Affirmed and Opinion filed March 30, 2000.

In The

Fourteenth Court of Appeals

NO. 14-98-00650-CR

VINCE EDWARD MIZE, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 180th District Court
Harris County, Texas
Trial Court Cause No. 675,760

O P I N I O N

Charged by indictment with the felony offense of aggravated robbery, enhanced by two prior felony convictions, appellant, Vince Edward Mize, pled not guilty and proceeded to trial by jury. After a jury returned a guilty verdict, appellant entered a plea of true to the enhancement paragraphs. The trial court found both enhancement allegations true and sentenced appellant to ninety-nine years' imprisonment. Appellant now challenges his conviction, claiming the trial court erred in not instructing the jury that a witness was an accomplice witness as a matter of law. In the alternative, appellant contends that because the evidence clearly established that the witness was an accomplice as a matter of fact, the evidence was insufficient to corroborate her testimony. In addition, appellant claims the evidence was legally and factually

insufficient to support his conviction. We affirm.

BACKGROUND

On the evening of February 6, 1993, appellant accompanied his friends Suzanne Titlow ("Suzanne") and Deanna Nicole Vincent ("Nic") to a Houston nightclub where they spent several hours. Suzanne and Nic were heavily intoxicated from alcohol, marijuana and other drugs.[1] About 2:00 a.m., the three left the club in appellant's blue car, in search of more marijuana. Their first stop was the home of appellant's friend, Eric;[2] Suzanne and Nic waited in the car while appellant went inside Eric's house. Five to ten minutes later, appellant came out of the house and went to talk to Russell Meadors ("Russell") and Tim Thrift ("Tim"), who had pulled up in a truck. All three men then joined Suzanne and Nic in the car. With Suzanne at the wheel, the five then drove to a trailer home on the north side of town. When they arrived, appellant pointed at a trailer home belonging to Robert Quintanilla, Sr. ("Robert, Sr.") and commented that was where he intended "to get the weed at." Suzanne, acting on appellant's instructions, dropped Russell, Tim, and appellant at the trailer home and drove around the block. Nic, who had consumed an enormous amount of drugs and alcohol, lay passed out in the back seat of the car as Suzanne circled the block.

Posing as Harris County Sheriff's Department officers, the three men knocked on the door of the trailer home. When Robert, Sr. opened the door, they rushed in, with guns drawn. One had a handgun and the other two had shotguns. The one with the handgun went down the hall to a bedroom where sixteen-year old Robert Quintanilla, Jr. ("Robert, Jr.") and his girlfriend lay asleep. The other two intruders held guns on Robert, Sr. and Belinda Morales ("Belinda"), who also lived in the trailer home. Initially, the intruders demanded money. When they asked for "dope," Robert, Sr. informed them it was in the trunk of his car, a *Monte Carlo* parked in the front of the trailer home.

Outside in the car, Suzanne sat listening to the radio as she waited for the men to return with the

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[1] Each of them had nine to ten drinks of hard liquor. Suzanne and Nic had two Valiums each and had smoked four or five joints of marijuana. Nic had also consumed some Rohypnols, a drug that causes loss of consciousness.

[2] Eric's last name is not given in the record.

marijuana. She watched as Tim emerged from the Quintanilla trailer home and opened the trunk of another car. Nic, who had been asleep in the back seat, awoke, and she and Suzanne then saw Russell walk out of the trailer home, holding his shotgun on a man and a woman as they walked toward the car. Russell forced Robert, Sr. and Belinda to their knees in the driveway while Tim put three paint buckets into the back seat of the car Suzanne was driving. The buckets contained packages covered with gray duct tape, which Suzanne recognized as packaging for marijuana.

Meanwhile, back in the trailer home, the other armed bandit pointed a handgun at Robert Jr.'s head and forced him to walk outside to the trailer next door, where he ordered Robert, Jr. to wake up "Joe." While being held at gunpoint, Robert, Jr. knocked on the door until a man opened it. When the robber pointed the gun at that man, Robert, Jr. tried to wrestle the gun away. In the struggle, the gun discharged, and both Robert, Jr. and the robber were knocked to the ground. The robber got a grip on the gun, stood up, and shot Robert, Jr. on the right side and ran away.

Suzanne, still waiting in the car, heard appellant scream from the back of the trailer home but could not understand him. When two gunshots followed, she panicked, threw the car into reverse, and raced out of the driveway, barely missing a ditch. Tim and Russell, who were fleeing from the scene, saw Suzanne in the car at the end of the street. They jumped in the car, and the four of them (Suzanne, Nic, Tim and Russell) returned to Eric's house without appellant.

