford Explorer, preparing to make a home visit with one of her parolees. While parking, Beard noticed appellant was the driver of a black Monte Carlo and had a large amount of gold teeth. Before she could exit her car,

Eugene Davis put a gun to her nose and told her not to move or he would kill her and demanded all of her cash. Beard gave him $260 in cash, and pursuant to his additional demands, gave him her two cellular phones, her keys, a purse and a pager. Next, Davis ordered Beard to lay on the floor of the back of her Explorer.

Once Beard was in back of her Explorer, she noticed appellant had pulled his car behind and perpendicular to Beard's Explorer and Davis entered appellant's car on the passenger side. Once in the car, Davis started laughing and gave appellant a high-five before driving away.

Beard followed appellant's car onto the freeway where she witnessed him driving erratically. While she was following appellant, Beard saw Davis turn around and point a gun at her. During her chase, she was able to flag down Officer Flakes of the Houston Police Department. She told Officer Flakes the two men in the Monte Carlo just robbed her. After a brief pursuit, appellant pulled his car off the freeway and Officer Flakes pulled in behind him. A motorcycle police officer, Officer Berry, assisted Officer Flakes in getting appellant and Davis out of their car.

After appellant and Davis exited their car, Officer Flakes retrieved $260 and one of Beard's business cards from appellant's pocket. Officer Flakes also obtained Beard's Parole Officer badge from the car, her business cards, credit cards, pager and wallet. Beard, who followed Officer Flakes' car until it stopped appellant's car, witnessed both the driver and passenger being removed from the car. At that time she identified appellant as the driver of the getaway car Davis entered after the robbery. She also identified Davis as the man who robbed her.

Appellant's first point of error complains the evidence is legally insufficient to support his conviction because there is no evidence appellant committed any element of the offense against the complainant – as a principal. Appellant's second point of error claims the evidence is legally insufficient to support the verdict because there was no evidence appellant acted with Davis to commit the aggravated robbery and there was no evidence Davis committed the aggravated robbery. We disagree.

In reviewing appellant's legal insufficiency point, we look at the evidence in the light most favorable to the verdict and determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781,

2789, 61 L. Ed.2d 560 (1979); *Mason v. State*, 905 S.W.2d 570, 574 (Tex. Crim. App. 1995). The trier of fact is the exclusive judge of the credibility of witnesses and of the weight to be given their testimony. *See Jones v. State*, 944 S.W.2d 642, 647 (Tex. Crim. App. 1996). Likewise, reconciliation of conflicts in the evidence is within the exclusive province of the fact finder. *See id*. This standard of review is the same for both direct and circumstantial evidence cases. *See Chambers v. State*, 711 S.W.2d 240, 245 (Tex. Crim. App. 1986).

The jury charge authorized the jury to find appellant guilty either as a principal *or* as a party to the offense. *See* TEX. PEN. CODE ANN. §§ 7.01 & 7.02 (Vernon 1994). A person is criminally responsible for another's conduct if: "acting with the intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense." TEX. PEN. CODE ANN. § 7.02(a)(2) (Vernon 1994). Stated another way, the "evidence must show that at the time of the offense the parties were acting together, each contributing some part towards the execution of their common purpose." *Burdine v. State*, 719 S.W.2d 309, 315 (Tex. Crim. App. 1986); *see Marvis v. State*, — S.W.2d —, No. 14-96-01562-CR, 1999 WL 627934 at p. 9 (Tex. App.–Houston [14th Dist.] Aug. 19, 1999, no pet. h.).

To establish liability as a party, in addition to the illegal conduct by the primary actor, it must be proven that the secondary actor harbored the specific intent to promote or assist the commission of the offense. *See Marvis*, 1999 WL 627934 at p. 10; *Pesina v. State*, 949 S.W.2d 374, 382 (Tex. App.–San Antonio 1997, no pet.). The agreement between the actors to commit the crime, if any, must occur before or contemporaneous with the criminal event. *See Beier v. State*, 687 S.W.2d 2, 3-4 (Tex. Crim. App. 1985). The evidence must show that at the time of the commission of the crime, the parties were acting together, each doing some part executing a common plan. *See Brooks v. State*, 580 S.W.2d 825, 831 (Tex. Crim. App. 1979). The essential element of culpability as a party is the common design to do a criminal act. *Id*. Although an agreement to act together to commit an offense may be proved by direct evidence, circumstantial evidence of the actions and events alone will be sufficient to show that one is a party to an offense. *See Burdine*, 719 S.W.2d at 315.

We find there was legally sufficient evidence to permit a jury to find appellant assisted Eugene Davis in committing aggravated robbery and that Davis committed the aggravated robbery. Thus, we overrule appellant's points of error one and two.

Appellant's third point of error argues appellant's conviction should be reversed because of a violation of federal due process where the verdict cannot be supported under the theory of law and fact submitted to the jury. We disagree.

Appellant argues that his due process rights were violated because the court's charge does not authorize a conviction under the facts presented at trial since the record is silent as to the identity of the person who approached Beard. However, the record is not silent regarding the identity of Beard's co-assailant. There was also ample testimony that Davis was appellant's co-assailant. Beard testified appellant's co-assailant was Davis. Appellant also solicited testimony from Beard that the person who held the gun in her fact was the same person that exited the Monte Carlo and was subsequently arrested with appellant on the side of the freeway. Additionally, Officer Flakes testified he observed Beard identify both individuals, immediately after their apprehension, as being involved in the robbery. Another police officer also identified appellant and Davis as the suspects who were arrested. Finally, appellant's wife testified she learned appellant was arrested because he had "got in trouble with Eugene [Davis]." Plus, the jury was properly charged that appellant could be convicted using the law of the parties. *See* TEX. PEN. CODE ANN. § 7.02 (Vernon 1994). Thus, appellant's third point of error is overruled.

We affirm.

/s/ Norman Lee
Justice

Judgment rendered and Opinion filed October 28, 1999.

Panel consists of Justices Draughn, Lee, and Hutson-Dunn.[*]

Do Not Publish — TEX. R. APP. P. 47.3(b).

[*] Senior Justices Joe L. Draughn, Norman Lee and Camille D. Hutson-Dunn sitting by assignment.