Affirmed and Opinion filed May 3, 2001.

In The

Fourteenth Court of Appeals

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14-98-01442-CR
14-98-01443-CR
14-98-01444-CR

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FELIPE ROLANDO RIVAS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 182nd Judicial District Court
Harris County, Texas
Trial Court Cause Nos. 754,609; 718,128 & 718,127

O P I N I O N

Over his plea of not guilty, a Harris County jury found appellant, Felipe Rolando Rivas, guilty of aggravated robbery. The same day of the verdict the trial court adjudicated appellant guilty in two prior robbery cases, for which he had previously received deferred adjudication probation, and sentenced him to twenty years' confinement in each case. On this offense, the jury also assessed punishment at twenty years' confinement. In four points of error, appellant argues: (1) the trial court erred in failing to submit the requested lesser included charge of attempted theft; (2) the trial court erred in failing to charge the jury on his requested defense

of renunciation; (3) the prosecutor engaged in improper prosecutorial argument by telling jurors to assess the number of years punishment, as opposed to a fine, to let the complainant's family know what the life of their dad was worth; and (4) the trial court erred in cumulating the current aggravated robbery sentence with the two other sentences. We affirm.

Lesser Included Offense

In his first point of error, appellant argues the trial court erred in failing to submit the requested charge on attempted theft. A defendant is entitled to a charge on a lesser offense only if the lesser offense is included within the proof necessary to establish the offense charged, and there is some evidence that would permit the jury rationally to find that if the defendant is guilty, he is guilty only of the lesser offense. *See Rousseau v. State*, 855 S.W.2d 666, 673 (Tex. Crim. App. 1993); *Dowden v. State*, 758 S.W.2d 264, 268 (Tex. Crim. App. 1988). The credibility of the evidence, and whether it conflicts with other evidence or is controverted, may not be considered in determining whether an instruction on a lesser included offense should be given. *See Banda v. State*, 890 S.W.2d 42, 60 (Tex. Crim. App. 1994). Regardless of its strength or weakness, if *any* evidence raises the issue that the defendant was guilty only of the lesser offense, then the charge must be given. *See Medina v. State*, 7 S.W.3d 633, 638 (Tex. Crim. App. 1999)*; Saunders*, 840 S.W.2d at 391.

Appellant was charged and convicted of aggravated robbery. The jury was also charged on the lesser included offense of robbery. One commits robbery if, in the course of committing theft, and with intent to obtain or maintain control of the property, he either intentionally, knowingly, or recklessly causes bodily injury to another, or, intentionally, knowingly, or recklessly threatens or places another in fear of imminent bodily injury or death. *See* TEX. PENAL CODE ANN. § 29.02(a)(1) & (2) (Vernon 1994). The offense rises to the level of aggravated robbery when, during the robbery, one causes serious bodily injury to another or uses or exhibits a deadly weapon. It is not necessary to prove that the violence occurred during the commission of a theft, for violence accompanying an escape immediately subsequent to an attempted theft may be enough to prove robbery. *See Steele v. State*, 22

S.W.3d 550, 554 (Tex. App.—Fort Worth 2000, pet. ref'd); *Thomas v. State*, 864 S.W.2d 193, 197 (Tex. App.—Texarkana 1993, pet. ref'd).

The jury was not charged on the lesser included offense of attempted theft. A person commits attempted theft if, with specific intent to unlawfully appropriate property with the intent to deprive the owner of the property, he does an act amounting to more than mere preparation that tends but fails to effect the commission of the intended theft. *See* TEX. PENAL CODE ANN. §§ 15.01(a) and 31.03(a) (Vernon 1994). Appellant claims because he testified that he only asked the complainant if he had any money, but did not issue or participate in any threat in order to obtain the money, the jury should have been given the lesser included offense of attempted theft. We agree; thus, we find the trial court erred in denying appellant's request for an instruction on the lesser included offense of attempted theft.