When Robert, Sr. saw the two robbers with the shotguns flee, he ran inside his trailer, retrieved his own gun, and fired at their cohort, who remained behind. The remaining robber tried to return fire, but his handgun jammed, at which point he ran east, dropping the malfunctioning weapon as he fled. Robert, Sr., who moments earlier had heard his son screaming that he had been shot, found Robert, Jr. bleeding from a gunshot wound to the stomach. The police and an ambulance arrived shortly thereafter. These events transpired between approximately 3:30 a.m. and 4:30 a.m.

Two to three hours later, appellant arrived at Eric's house. He was pale and dirty. His shoulder was hurt, and his pants were ripped. Appellant told Nic and Suzanne that while they were at the trailer home, Robert, Jr. and he fought over a gun. Appellant told them that during the struggle, he had shot

Robert, Jr. in the foot.[3]

The police searched for the gun in the pre-dawn hours but could not find it. Later, by the light of day, Robert, Sr. and his friends found the handgun and turned it over to the police. As part of the police investigation, Harris County Sheriff's Department Detectives Jimmie Clark and David Carl Cheatham interviewed appellant about the Quintanilla robbery. While being questioned, appellant looked down and uttered "those damn Mexicans" in a disgusted manner. At that point, the detectives had not indicated that the individuals robbed at the trailer home were Hispanic, nor had the detectives mentioned the victims' names or national origin. As part of the interview, the detectives showed appellant a Smith and Wesson gun that had been recovered from the scene. Appellant initially denied ever owning, possessing, or handling the weapon. After being asked how he would explain it if his fingerprints were found on the gun, appellant admitted that he had previously handled it. Although the officers never mentioned that there had been a shooting during the robbery, appellant volunteered that he had not shot anybody.

ACCOMPLICE WITNESS

Appellant's first and second points of error are premised on his contention that Suzanne was an accomplice witness. An accomplice witness is someone who participates with a defendant before, during, or after the commission of a crime. *See Kutzner v. State*, 994 S.W.2d 180, 187 (Tex. Crim. App. 1999). "The participation must involve an affirmative act committed by the witness to promote the commission of that offense." *Id*. A witness is not an accomplice merely because she knew about the offense and did not disclose it or even concealed it. *See id*. at 188. Nor is a witness an accomplice merely because she was present at the scene. *See Creel v. State*, 754 S.W.2d 205, 214 (Tex. Crim. App. 1988); *Mize v. State*, 915 S.W.2d 891, 895 (Tex. App.—Houston [1st Dist.] 1995), *pet. ref'd*, 922 S.W.2d 175 (Tex. Crim. App. 1996) (en banc). At trial, Suzanne testified that her only intent in going to the trailer home was to get marijuana. According to Suzanne, she did not know a robbery was going to take place, and she did not intend to be the getaway driver.

In his first point of error, appellant contends the trial court erred in not instructing the jury that

[3] Although this was Suzanne's testimony at trial, she had previously told police that appellant had stated he had to shoot Robert, Jr. "to get him off."

Suzanne was an accomplice witness as a matter of law. Under "the law of the case" doctrine, "'where determinations as to questions of law have already been made on a prior appeal to the court of last resort, those determinations will be held to govern the case throughout all its subsequent stages, including a retrial and a subsequent appeal.'" *Ex parte Granger*, 850 S.W.2d 513, 516 (Tex. Crim. App. 1993) (quoting *Granviel v. State*, 723 S.W.2d 141, 147 (Tex. Crim. App. 1986)). The First Court of Appeals has previously held that Suzanne was not an accomplice as a matter of law. *See Mize*, 915 S.W.2d at 895. Although we may disregard the "law of the case" under compelling circumstances,[4] appellant has failed to identify any facts or circumstances that would warrant a reconsideration of the law of this case. Accordingly, the First Court of Appeals' determination of this issue

governs this appeal, and we find that Suzanne is not an accomplice witness as a matter of law. We overrule the first point of error.

In the alternative, appellant contends in his second point of error that the evidence clearly established that Suzanne was an accomplice witness as a matter of fact, and therefore, there was insufficient evidence to corroborate her testimony. To convict a defendant using accomplice witness testimony, the testimony must be corroborated by other evidence tending to connect the defendant with the offense committed. *See* TEX. CODE CRIM. PROC. ANN. Art. 38.14 (Vernon 1979). The trial court submitted the issue of whether Suzanne was an accomplice witness as a question of fact to the jury. We must presume the jury followed the trial court's charge and view the evidence in the light most favorable to the verdict. *See Gamez v. State*, 737 S.W.2d 315, 324 (Tex. Crim. App. 1987). Viewing the evidence in the light most favorable to the verdict, the jury must have found that either: (1) Suzanne was not an accomplice witness, or (2) she was an accomplice witness but her testimony was corroborated.

