Affirmed and Opinion filed March 30, 2000.

In The

Fourteenth Court of Appeals

NO. 14-98-00201-CR

HENRY ANTONIO MORA, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 232nd District Court
Harris County, Texas
Trial Court Cause No. 757,522

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 then pled true to the enhancement allegation and the trial court assessed punishment at 75 years confinement in the Texas Department of Criminal Justice--Institutional Division. Appellant raises six points of error. We affirm.

I. Sufficiency Challenges

The first point of error contends the evidence is legally insufficient to sustain the conviction. The third point of error contends the trial court erred in denying appellant's motion for instructed verdict. The fourth point of error contends the evidence is factually insufficient because the evidence is insufficient to corroborate the accomplice witness testimony. To address these points, a comprehensive review of the evidence is necessary.

A. Factual Summary

Ememeleina Arhaja, the wife of the complainant, testified that on the alleged date she and the complainant had just cashed a check and were waiting at a bus stop. Arhaja noticed two men who appeared suspicious, therefore, Arhaja and the complainant moved to a different bus stop. The two men re-appeared at the second bus stop and robbed the complainant, taking his wallet and a necklace. The robbers also took a chain from Arhaja. To facilitate the robbery, appellant's co-defendant displayed a firearm and used it to strike the complainant. After the attack, the complainant ran to a store and Arhaja chased after the robbers. Arhaja saw the robbers enter a car, which was occupied by two females, and flee. Arhaja got a partial license plate number from the vehicle. Arhaja identified appellant's co-defendant from a photo spread, a video line-up and in court. Arhaja identified appellant from a line-up, but was not able to identify appellant in court.

The complainant, Geronimo Perez, testified that he moved from the first to the second bus stop because of two men who appeared suspicious. After arriving at the second bus stop, the two men surprised the complainant when they used a firearm to strike the complainant in the head, grabbed his wallet and took his chain necklace. The necklace bore the complainant's name. The complainant identified appellant's co-defendant as the individual wielding the firearm. The complainant identified appellant in court.

Houston Police Department Officer Juan Huezoh was the first officer on the scene.

He separated Arhaja and the complainant, took their descriptions of the robbers and got a partial license plate number from Arhaja.

Houston Police Officer Cheryl Clement heard the broadcast regarding the description of the vehicle and a partial license plate number. Shortly thereafter, Clement noticed a vehicle fitting the description in a parking lot about three quarters of a mile from the site of the robbery. Clement saw two black males and one black female standing near the car. The vehicle was later moved and abandoned. Clement contacted the robbery division to get a "hold" on the vehicle, meaning the car could be towed because there was reason to believe it had been involved in the robbery. The vehicle was towed to the Houston Police Department storage lot for further investigation. Subsequent to the impounding of the vehicle, Arhaja went to the storage lot and identified the towed vehicle as the one she had seen the two suspects enter when they fled the scene.

After running the license plate, the police went to an apartment complex and received the names of Tazzie Gray, Daisy Gray, Nico Gray, and Alvaro Gomez. A photo spread was prepared with the photo of Alvaro Gomez, also known as Orobio Gamboa Quintilliano, appellant's co-defendant. Both the complainant and Arhaja identified the co-defendant. An arrest warrant was issued for the co-defendant and he was subsequently arrested along with Tazzie Gray. The co-defendant subsequently gave a video taped statement concerning his participation in the robbery.

The investigation then led Clement to Darlene Cheeks. After Cheeks was arrested, and provided Clement with the name of appellant, Cheek's boyfriend, Clement then arrested appellant.

Clement later placed appellant and his co-defendant in separate line-ups and video-taped them. Both line-ups were shown to the complainant and Arhaja. Both identified the co-defendant. Arhaja was able to identify appellant from a video line-up, but the complainant was not. Cheeks directed Clement to a firearm hidden in the impounded

vehicle. A firearm was also recovered from the apartment of Tazzie Gray when she was arrested.[1]

Jesus Chagoyenn, a goldsmith who owned a jewelry shop, identified appellant and his co-defendant as the men from whom Chagoyenn purchased a chain and a ring, which he later melted down. Chagoyenn testified he did not normally buy jewelry, but the two men stated they needed money for gas.

Darlene Cheeks testified as an accomplice. In exchange for her testimony, she agreed to plead guilty to several pending aggravated robberies and the State agreed the charges would be reduced to robbery and she would be sentenced to eight years concurrent for all cases. Cheeks stated she had been romantically involved with appellant and she was acquainted with the co-defendant who was the boyfriend of Tazzie Gray.