Having found error in the charge, we must determine whether sufficient harm resulted from the error to require reversal. *See Irizarry v. State*, 916 S.W.2d 612, 614 (Tex. App.—San Antonio 1996, pet. ref'd). Where, as here, appellant objected to the charge and affirmatively requested an instruction on the lesser included offense, reversal is required so long as appellant has suffered *some* harm. *See Abdnor v. State*, 871 S.W.2d 726, 732 (Tex. Crim. App. 1994); *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1984).

We begin our analysis by observing that the trial court submitted instructions on aggravated robbery and robbery. This fact does not, *a fortiori*, render the trial court's error harmless. *See Saunders v. State*, 913 S.W.2d 564, 574 (Tex. Crim. App. 1995). However, the jury did not face the dilemma of deciding whether to convict on the greater inclusive offense, about which it may have had a reasonable doubt, or acquit a defendant it did not believe to be wholly innocent. *See id.* at 573. Here, the entire defensive theory was that appellant only walked up to the complainant and asked him for money, and, after the complainant answered negatively, appellant walked away. Soon thereafter, complainant was shot and killed by one of the co-defendants. Appellant testified that he did not engage in the aggravated robbery in any way and was surprised when the complainant was subsequently shot. Appellant's counsel

asserted in closing argument that the evidence might tend to support a conviction for attempted theft or robbery, but not aggravated robbery. He also argued that the only proper verdict in this case is one of "not guilty."

By convicting appellant of aggravated robbery, rather than the lesser included offense of robbery, the jury implicitly rejected appellant's contention. Moreover, there was abundant evidence to support a finding that appellant committed the offense of aggravated robbery. Appellant's statement to the police and his testimony at trial provided evidence that he intended to commit aggravated robbery with his friends, he knew a deadly weapon was present, he intended to take money from the complainant, he was the one who actually approached the complainant for his money, and he was aware of the risks involved in trying to illegally obtain money while armed with a gun.

Under the facts presented here, we are convinced beyond any reasonable doubt that the jury was permitted to fulfill its full role as fact finder, and appellant suffered no harm. *See Saunders*, 913 S.W.2d at 517; *Otting v. State*, 8 S.W.3d 681, 689-690 (Tex. App.—Austin 1999, pet. ref'd untimely filed); *Irizarry*, 916 S.W.2d at 614-15; *Jiminez v. State*, 953 S.W.2d 293, 299- 300 (Tex. App.—Austin 1997, pet. ref'd) (all holding the trial court's denial of a lesser included offense charge was harmless under the particular facts of each case). In light of the defensive theory presented to the jury, the jury's rejection of other lesser offenses, and the evidence before us, we find that the inclusion of a charge on the lesser included offense of attempted theft would not have altered the outcome. Accordingly, the error is harmless; appellant's first point of error is overruled.

Renunciation Defense

In his second point of error, appellant claims he was entitled to have his requested defense of renunciation included in the court's charge. Upon a timely request, a defendant has the right to an instruction on any defensive issue raised by the evidence, whether such evidence is strong or weak, unimpeached or contradicted, regardless of what the trial court may or may

not think about the credibility of the evidence. *See Granger v. State,* 3 S.W.3d 36, 38 (Tex. Crim. App. 1999); *Darty v. State*, 994 S.W.2d 215, 218 (Tex. App.—San Antonio 1999, pet. ref'd). Therefore, the issue we must decide is whether the renunciation defense was raised by the evidence. *See* TEX. PENAL CODE ANN. § 2.04(c) (Vernon 1994). Section 15.04 of the *Texas Penal Code*, which governs the renunciation defense, provides: "It is an affirmative defense to prosecution under Section 15.01 that under circumstances manifesting a voluntary and complete renunciation of his criminal objective the actor avoided commission of the offense attempted by abandoning his criminal conduct or, if abandonment was insufficient to avoid commission of the offense, by taking further affirmative action that prevented the commission." TEX. PENAL CODE ANN. § 15.04 (Vernon 1994). An essential part of the renunciation defense is that it must be voluntary *and* it must either avoid commission or prevent commission of the offense. *See Hackbarth v. State*, 617 S.W.2d 944, 946 (Tex. Crim. App. 1981).