Appellant does not contend that the evidence was insufficient to support a jury finding that Suzanne was not an accomplice witness. Arguments not briefed are waived. *See* TEX. R. APP. P. 38.1(h). When a general verdict is returned, the conviction may stand upon any theory properly presented to the jury in

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[4] *See Ex parte Granger*, 850 S.W.2d at 516. Compelling circumstances include a change in the law and any other circumstance that would mitigate against relying on prior treatment of the issue. *See Zavala v. State*, 956 S.W.2d 715, 718 (Tex. App.—Corpus Christi 1997, no pet.); *Peden v. State*, 917 S.W.2d 941, 956 (Tex. App.—Fort Worth 1996, pet. ref'd).

the charge. *See McDuff v. State*, 939 S.W.2d 607, 614 (Tex. Crim. App. 1997). Because two theories support the verdict, we would have to find the evidence was not sufficient on both of them before we could reverse the lower court's decision. Therefore, even if we were to determine that the evidence was insufficient to corroborate Suzanne's testimony, we still could not reverse and remand on this point of error. Nevertheless, in the interest of thoroughness, we will address whether Suzanne's testimony was sufficiently corroborated.

In determining whether an accomplice witness' testimony is sufficiently corroborated, we disregard the accomplice testimony and consider whether the other incriminating evidence "tends to connect the defendant with the offense." *McDuff*, 939 S.W.2d at 612 (citing *Burks v. State*, 876 S.W.2d 877, 887 (Tex. Crim. App. 1994)). The non-accomplice evidence need only tend to connect appellant to the offense; it does not have to link appellant directly to the crime or solely establish his guilt beyond a reasonable doubt. *See id.* (citing *Burks*, 876 S.W.2d at 888). There is a substantial amount of such evidence in this case.

1. Non-Accomplice Testimony Placing Appellant in the Company of Accomplices at or Near the Time and Place of the Offense.

"Evidence that the defendant was in the company of the accomplice at or near the time or place of the offense is proper corroborating evidence." *Id.* (citing *Cockrum v. State*, 758 S.W.2d 577, 581 (Tex. Crim. App. 1988)). The record contains non-accomplice testimony establishing that appellant was in the company of the alleged accomplice, Suzanne, as well as two other accomplices (Tim and Russell) at or near the time and place of the Quintanilla robbery. Nic testified that Suzanne and appellant were with her the evening of the offense and that the three of them left the nightclub together at about 2:00 a.m. on the date of the offense. Appellant acknowledged that he was riding in a car with Nic on that occasion. Nic testified that when she woke up in the back seat of that car, she saw Tim and Russell walking with some people in front of them.

2. Appellant's Statements

Additionally, appellant made statements to both the police and Nic which provided corroborating evidence. When detectives Clark and Cheatham questioned appellant about a robbery at a trailer house,

appellant responded by looking down and uttering "those damn Mexicans." Because the detectives had not mentioned the national origin of anyone involved, this statement indicated appellant had some knowledge of the offense. Nic, who is not alleged to have been an accomplice, relayed to detective Clark appellant's statement that "they were struggling and the gun went off and that he thought he shot the guy in the foot."[5]

3. Complainant's Identification

Additional corroborating evidence exists in the form of the complainant's tentative identification of appellant before and during trial. Detective Clark testified that Robert, Jr. tentatively identified appellant's photograph as looking like the person who shot him. When asked during trial whether appellant looked like the person he saw with a gun, Robert, Jr. answered, "probably so."

4. Weapon Used in Offense

The firearm used in the offense also provided corroborating evidence. Robert, Sr. testified that when the robber tried to fire a gun, it locked. The Smith and Wesson firearm admitted in evidence had an empty casing jammed between the slide and barrel. Appellant admitted to police that he had handled this gun.

All of this non-accomplice evidence tends to connect appellant to the offense. Therefore, if the jury found that Suzanne was an accomplice witness, the evidence was sufficient to corroborate her testimony. We overrule appellant's second point of error.

LEGAL AND FACTUAL SUFFICIENCY OF THE EVIDENCE

In his third and fourth points of error, appellant contends the evidence was legally and factually insufficient to support his conviction for aggravated robbery.

In determining whether the evidence is legally sufficient, we must decide "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the

[5] Presumably, "they" refers to appellant and Robert, Jr.

essential elements of the crime beyond a reasonable doubt." *King v. State*, 895 S.W.2d 701, 703 (Tex. Crim. App. 1995) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). This standard of review applies to both direct and circumstantial evidence cases. *See Geesa v. State*, 820 S.W.2d 154, 156-61 (Tex. Crim. App. 1991). We consider all the evidence, including accomplice witness testimony. *See McDuff*, 939 S.W.2d at 614.