On May 4, 1997, the four went looking for someone to rob. They went to a convenience store, which Gray entered, and saw the complainant and Arhaja cashing a check. They followed the complainant and Arhaja to a bus stop. The two men got out of the car while Cheeks and Gray remained in the car. After five or ten minutes, the men returned with a wallet, a necklace and a ring. Cheeks testified the firearm used was State's exhibit 11. Cheeks also pointed out the jewelry store on Chimney Rock where the items had been sold.

Houston Police Officer A.A. Cavasos assisted with the investigation of the robbery. He testified Chagoyenn told him that the chain he bought and subsequently melted down bore the moniker of "Geronimo," the first name of the complainant. Chagoyenn testified at trial he did not remember that, nor did he remember telling the officer that.

Appellant's co-defendant testified that he did not commit the robbery. Although the co-defendant had earlier given a video-taped statement confessing to the robbery, he testified

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[1] Two firearms were admitted into evidence. The firearm recovered from Gray was State's exhibit 10 and the firearm recovered from the impounded vehicle was State's exhibit 11. The admission of these exhibits is the subject of part III of the opinion, *infra*.

that he had smoked marijuana and crack cocaine the morning of the statement and that he was forced to give the statement.

B. Standards of Review

We must next 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).

In *Cook v. State*, 858 S.W.2d 467, 470 (Tex. Crim. App. 1993), the Court of Criminal Appeals stated: "A challenge to the trial court's ruling on a motion for an instructed verdict is in actuality a challenge to the sufficiency of the evidence to support the conviction." Therefore, when considering a point of error contending the trial court erred in overruling a motion for instructed verdict, the reviewing court "will consider the evidence presented at trial by both the State and appellant in determining whether there was sufficient evidence." *Id*. In other words, the standard of appellate review of a ruling on a motion for instructed verdict is the same standard in reviewing legal sufficiency of the evidence. *See Margraves v. State*, 996 S.W.2d 290, 302 (Tex. App.—Houston [14th Dist.] 1999, pet. ref'd) (*citing Roper v. State*, 917 S.W.2d 128, 130 (Tex. App.—Fort Worth 1996, pet. ref'd); *Griffin v. State*, 936 S.W.2d 353, 356 (Tex. App.—Houston [14th Dist.] 1996, pet. ref'd)).

When we 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). In *Cain v. State*, 958 S.W.2d 404 (Tex. Crim. App. 1997), the court 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. *See 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. *See 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. *See id*. at 408.

C. Legal Sufficiency

As the standard of appellate review is the same, we will jointly consider the first and third points of error. A person commits aggravated robbery if he knowingly and 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.

From the facts presented, after viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Both the complainant and Arhaja identified appellant, and Cheeks further testified appellant had been involved in the commission of the crime. Although appellant contends the identification by the complainant and Arhaja is infirm, the jury is the exclusive judge of the facts proved, the credibility of the witnesses, and the weight to be given to the testimony. *See* 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 159

(1988). The jury could rationally have believed the testimony of the complainant and Arhaja in determining beyond a reasonable doubt that appellant was guilty of aggravated robbery. The complainant was severely beaten and stated he feared for his life, recounting that when the firearm was placed on his stomach, he "felt death." The complainant's money and jewelry were taken without his consent. The evidence is legally sufficient to sustain the conviction. The first and third points of error are overruled.

D. Factual Sufficiency

We now turn to the factual sufficiency challenge. *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 both the complainant and Arhaja. He was dating Cheeks, who admitted her involvement in the instant crime. The jeweler identified appellant as one of two men selling him a chain and a ring, exactly the items Cheeks testified were taken during the robbery. The test for factual sufficiency 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 fourth point of error is overruled.

II. Accomplice Witness Corroboration

The second point of error contends the "conviction for aggravated robbery is void

because it was had upon accomplice witness testimony that was not corroborated at trial by other evidence that tended to connect appellant to the crime[.]" The Texas Code of Criminal procedure provides:

> A conviction cannot be had upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the offense committed; and the corroboration is not sufficient if it merely shows the commission of an offense.

TEX. CODE CRIM. PROC. art. 38.14. An accomplice witness is a discredited witness because his or her testimony alone cannot furnish the basis for the conviction; no matter how complete a case may be made out by an accomplice witness or witnesses, a conviction is not permitted unless he or they are corroborated. *See Walker v. State*, 615 S.W.2d 728, 731 (Tex. Crim. App. 1981).