Here, the only evidence showing some support for the inclusion of a renunciation defense charge is when appellant testified that after he asked complainant for money, he turned and walked away. However, to complete the renunciation defense, appellant was required to take further affirmative action to prevent the commission of the crime. *See id*. There is no evidence to show he took any affirmative action to prevent the commission of the robbery. Thus, because there is no evidence to support the inclusion of a renunciation defense charge, the trial court did not err in failing to include such a charge. Accordingly, we overrule appellant's second point of error.

Prosecutorial Argument

In his third point of error, appellant argues the trial court erred in overruling his objection to improper prosecutorial argument during the punishment phase. Specifically, appellant contends the prosecutor improperly told jurors that years of imprisonment as

punishment, as opposed to a monetary fine, would let the complainant's family know the value of their' father's life. The prosecutor made the following closing argument in the punishment phase of the trial:

> Incidentally, before I forget to tell you this, it doesn't do any good, in my estimation, to give anybody a fine in this case. Fines are very difficult to collect from these kind of things. They don't do any good. You need to go back, look at the specific number of years you think is appropriate. You don't consider how much they are actually going to serve because the Judge tells you not to do that. You go back and if you think 60 years is appropriate, you say 60 years, if you think 45 years is appropriate you say 45 years. Let the chips fall where they may. And you let Mr. Rivas' friends, you let the [complainant's] family know, what the life of their dad was worth.

Appellant objected on grounds that the State was arguing to put a value on the deceased by the punishment assessed by the jury. The trial court overruled the objection. The prosecutor continued with the following argument:

> That's what your verdict says. It doesn't do a thing for me, doesn't do a thing for Mr. Morrow. We have other cases. We will come back another day. But you do have to justify it to yourself, how you feel about this and what kind of punishment is actually appropriate for what Mr. Rivas has done in this case.
>
> I know you were diligent in trying to reach a verdict on guilt of innocence. So far you have done the right thing. Don't nullify it. Don't nullify your earlier decision by just going in and saying, let's pick some number quickly and let's get out of here. Think about it, think about what it's really worth, because it's important. It may be one of the most important decisions you make for you and this community.

The purpose of closing argument is to facilitate the jury's proper analysis of the evidence presented at trial so that it may arrive at a just and reasonable conclusion based on the evidence alone and not on any fact not admitted into evidence. *See Campbell v. State*, 610 S.W.2d 754, 756 (Tex. Crim. App. [Panel Op.] 1980); *Tucker v. State*, 15 S.W.2d 229, 236 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd). Proper jury argument consists of: (1) summation of the evidence, (2) reasonable deductions from the evidence, (3) answer to the argument of opposing counsel, and (4) a plea for law enforcement. *See Felder v. State*, 848 S.W.2d 85, 94-95 (Tex. Crim. App. 1992); *Borjan v. State*, 787 S.W.2d 53, 57 (Tex. Crim.

App. 1990).

Looking at the totality of the prosecutor's argument, he was merely arguing for the jury to assess punishment based on all the facts and circumstances of this case and how it would impact society. As such, it was a proper plea for law enforcement.[1] *See Stone v. State*, 574 S.W.2d 85, 90 (Tex. Crim. App. [Panel Op.] 1978); *Smith v. State*, 966 S.W.2d 111, 112-13 (Tex. App.—Beaumont 1998, no pet.); *Smith v. State*, 846 S.W.2d 515, 518 (Tex. App.—Houston [14th Dist.] 1993, pet. ref'd). Accordingly, appellant's third point of error is overruled.

Cumulation of Sentences

In his fourth point of error, appellant argues that the trial court erred in cumulating the current aggravated robbery sentence upon the two other sentences because the current aggravated robbery was used both in this trial and as a basis for adjudicating his guilt in the other robbery cases.