When reviewing the factual sufficiency of the evidence, we consider all of the evidence "without the prism of 'in the light most favorable to the prosecution'" and "set aside the verdict only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust." *Clewis v. State*, 922 S.W.2d 126, 129 (Tex. Crim. App. 1996). Three major principles should guide appellate courts when conducting a factual sufficiency review. *See Cain v. State*, 958 S.W.2d 404, 407 (Tex. Crim. App. 1997) (construing *Clewis*, 922 S.W.2d at 129). The first principle requires deference to the jury's findings. *See id.* Appellate courts "'are not free to reweigh the evidence and set aside a jury verdict merely because the judges feel that a different result is more reasonable.'" *Clewis*, 922 S.W.2d at 135 (quoting *Pool v. Ford Motor Co.*, 715 S.W.2d 629, 634 (Tex. 1986)). The second principle requires a detailed explanation of a finding of factual insufficiency. *See Cain*, 958 S.W.2d at 407. The final principle requires the court of appeals to review all the evidence. *See id.* If there is sufficient competent evidence of probative force to support the finding, a factual sufficiency challenge cannot succeed. *See Taylor v. State*, 921 S.W.2d 740, 746 (Tex. App.—El Paso 1996, no pet.).

A person commits aggravated robbery if he (1) commits the offense of robbery and (2) uses or exhibits a deadly weapon. *See* TEX. PEN. CODE ANN. § 29.03(A)(2) (Vernon 1994). Robbery occurs when

> in the course of committing theft as defined in Chapter 31 and with intent to obtain or maintain control of the property, he:
>
> > (1) intentionally, knowingly, or recklessly causes bodily injury to another;
> >
> > (2) intentionally or knowingly threatens or places another in fear of imminent bodily injury or death.

TEX. PEN. CODE ANN. § 29.02 (Vernon 1994). An individual does not have to successfully commit theft in order to commit robbery. *See Crawford v. State*, 889 S.W.2d 582, 584 (Tex. App.—Houston [14th Dist.] 1994, no pet.). The law of parties provides:

> (A) A person is criminally responsible for an offense committed by the conduct of another if: . . .
>
> (2) acting with 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 (Vernon 1974). Under the law of parties, the evidence supports a conviction when the actor was physically present at the commission of the offense and encouraged the commission of the offense either by words or other agreement. *See Ransom v. State*, 920 S.W.2d 288, 302 (Tex. Crim. App. 1994). "'[T]he 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 Marvis v. State*, 3 S.W.3d 68, 72 (Tex. App.—Houston [14th Dist.] 1999, pet. filed) (quoting *Burdine v. State*, 719 S.W.2d 309, 315 (Tex. Crim. App. 1986) (en banc)). To determine whether the defendant was a party, we may examine the events occurring before, during, and after the commission of the offense and rely on the actions of the defendant which show an understanding of a common design to commit the offense. *See Ransom*, 920 S.W.2d at 302.

Appellant was charged with the offense of aggravated robbery both as a principal and as a party. The charge on parties instructed the jury that they could convict appellant if they found: (1) he solicited, encouraged, aided, or attempted to aid another person or persons in the offense of robbery, and (2) he actually used or exhibited the firearm. The evidence is clear that appellant was among the group that set out to obtain marijuana from the Quintanilla trailer home and that marijuana was taken in the robbery. Suzanne positively identified appellant as being the same person who, along with Tim and Russell, robbed the Quintanillas at gunpoint. Additionally, Suzanne's account of the events is entirely consistent with that of Robert, Sr. and strongly suggests that appellant was the man who shot Robert, Jr. The testimony of Robert, Sr. and Robert, Jr. also supports the conclusion that the man who shot Robert, Jr. intentionally and knowingly threatened him with bodily injury and death. Viewing the evidence in the light most favorable

to the prosecution, any rational trier of fact could have found beyond a reasonable doubt that appellant was a principal or a party in committing the aggravated robbery.

In considering all the evidence under a factual sufficiency review, we note that appellant did not testify at trial nor did he call any witnesses in his defense. After viewing all the evidence, we find the verdict of guilty is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Thus, we find the evidence is legally and factually sufficient to support the verdict and therefore overrule the third and fourth points of error.

The judgment is affirmed.

/s/ Kem Thompson Frost
Justice

Judgment rendered and Opinion filed March 30, 2000.

Panel consists of Justices Yates, Fowler and Frost.

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