Affirmed and Opinion filed June 1, 2000.

In The

Fourteenth Court of Appeals

NO. 14-98-01397-CR

GERALD TROY DAVIS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 174th District Court
Harris County, Texas
Trial Court Cause No. 782,321

O P I N I O N

Appellant, Gerald Troy Davis, appeals his jury conviction for the offense of aggravated robbery. The trial court assessed punishment at twenty-five years confinement in the Texas Department of Criminal Justice - Institutional Division. In four points of error, appellant claims the evidence was legally and factually insufficient to support his conviction, the trial court erred in overruling his evidentiary objection, and the trial court failed to instruct the jury that accomplice testimony must be corroborated. We affirm.

FACTUAL BACKGROUND

Appellant entered the Sam Wong Grocery Store and walked past the checkout counter where the complainant, Angie Wong, and her store clerk, Bernardo Nieto, were conversing. Appellant went to the meat market counter in the rear of the store and called to Nieto for assistance. After Nieto went to the meat counter, two men entered the store. One of the men, armed with a shotgun, discharged the weapon into the ceiling. The two men threatened to kill the complainant and took money from the register.

When Nieto heard the gunshot, he dropped the meat he was getting for appellant. Appellant ordered Nieto to "get on the ground." Appellant then walked to the front of the store where the robbery was taking place. With his hands half raised, he walked by the two armed robbers. Appellant ran back to Nieto in the rear of the store and told Nieto to stay down. Appellant again walked to the front of the store, past the two men and moved toward the door. Appellant and the two robbers then quickly left the store together.

LEGAL AND FACTUAL SUFFICIENCY OF THE EVIDENCE

In his first and second points of error, appellant challenges the legal and factual sufficiency of the evidence to support the jury's verdict. Appellant maintains the evidence was insufficient to show he was either a primary actor or a party to the offense.

In conducting a legal sufficiency review of the evidence, an appellate court must view the evidence adduced at trial in the light most favorable to the verdict and determine if any rational fact finder could have found the crime's essential elements to have been proven beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 319 (1979). The reviewing court will examine the entire body of evidence; if any evidence establishes guilt beyond a reasonable doubt, and the fact finder believes that evidence, the appellate court may not reverse the fact finder's verdict on grounds of legal insufficiency. *See id.* The standard of review is the same for both direct and circumstantial evidence. *See Geesa v. State*, 820 S.W.2d 154, 162 (Tex. Crim. App. 1991).

In reviewing the evidence for factual sufficiency, an appellate court will examine all the evidence without the prism of "in the light most favorable to the prosecution," and will set aside the jury's verdict only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *See Clewis v. State*, 922 S.W.2d 126, 129 (Tex. Crim. App. 1996). The court reviews the evidence weighed by the jury that tends to prove the existence of the elemental fact in dispute and compares it with the evidence that tends to disprove that fact. *See Jones v. State*, 944 S.W.2d 642, 647 (Tex. Crim. App. 1996). The appellate court is authorized to disagree with the jury's determination, even if probative evidence exists which supports the verdict. *See id.* However, a factual sufficiency review must be appropriately deferential so as to avoid substituting our own judgment for that of the fact finder. *See id.* Accordingly, we are only authorized to set aside a jury's finding in instances where it is manifestly unjust, shocks the conscience, or clearly demonstrates bias. *See id.*

The State alleged appellant committed the offense of aggravated robbery and had the burden to prove that appellant, or someone for whom he is criminally responsible, in the course of committing theft, intentionally, or knowingly threatened, or placed another person in fear of imminent bodily injury or death, and exhibited a deadly weapon. *See* TEX. PEN. CODE ANN. § 29.03 (Vernon 1994). Under the facts of this case, there is no evidence to support appellant's guilt as a principal; thus, his criminal liability must be predicated on another person's commission of the offense for whom he is criminally responsible.

To establish liability as a party, the evidence must show that the accused harbored the specific intent to promote or assist in the commission of the offense. *See Pesina v. State*, 949 S.W.2d 374, 382 (Tex. App.—San Antonio 1997, no pet.). The State must prove that at the time of the commission of the offense, the parties were acting together, each doing some part towards the execution of a common plan. *See Brooks v. State*, 580 S.W.2d 825, 831 (Tex. Crim. App. 1979). The essential elements of the parties' culpability is the common design to do a criminal act. *See 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 may be sufficient to show that one is a party to an offense. *See Burdine v. State*, 719 S.W.2d 309, 315 (Tex. Crim. App. 1986). The fact finder may make its determination based on the events occurring before, during, and after the commission of the offense and may rely on the actions of the

defendant, which show an understanding and common design to do the criminal act. *See Beier v. State*, 687 S.W.2d 2, 4 (Tex. Crim. App. 1985).