Generally, the trial court has discretion to order that sentences be served consecutively. *See* TEX. CODE CRIM. PROC. ANN. Art. 42.08 (Vernon Supp. 2000). However, when the accused is found guilty of more than one offense arising out of the same criminal episode prosecuted in a single criminal episode, the sentences shall run concurrently. *See* TEX. PEN. CODE ANN. § 3.03 (Vernon 1994). "Criminal episode" is defined as the commission of two or more offenses if: (1) the offenses are committed pursuant to the same transaction or pursuant to two or more transactions that are connected or constitute a common scheme or plan, or (2) the offenses are the repeated commission of the same or similar offenses. *See* TEX. PEN. CODE ANN. § 3.01 (Vernon 1994). If Section 3.03 of the *Texas Penal Code* does

[1] Appellant relies on *Tidmore v. State*, 976 S.W.2d 724, 731 (Tex. App.—Tyler 1998, pet. ref'd) for the proposition that assessing a worth to a complainant's life is not permissible jury argument. In *Tidmore*, the prosecutor suggested a specific number of years and stated a human life was worth that amount. This case is inapplicable here because the prosecutor in this case repeatedly told the jury that the decision on punishment was theirs to make and it should be based on the facts of this particular case and in line with society's best interests.

not apply, the trial court retains the right to cumulate sentences under Article 42.08 of the *Texas Code of Criminal Procedure*. *See Lumpkin v. State*, 681 S.W.2d 885, 889 (Tex. App.—Fort Worth 1984, no pet.) (citing *Smith v. State*, 574 S.W.2d 41 (Tex. Crim. App. 1979)).

A proceeding to revoke probation is not criminal or civil, but rather an administrative proceeding. *See Cobb v. State*, 851 S.W.2d 871, 873 (Tex. Crim. App. 1993); *Burke v. State*, 930 S.W.2d 230, 232 (Tex. App.—Houston [14th Dist.] 1996, pet. ref'd). The probation revocation hearing is merely an extension of the original sentencing portion of the defendant's trial. *See Cobb*, 851 S.W.2d at 874. A trial court may cumulate sentences arising from a probation revocation and the new offense that is the basis for the revocation if they do not arise from a "single criminal action." *See Sylvester v. State*, 709 S.W.2d 48, 49 (Tex. App.—Houston [1st Dist.] 1986, pet. ref'd); *see also Crider v. State*, 848 S.W.2d 308, 312 (Tex. App.—Fort Worth 1993, pet. ref'd). A "single criminal action" exists whenever allegations and evidence arising out of the same criminal episode are presented in a single trial or plea proceeding, whether pursuant to one charging instrument or several. *LaPorte v. State*, 840 S.W.2d 412, 415 (Tex. Crim. App. 1992).

Here, although the jury was deliberating appellant's punishment for the current aggravated robbery, the trial court held an adjudication hearing on two previous robberies, to which appellant had pled guilty and had been given deferred adjudication probation. In this hearing, the trial court found appellant guilty in both cases and assessed punishment in each case at twenty years' confinement. Shortly thereafter, the jury returned with a punishment verdict, assessing twenty years' confinement. The trial court ordered the sentence in the aggravated robbery trial to begin upon completion of the sentences in the two robberies, for which deferred adjudication had previously been revoked. Accordingly, we find the earlier robbery convictions did not arise out of the same criminal episode as the aggravated robbery. Consequently, because the trial court did not improperly cumulate appellant's sentences, we overrule appellant's fourth point of error.

Having overruled each of appellant's four points of error, we affirm the trial court's

judgment.

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Ross A. Sears
Justice

Judgment rendered and Opinion filed May 3, 2001.

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

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

[**] Senior Justices Ross A. Sears, Joe L. Draughn, and D. Camille Hutson-Dunn sitting by assignment.