The test for weighing the sufficiency of corroborative evidence is to eliminate from consideration the testimony of the accomplice witness and then examine the testimony of other witnesses to ascertain if there is evidence which tends to connect the accused with the commission of the offense. *See Reed v. State*, 744 S.W.2d 112, 125 (Tex. Crim. App. 1988).

If the testimony of Cheeks is eliminated, the identification of appellant as the robber by both the complainant and Arhaja stands as the non-accomplice testimony against appellant. The jury may believe or disbelieve all or any part of a witness's testimony. *See Sharp*, 707 S.W.2d at 614. Arhaja's eyewitness account and subsequent identification of appellant as one of the robbers is sufficient evidence to connect appellant with the commission of the instant offense. Point of error number two is overruled.

III. The Handguns

Points of error five and six contend the trial court erred in admitting into evidence State's exhibits 10 and 11, two different firearms, where the evidence showed that only one firearm was used in the commission of the offense, because such evidence was not

admissible under Texas Rules of Evidence 401, 402, or 403.

A. Preservation of Error

The State responds the error, if any, has been waived because appellant did not object, thereby waiving any error, and further, the exhibits were never admitted into evidence. The record belies these propositions. At trial, the following colloquy occurred:

> The State: I would offer into evidence Judge State's Exhibit Number 10 and State's Exhibit Number 11. Let the record reflect that I'm tendering to opposing counsel.
>
> Mr. Alexander (counsel for co-defendant): That's all right. Judge I have the same objection as to **11 hadn't been tied** in, no predicate, no relevance. At this point and time it's prejudicial. It's a gun waving at this point. Judge I object to that.
>
> The State: May I respond?
>
> The Court: Mr. Gonzalez
>
> Mr. Gonzalez (counsel for appellant): **I'll adopt his objection your honor**.
>
> The Court: **Let the record show**. What says the State?
>
> The State: Well the complainants have both stated that it was a black gun with a longer barrel and it was a revolver. I've given the choice to the complainants. They've looked at the gun and pointed it out. I believe I can further in evidence –
>
> The Court: That's sufficient Counsel. **They're both received and admitted into evidence**. State's exhibit 10 and 11. (emphasis supplied)

The record establishes the firearms were admitted into evidence and that appellant objected to their admission. Therefore, the error, if any, has been preserved for appellate review.

B. Admissibility

Cheeks provided the police with State's exhibit 11, which was hidden in the car identified by Arhaja as the vehicle into which she saw the two suspects escape. Cheeks stated State's exhibit 11 was the firearm used in the commission of the offense.

Rule 401 defines relevancy for purposes of admission or exclusion under Rule 402. "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Rule 402 provides that "all relevant evidence is admissible, except as otherwise provided by Constitution, by statute, by these rules, or by other rules prescribed pursuant to statutory authority. Evidence which is not relevant is inadmissible."

Evidence tending to affect the probability of the truth or falsity of a fact in issue is logically relevant. *See Montgomery v. State*, 810 S.W.2d 372, 386 (Tex. Crim. App. 1991)(on rehearing). The court has broad discretion in determining the admissibility of evidence, and its ruling will not be disturbed on appeal absent a clear abuse of discretion. *See Allridge v. State*, 850 S.W.2d 471, 492 (Tex. Crim. App. 1991).

State's exhibit 11 was identified as the firearm used in the robbery; therefore it is directly relevant to the instant offense. Although appellant contends the State failed to show this was the "robbery gun," this does not affect the admissibility. Even if it was **not** the robbery firearm, the introduction of a weapon submitted as being similar to the one used in the commission of the crime is admissible as demonstrative evidence to aid the jury in understanding oral testimony adduced at trial. *See Simmons v. State*, 622 S.W.2d 111, 113-14 (Tex. Crim. App. [Panel op.] 1981); *Fletcher v. State*, 902 S.W.2d 165, 167 (Tex.

App.—Houston [1st Dist.] 1995, pet. ref'd); *Jackson v. State*, 772 S.W.2d 459, 466 (Tex. App.—Beaumont 1989, no pet.). It is within the trial court's discretion to admit into evidence a type of weapon or instrument similar to that used in the commission of an offense. *Simmons*, 622 S.W.2d at 113. Therefore, State's exhibit 11 was admissible under Rules 401 and 402.

