Affirmed and Opinion filed November 10, 1999.

In The

Fourteenth Court of Appeals

NO. 14-97-01434-CR

JAQUARY IRA WHITE, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 338th District Court
Harris County, Texas
Trial Court Cause No. 742,424

O P I N I O N

A jury convicted Jaquary Ira White (appellant) of aggravated robbery and sentenced him to thirty-six years in the Texas Department of Criminal Justice, Institutional Division. *See* TEX. PENAL CODE ANN. § 29.03 (Vernon 1994). Appellant brings four points of error complaining: the trial court erred in overruling appellant's motion to suppress; the evidence is legally and factually insufficient to support appellant's conviction because the State failed to prove the weapon used was a firearm; and the trial court erred by not charging the jury on the lesser included offense of robbery. We affirm.

Facts

Wearing all black, disguised by a ski mask, and brandishing a .9mm handgun, appellant entered an AutoZone store along with his co-assailants, Homie, Sonia, Poo-Poo and Snapper. At gunpoint, the co-assailants forced employees complainant and another employee to give them money from the safe. Before taking money from the cash register, the assailants fled because one of the robbers observed a bystander who left to call the police.

A Houston police officer later questioned Appellant, who was in jail on another offense, about his involvement in the AutoZone aggravated robbery. During this meeting, appellant dictated the following confession:

> Homie came by and ask me if I wanted to go robbing. I said no at first, then changed my mind. We went to a house where we met Sonia, Poo-Poo, and Snapper. We was in a brown 4 door car, we got suited up at the house. The suits was in the trunk of the car. Homie gave out the guns. He gave me a 9mm. We went to AutoZone store on Lyons Ave. Homie, Sonia, Poo-Poo and Snapper went in the store. I went inside and stood next to the door. Poo-Poo emptied the case registers. [sic] Homie went to the back with Sonia. Snapper was at the door with me. After store was robbed we came out got into brown car. We drove around corner and got out and jumped into a van. I heard a gun shot when we got into the van.
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> We went back to the same house. Took off the stuff and waited for money to get counted. Tarence or T, Poo-Poo, Snapper, Sonia, Bubba, Homie and Me was in the house. Snapper went to the back. I was in the living room. I got two hundred dollars then I went home. Poo-Poo was there when I got my money.
>
> Bubba was also in the robbery. He went in and stood at front with me and Snapper. The van was tourquis [sic] in color but I don't know who was driving.
>
> This was Thanksgiving weekend.
>
> I went and bought some tennis shoes at the Foot Locker in Northwest Mall. I paid $140-$150 for pair of black & white Nike's. [sic]

> I don't know about any other robbery[,] the one at the AutoZone on Lyons is the only one I was a part of. I did not rob any place else.

Motion to Suppress

Appellant argues the trial court committed reversible error by overruling the motion to suppress his written statement. He claims the statement was induced by a police officer's promise of leniency in sentencing.

Because the issue of voluntariness of appellant's written statement is not restricted to the trial court's evaluation of the witnesses' credibility and demeanor, we review *de novo* the trial court's decision to admit appellant's written statement. *See Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997); *Rodriguez v. State*, 968 S.W.2d 554, 556 (Tex. App.–Houston [14th Dist.] 1998, no pet.). In conducting our *de novo* review, we will examine testimony from both the motion to suppress hearing and the trial. *See Hardesty v. State*, 667 S.W.2d 130, 133 n. 6 (Tex. Crim. App. 1984).

Article 38.21 of the Texas Code of Criminal Procedure states, "[a] statement of an accused may be used in evidence against him if it appears that the same was freely and voluntarily made without compulsion or persuasion . . . ." TEX. CODE CRIM. PROC. ANN. Art. 38.21 (Vernon 1979). Appellant's confession will be considered involuntary and ordered suppressed if the officer made a positive promise, "i.e., of some benefit to the [appellant], made or sanctioned by a person in authority and of such a character as would likely influence him to speak untruthfully." *Janecka v. State*, 937 S.W.2d 456, 466 (Tex. Crim. App. 1996); *see Fisher v. State,* 379 S.W.2d 900, 902 (Tex. Crim. App. 1964).

