Affirmed and Opinion filed March 2, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-98-00332-CR

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SILVESTER EARL RIVERS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 337th District Court
Harris County, Texas
Trial Court Cause No. 743,179

O P I N I O N

Appellant was charged by indictment with the offense of aggravated robbery. The indictment also alleged a prior felony conviction for the purpose of enhancing the range of punishment. A jury convicted appellant of the charged offense. Appellant pled true to the enhancement allegation and the trial court assessed punishment at twenty years confinement in the Texas Department of Criminal Justice--Institutional Division. Appellant raises four points of error. We affirm.

I. Sufficiency of the Evidence

Points of error one and two contend the evidence is legally and factually insufficient to sustain the conviction. To resolve these points we will begin with a comprehensive review of the record evidence.

A. Evidentiary Review

On October 16, 1996, the complainant, her nephew, Paul Irvin, and his friend, Harold, were in the complainant's home. The complainant was awakened by a knock at her door. Wearing only a housecoat, she opened the door and saw appellant and his co-defendant, Robert Guillory, pointing guns at her and her nephew. The complainant asked, "What's is this?" Guillory replied, "You know what this is: a robbery. Your money and your jewelry." As appellant got Harold out of bed, Guillory instructed the complainant to gather her money and jewelry and the complainant complied. Guillory then forced the complainant outside. Upon seeing a neighbor, the complainant attempted to flee. However, Guillory grabbed the complainant's hair and she fell to the street. When the complainant got back on her feet she attempted to flee again. This time, Guillory grabbed the complainant's housecoat. However, this did not prevent the complainant's escape and she ran naked to the home of the neighbor and called the police.

The complainant provided the police with a description of the vehicle used by the assailants to leave the scene. Several weeks later, the complainant saw the vehicle and called the police. However, when the police arrived, the vehicle was gone.

The complainant's nephew, Paul Irvin testified he saw appellant with a gun and it was appellant who ordered him to put all the jewelry in a plastic bag. Irvin also heard appellant tell Guillory to take the complainant outside. Appellant stayed in the house after Guillory and the complainant left. A few seconds later, Guillory returned and informed appellant the complainant had escaped.

Houston Police Officer Moore testified he responded to the complainant's call and that everyone appeared frightened and were all talking to him at once, informing him they had been robbed.

Joey Nuncio, an employee of the Diamond Pawn Shop, testified that according to a pawn slip of October 28, 1996, appellant pawned a gold chain.

Houston Police Officer J.K. Campbell arrived at the scene, interviewed the complainant, and got a description of the vehicle with a partial license plate number. On January 4, 1997, Campbell spotted the vehicle. After running the license plate number, Campbell went to a house near where the car was parked. On the front porch area of the house there was mail addressed to appellant. After obtaining appellant's name, Campbell obtained a photograph of appellant and placed it in a photospread.

Campbell met with the complainant and Irvin on January 16, 1997. Campbell stated the complainant tentatively identified appellant from the photospread. Irvin, however, was unable to identify appellant. Campbell later learned appellant had pawned an item of jewelry. The complainant provided Campbell with a photo of her missing necklace. After examining the photo and the item pawned by appellant, Campbell determined they looked similar, but there was nothing distinguishing. He then prepared a "line-up" with several gold necklaces and had the complainant identify hers, which was the necklace pawned by appellant.

Campbell also conducted the live line-up where the complainant and Irvin positively identified appellant as one of the men who had robbed them.

B. Standard of Appellate Review

We must now determine the appropriate standard of appellate review for resolving these points of error. When we are asked to determine whether the evidence is *legally* sufficient to sustain a conviction we employ the standard of *Jackson v. Virginia*, and ask "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact

could have found the essential elements of the crime beyond a reasonable doubt." 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979).

To determine whether the evidence is *factually* sufficient, we employ the standard announced in *Clewis v. State*, and view all of the evidence without the prism of "in the light most favorable to the prosecution" and reverse the conviction only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. 922 S.W.2d 126, 129 (Tex. Crim. App. 1996). The *Clewis* standard was thoroughly discussed in *Cain v. State*, 958 S.W.2d 404 (Tex. Crim. App. 1997), which stressed the importance of the three principles that must guide a court of appeals when conducting a factual sufficiency review. The first principle is deference to the jury. A court of appeals may not reverse a jury's decision simply because it disagrees with the result. Rather, the court of appeals must defer to the jury and may find the evidence factually insufficient only where necessary to prevent manifest injustice. *Id.* at 407. The second principle requires the court of appeals to provide a detailed explanation supporting its finding of factual insufficiency by clearly stating why the conviction is manifestly unjust, shocks the conscience, or clearly demonstrates bias, and the court should state in what regard the contrary evidence greatly outweighs the evidence in support of the verdict. *Id.* at 407. The third principle requires the court of appeals to review all of the evidence. The court must consider the evidence as a whole, not viewing it in the light most favorable to either party. *Id.* at 408.

C. The Legal Sufficiency Challenge

We will begin with the legal sufficiency challenge raised in the first point of error. A person commits aggravated robbery if he knowingly or intentionally threatens or places another in fear of imminent bodily injury or death in the course of committing theft with the intent to obtain or maintain control of the property, and uses or exhibits a deadly weapon. *See* TEX. PEN. CODE § 29.03.

We find the following record evidence probative in determining whether the evidence is legally sufficient to prove the essential elements of the crime beyond a reasonable doubt. The complainant and her nephew were accosted at gunpoint in their home, jewelry and money were taken, and both parties were in imminent fear of serious bodily injury or death.