C. Rule 403

The Court of Criminal Appeals favors "admission of relevant evidence and implies a presumption that relevant evidence will be more probative than prejudicial." *See generally* TEX. R. EVID. 403. In *Brimage v. State*, 918 S.W.2d 466, 505 (Tex. Crim. App. 1994), *cert. denied*, 519 U.S. 838, 117 S.Ct. 115, 136 L.Ed.2d 66 (1996), the Court of Criminal Appeals held relevant evidence, which is not inflammatory or prejudicial and assists the jury in deciding a case is admissible. The court has also held that Rule 403 requires exclusion of evidence only when there exists a clear disparity between the degree of prejudice of the offered evidence and its probative value. *See Joiner v. State*, 825 S.W.2d 701, 708 (Tex. Crim. App.1992) and *Brimage*, 918 S.W.2d at 506.

In *Old Chief v. United States*, 117 S.Ct. 644, 650 (1997), the Court considered the admissibility of evidence under Rule 403:[2]

> The principal issue is the scope of a trial judge's discretion under Rule 403, which authorizes exclusion of relevant evidence when its "probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." FED. R. EVID. 403. Old Chief relies on the danger of unfair prejudice.
>
> The term **"unfair prejudice," as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the**

[2] Texas Rule of Evidence 403 is essentially the same as its federal counterpart. Texas Rules of Evidence Handbook 213 (3d ed. 1998).

> **offense charged**. *See generally* 1 J. Weinstein, M. Berger, & J. McLaughlin, *Weinstein's Evidence*, ¶ 403[03] (1996) (discussing the meaning of "unfair prejudice" under Rule 403). So, the Committee Notes to Rule 403 explain, "**'Unfair prejudice' within its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one**." Advisory Committee's Notes on Fed. Rule Evid. 403, 28 U.S.C.App., p. 860. (footnote omitted)(emphasis supplied)

The admission of State's exhibit 11 was not the type of evidence to "lure the factfinder into declaring guilt on a ground different from proof specific." The weapon was identified as the one used in the robbery, or at least similar to the one the complainant was beat about the head with. The evidence was not more prejudicial than probative. Further, the court's ruling on a rule 403 objection will only be reversed for a clear abuse of discretion. *See Matamoros v. State*, 901 S.W.2d 470, 476 (Tex. Crim. App. 1995). Therefore, State's exhibit 11 was admissible under Rule 403.

D. Admissibility of State's Exhibit 10

Because State's exhibit 11 was identified as the firearm used in the robbery, State's exhibit 10 was not admissible as a similar weapon. *See generally*, *Montgomery*, 810 S.W.2d at 386. Having found error in the admission of State's exhibit 10, we must address whether appellant was harmed by the trial court's error.

In determining whether appellant was harmed, we apply the standard set out in Texas Rule of Appellate Procedure 44.2(b) to non-constitutional errors. Under Rule 44.2(b), appellant must show that a substantial right was affected. A substantial right is affected when the error had a substantial and injurious effect or influence in determining the jury's verdict. *See King v. State*, 953 S.W.2d 266, 271 (Tex. Crim. App. 1997). A criminal conviction should not be overturned for non-constitutional error if the appellate court, after examining the record as a whole, has a fair assurance that the error did not influence the jury, or had but a slight effect. *See Johnson v. State*, 967 S.W.2d 410, 417 (Tex. Crim. App.

1998).

Appellant claims he was harmed not by the admission of either firearm individually, but by the admission of two firearms. Appellant asserts that because two firearms were admitted into evidence, the jury could have concluded that appellant also used a firearm during the commission of the offense. The record does not support appellant's assertion.

The State used both firearms twice during its case in chief. The first time, the State showed both weapons to the complainant and asked if either weapon looked like the one used in the offense. The complainant responded that State's exhibit 10 looked like the firearm, but the gun used in the offense had a shorter barrel than State's exhibit 10. The complainant was subsequently asked to identify "the man without the gun." The complainant then identified appellant. The second time the State used both weapons was when the prosecutor asked Officer Clement to testify as to how she recovered each weapon. Officer Clement did not testify that both weapons had been used during the offense.

During Darlene Cheeks' testimony, the State showed her State's exhibit 11 and she testified that the firearm belonged to appellant's co-defendant. She further testified that when appellant and the co-defendant left the car to commit the robbery, the co-defendant carried the gun and when they returned to the car, the co-defendant was carrying the gun. She never testified that appellant carried any weapon. During closing argument, the State did not refer to either weapon. Further, the State did not lead the jury to believe that two firearms had been used in the commission of the offense. Having examined the record as a whole, we conclude the improper admission of State's exhibit 10 did not influence the jury.

The fifth and sixth points of error are overruled.

The judgment of the trial court is affirmed.

/s/ Charles F. Baird
Justice

Judgment rendered and Opinion filed March 30, 2000.

Panel consists of Justices Edelman, Wittig and Baird.[3]

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

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