Although a "positive" promise, such as, promising leniency in sentencing, can be something less than unequivocal, to render a confession involuntary, the promise must carry the suggestion of a *quid pro quo*. *See Smith v. State*, 779 S.W.2d 417, 428 (Tex. Crim. App. 1989). Our review of the record reveals that the police officer's statements were not

positive promises. The officer denied making any promises of leniency. Although The officer stated that "the truth it might save you a lot of problems in life,"this was not a promise of future conduct whereby appellant would derive some benefit from the officer's actions. The officer merely stated that telling the truth would be better than fabricating a story. This request for the truth is not the type of statement that would encourage appellant, or anyone, to speak untruthfully and did not constitute a positive promise. *See Nenno v. State*, 970 S.W.2d 549, 558 (Tex. Crim. App. 1998); *Garcia v. State*, 919 S.W.2d 370, 388 (Tex. Crim. App. 1994).

Thus, because appellant was not coerced or induced to make his statement as a result of the officer's conduct, appellant's first point of error is overruled.

Use of a Firearm

In his next two points of error, appellant contends the evidence was legally and factually insufficient to support appellant's aggravated robbery conviction because the State failed to prove the weapon used against the complainant was a firearm, as alleged in the indictment.

When reviewing a legal sufficiency challenge, we review all of the evidence in the light most favorable to the judgment to determine whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 318-19, 99 S.Ct. 2781, 2789 (1979); *Garrett v. State*, 851 S.W.2d 853, 857 (Tex. Crim. App. #1993). We will not re-evaluate the weight and credibility of the evidence; instead, we act only to ensure the jury reached a rational decision. *See Muniz v. State*, 851 S.W.2d 238, 246 (Tex. Crim. App. #1993). Under this standard of review, it is within the province of the jury to resolve conflicts in the testimony, to assess the credibility of the witnesses, to weigh the evidence and to draw reasonable inferences therefrom. *See Jackson*, 443 U.S. at 319. This standard applies equally to

direct and circumstantial evidence cases. *See Myles v. State*, 946 S.W.2d 630, 636 (Tex. App.–Houston [14th Dist.] 1997, no pet.).

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). We review the jury's weighing of the evidence and are authorized to disagree with the jury's determination. *See id.* at 133. This review, however, must be appropriately deferential so as to avoid substituting our judgment for that of the jury. *See id.* We must consider all of the evidence, both that which tends to prove or disprove a vital fact in evidence. *See Taylor v. State*, 921 S.W.2d 740, 746 (Tex. App.--El Paso 1996, no pet.). A factual insufficiency point should be sustained only if the verdict is so contrary to the great weight and preponderance of the evidence as to be manifestly unjust. *See id.* In other words, if there is sufficient competent evidence of probative force to support the finding, a factual sufficiency challenge cannot succeed. *See id.* This is true even if the finding is supported by no more than a scintilla of evidence and even though reasonable minds might differ as to the conclusions to be drawn from the evidence. *See id.*

Appellant argues the evidence is legally and factually insufficient to support the aggravated robbery charge because the complainant was not able to identify the weapon used as a firearm. Appellant was indicted for aggravated robbery. *See* TEX. PEN. CODE ANN. § 29.03(a) (Vernon 1994). The indictment alleged appellant used or exhibited a firearm as the deadly weapon during the robbery. *See* TEX. PEN. CODE ANN. § 1.07(11) (Vernon 1994) (A firearm is by definition a deadly weapon). The jury charge instructed the jury it could convict appellant individually or as a party to the offense. *See* TEX. PEN. CODE ANN. §§ 7.02, 7.03 (Vernon 1994). Thus, the State had to prove that a deadly weapon was used or exhibited during the course of the aggravated robbery.

To prove a deadly weapon was used during the robbery, "[t]estimony using any of the terms 'gun', 'pistol' or 'revolver' is sufficient to authorize the jury to find that a deadly weapon was used." *Wright v. State*, 591 S.W.2d 458, 459 (Tex. Crim. App. 1979); *see Carter v. State*, 946 S.W.2d 507, 510-11 (Tex. App.–Houston [14th Dist.] 1997, pet. ref'd). From this type of evidence, the jury "may draw reasonable inferences and make reasonable deductions [] within the context of the crime." *Benavides v. State*, 763 S.W.2d 587, 589 (Tex. App.–Corpus Christi 1988, pet. ref'd). Thus, "[a]bsent any specific indication to the contrary at trial, the jury should be able to make the reasonable inference, from the victim's testimony that a 'gun' was used in the commission of a crime, that the gun was a firearm." *Id*; *see Joseph v. State*, 681 S.W.2d 738, 739 (Tex. App.–Houston [14th Dist.] 1984, no pet.).