Although appellant was present in the grocery store during the commission of the aggravated robbery, there is no direct evidence that appellant intended to promote or assist the commission of the offense. Nor is there direct evidence that he solicited, encouraged, directed, aided, or attempted to aid another person to commit the offense. In fact, appellant claims his conduct could be viewed as innocent. Therefore, appellant's conviction can be upheld only if a rational juror could infer his guilt from circumstantial evidence.

When viewed in the light most favorable to the jury's verdict, the evidence in this case reveals the following. Appellant entered the store approximately one minute before the two robbers entered.[1] Appellant called Nieto, the store clerk, to the rear of the store. Once the two robbers entered and discharged the shotgun, appellant told Nieto to "get down" and "stay down." However, appellant never got down himself. Rather, he went to the front of the store twice and walked right by the armed robbers. He exchanged no words with them, nor did they seem concerned with his presence.[2] Appellant left the store with the two robbers.

From this evidence, a rational juror could draw several inferences. First, by calling Nieto to the rear of the store, it can be inferred that appellant was sequestering the only male employee in the store for the benefit of the two robbers. Second, by ordering this employee to get on the ground, appellant was assisting the robbers and not trying to protect the employee from harm. Third, in walking to the front of the store during the robbery, after having heard a shotgun blast, a rational fact finder could have concluded that appellant had no fear of the two robbers and was checking on their progress. Finally, because the

---

[1] The videotape of the robbery skips after appellant enters the store. It is therefore impossible to know for certain the amount of time that passed between appellant's entrance and the two robbers' entrance.

[2] It is clear from the videotape the robbers were agitated whenever the complainant made any movement; however, they paid no attention to appellant's presence or movements through the store.

robbers did not appear to be threatened by appellant's presence and because they all departed from the store at the same time, it is reasonable to infer they were acting together.

Appellant points to the following evidence as contrary to verdict. On cross-examination, Nieto testified appellant could have been trying to protect him by telling him to "get down," and it was possible that appellant was not involved in the robbery. Appellant also notes that during the robbery, he had his hands up when he walked to the front of the store. Finally, he maintains that he left the store before the two robbers.

We find the evidence legally and factually sufficient to support the jury finding that appellant was a party to the offense. Based on the evidence adduced at trial, a rational trier of fact could conclude that the crime's essential elements were proven beyond a reasonable doubt. Further, despite any conflicting evidence, the jury's verdict is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. We therefore overrule appellant's first and second points of error.

ERRONEOUS ADMISSION OF TESTIMONY

In his third point of error, appellant complains the trial court erred in admitting testimony concerning the amount of money taken during the robbery. Specifically, appellant asserts the evidence was irrelevant.

In order to preserve a complaint for appellate review, a defendant must make a timely and specific objection. *See Turner v. State*, 805 S.W.2d 423, 431 (Tex. Crim. App. 1991); *see also* TEX. R. APP. P. 33.1(a)(1). To be timely, an objection must be made at the earliest possible opportunity. *See Turner*, 805 S.W.2d at 431.

In this case, the following occurred:

PROSECUTOR:	Do you know how much money they took?
THE COMPLAINANT:	I don't remember clearly. But probably around $1,500.00.
PROSECUTOR:	Now, Mrs. Wong, is there some reason that you keep a large amount of cash in your store?
DEFENSE COUNSEL:	I object to the relevancy.
TRIAL COURT:	That will be overruled.

The earliest opportunity for appellant to object to how much money was taken was right after the question was asked. However, appellant did not object when the prosecutor asked the complainant how much money was taken. Rather, he objected after the complainant was asked why she kept that much cash in the store. We cannot determine from the record whether appellant was objecting to the relevancy of the amount of money taken or the relevancy of why Wong kept a large amount of cash. In any event, because the objection was not made at the earliest possible opportunity, it was untimely. Accordingly, appellant has waived his complaint on appeal and his third point of error is overruled.

FAILURE TO GIVE ACCOMPLICE INSTRUCTION

In his fourth point of error, appellant claims the trial court erred in failing to give an accomplice witness instruction. Appellant asserts there was no corroborating testimony in accordance with Texas Code of Criminal Procedure article 38.14 (Vernon 1979). Article 38.14 states "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."

Appellant contends the State presented testimonial evidence that an alleged accomplice led the arresting officer to appellant. Houston Police Officer Wilkinson testified that after talking to one of the two robbery suspects, his investigation turned to appellant. This testimony does not fall within the purview of article 38.14. *See Bingham v. State*, 913 S.W.2d 208, 211 (Tex. Crim. App. 1995) (noting that article 38.14 embraces only in-court testimony of an accomplice). Neither of the two robbers testified at appellant's trial. Because there was no testimony from an accomplice elicited during trial, the court did not err in failing to give an accomplice witness instruction. Point of error four is overruled.

The judgment of the trial court is affirmed.

/s/ Leslie Brock Yates
Justice

Judgment rendered and Opinion filed June 1, 2000.

Panel consists of Justices Yates, Fowler, and Edelman.

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