Appellant argues that the lack of fingerprints and the complainant's prior criminal history make this evidence insufficient. However, this argument fails when we recognize that the jury is the exclusive judge of the facts proved, the credibility of the witnesses, and the weight to be given to the testimony. TEX. CODE CRIM. PROC. art. 38.04. The jury may believe or disbelieve all or any part of a witness's testimony. *See Sharp v. State*, 707 S.W.2d 611, 614 (Tex. Crim. App. 1986), *cert. denied*, 488 U.S. 872, 109 S.Ct. 190, 102 L.Ed.2d 150 (1988). Clearly, the jury found the testimony of the complainant and/or Irvin credible, especially in light of the subsequent investigation by Campbell.

Consequently, we hold the evidence is legally sufficient to sustain the conviction. The first point of error is overruled.

D. Factual Sufficiency Challenge

We now turn to the factual sufficiency challenge raised in the second point of error. *Clewis* directs us to set aside the verdict only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *See Clewis*, 922 S.W.2d at 129. When performing this review, the appellate court must be "appropriately deferential" to avoid substituting its judgment for the fact finder's. *See Santellan v. State*, 939 S.W.2d 155, 164 (Tex. Crim. App. 1997); *Clewis*, 922 S.W.2d at 133. This requirement was reiterated in *Cain*'s instruction for us to defer to the jury. 958 S.W.2d at 407.

Appellant was positively identified by the complainant and Irvin. Appellant's name was on the pawn ticket of the complainant's necklace. His mail was at the house near where the vehicle used in the robbery was located. The test for a factual sufficiency challenge is whether the jury finding of guilt was "so contrary to the overwhelming weight of the evidence as to be

clearly wrong and unjust." *Clewis*, 922 S.W.2d at 129. Under this standard, we cannot conclude that in light of the foregoing record evidence, the finding of guilt was clearly wrong or unjust.

Consequently, we hold the evidence is factually sufficient to support the jury's verdict. The second point of error is overruled.

II. Law of Parties Instruction

The third point of error contends the trial court erred by instructing the jury on the law of parties. Section 7.02 of the Texas Penal Code states that 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. 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." *See Burdine v. State*, 719 S.W.2d 309, 315 (Tex. Crim. App. 1986), *cert. denied,* 480 U.S. 940, 107 S.Ct. 1590, 94 L.Ed. 2d 779 (1987). Generally, an instruction on the law of parties may be given to the jury whenever there is sufficient evidence to support a verdict that the defendant is criminally responsible under the law of parties. *See McCuin v. State*, 505 S.W.2d 827, 830 (Tex. Crim. App. 1974).

We find ample evidence that appellant was a party in this aggravated robbery. Although Guillory demanded the money and jewelry and left with the complainant, appellant assisted by instructing Guillory to take the complainant, instructing Irvin to bag the stolen items, and tying up Irvin. Additionally, appellant was an armed participant in the instant offense.

We hold the trial court did not err in instructing the jury on the law of parties. The third point of error is overruled.

III. Motion for New Trial

The fourth point of error contends the trial court abused its discretion in failing to hold a hearing on appellant's motion for new trial wherein the appellant alleged ineffective assistance of counsel. Specifically, the motion for new trial states: "The Defendant was denied counsel. Defendant was actually denied the effective representation of counsel." No facts were alleged and no affidavits were attached to the motion.

It is well-settled that a defendant is not entitled to an evidentiary hearing on an unsupported motion for new trial. *See Jordan v. State*, 883 S.W.2d 664, 665 (Tex. Crim. App. 1994); *Callahan v. State*, 937 S.W.2d 553, 560 (Tex. App.—Texarkana 1996, no pet.); and, *Sandoval v. State*, 929 S.W.2d 34, 36 (Tex. App.—Corpus Christi 1996, pet. ref'd). In *Reyes v. State*, 849 S.W.2d 812, 816 (Tex. Crim. App. 1993), the court held:

> [W]e have held, in certain instances, the trial judge abuses his discretion in failing to hold a hearing on a motion for new trial that raises matters which are not determinable from the record. *See, McIntire v. State*, 698 S.W.2d 652, 658 (Tex. Crim. App. 1985) (citing *Hicks v. State*, 75 Tex.Crim. 461, 171 S.W. 755, 763 (1914)); *Fielding v. State*, 719 S.W.2d 361, 364 (Tex.App.--Dallas 1986); and *McMillan v. State*, 769 S.W.2d 675, 676 (Tex.App.--Dallas 1989). To hold otherwise would deny the accused meaningful appellate review. *McIntire*, 698 S.W.2d at 660. However, we recognized that an unrestricted requirement of a hearing on matters not determinable from the record could lead to "fishing expeditions." *Id*. at 658. Therefore, we **required, "as a prerequisite to obtaining a hearing" and "as a matter of pleading," motions for new trial be supported by affidavit, either of the accused or someone else specifically showing the truth of the grounds of attack**. *Id*. (Quoting *Hicks*) (footnote omitted)(emphasis added).

As noted above, the instant motion for new trial did not contain any factual allegations or any affidavits. Appellant contends witnesses were subpoenaed and the court abused its discretion by not holding the hearing. While this may be true, because the motion for new trial was deficient in form, the trial court was not required to hold a hearing on the motion for new trial. The fourth point of error is overruled.

The judgment of the trial court is affirmed.

/s/ Charles F. Baird
Justice

Judgment rendered and Opinion filed March 2, 2000.

Panel consists of Justices Yates, Frost and Baird.[1]

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[1] Former Judge Charles F. Baird sitting by assignment.