The State presented evidence of use a firearm during the robbery when the complainant testified one of her assailants pointed a gun at everyone. Additionally, there was testimony that one male assailant was holding a gun and another male assailant pulled a "long gun" out of his duffel bag and pointed it at everyone. The complainant also testified one of the female assailants was armed with a silver pistol. Another employee of the store also testified she was hit with a gun in the back of her head when she could not open the store's safe.

Accordingly, we find the evidence is legally and factually sufficient to support the jury's verdict that a firearm was used during the robbery. Thus, we overrule appellant's second and third point of error.

Charge Error

In his next point of error, appellant argues the jury charge should have included the lesser included offense of robbery. *See* TEX. PEN. CODE ANN. § 29.02 (Vernon 1994). The jury in this case was charged according to the elements of aggravated robbery. *See* TEX. PEN. CODE ANN. § 29.03 (Vernon 1994).

In determining whether a charge encompassing a lesser included offense is required, we apply a case specific two-step test. First, the lesser included offense must be included within the proof necessary to establish the offense charged. Second, some evidence must exist in the record that would permit a 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); *Royster v. State*, 622 S.W.2d 442, 446 (Tex. Crim. App. 1981). A defendant is entitled to an instruction on a lesser included offense if more than a scintilla of evidence raises the issue. *See Bignall v. State*, 887 S.W.2d 21, 23 (Tex. Crim. App. 1994).

The Court of Criminal Appeals stated the following regarding what evidentiary support is required to include a lesser included offense in the jury charge:

> The credibility of evidence and whether it is controverted or conflicts with other evidence in the case may not be considered in determining whether a defensive charge or an instruction on a lesser included offense should be given. When evidence from any source raises a defensive issue that a lesser included offense may have been committed and a jury charge on the issue is properly requested, the issue must be submitted to the jury. It is then the jury's duty, under the proper instructions, to determine whether the evidence is credible and supports the defense or the lesser included offense.

Moore v. State, 574 S.W.2d 122, 124 (Tex. Crim. App. 1978). A defendant is entitled to a charge on a lesser included offense even if the evidence supporting it is contradicted. *See Lugo v. State*, 667 S.W.2d 144, 145-46 (Tex. Crim. App. 1984). All of the evidence adduced at trial should be considered to determine whether an instruction on a lesser included offense should be given. If the evidence raises a lesser included offense, the trial court lacks discretion to refuse to submit the offense to the jury. *Id.*

Appellant argues he is entitled to a jury instruction on a lesser included offense, because the evidence a firearm was used during the robbery is subject to conflicting interpretations. *See Schweinle v. State*, 915 S.W.2d 17, 19 (Tex. Crim. App. 1996). Appellant asserts because his confession does not say that firearms were used during the

robbery, the evidence whether a firearm was used during the robbery is conflicting and raises the lesser included offense of robbery. We disagree.

The absence of firearm evidence in appellant's confession is not evidence that no firearms were used during the robbery. In fact, there was no evidence presented at trial that appellant *did not* use a firearm during the robbery or that he was guilty of *only* robbery. *See Bignall*, 887 S.W.2d at 23. Thus, there was no conflicting evidence to support only a nonaggravated robbery occurred. *See Aikens v. State*, 790 S.W.2d 66, 70 (Tex. App.–Houston [14th Dist.] 1990, no pet.). Rather, the overwhelming evidence at trial was that a firearm was used during the robbery. Accordingly, there is not a scintilla of evidence to support a lesser included jury charge for robbery. Thus, we overrule appellant's fourth point of error.

/s/ Norman Lee
Justice

Judgment rendered and Opinion filed November 10, 1999.

Panel consists of Justices Sears, Lee, and Cannon.[*]

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

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[*] Senior Justices Ross A. Sears, Norman Lee, and Bill Cannon sitting by assignment.