**Affirmed and Opinion filed November 18, 1999.**

**In The**

# Fourteenth Court of Appeals

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**NO. 14-97-00991-CR**

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**VITO HERNANDEZ, JR., Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

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**On Appeal from the 180th District Court**
**Harris County, Texas**
**Trial Court Cause No. 718,884**

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## O P I N I O N

Vito Hernandez, Jr., appeals his conviction by a jury for aggravated robbery. The jury assessed his punishment at fourteen years imprisonment. In two points of error, appellant contends the evidence was legally and factually insufficient to sustain his conviction because there was no proof that the complainant was in fear. We affirm.

On March 26, 1996, at about 11:30 p.m., appellant and Matthew Anthony Gonzalez (Matthew) broke into Porfirio Gonzalez's (Porfirio) home yelling "Police, m–f–!" at Porfirio's daughter, Irene. Fearing the men were not police, Irene ran out the back door to

her neighbor's house and asked him to call the police. Matthew and appellant, both armed with shotguns, went to the bedroom and awakened Porfirio and his wife, Belia. While appellant stood in the bedroom doorway holding his shotgun, Matthew pointed his shotgun at Porfirio and demanded money and drugs. Matthew threatened to kill Porfirio and Belia, and told them to get on the floor. Thinking Matthew would kill him if he got on the floor, Porfirio remained standing. Porfirio told Matthew he didn't have any money, and Matthew then demanded the keys to Porfirio's truck while cursing Porfirio and threatening to kill Belia. Matthew then struck Porfirio at least three times with the butt of the shotgun, and appellant got the truck keys in the living room.

Appellant and Matthew drove off in Porfirio's truck, and Porfirio waved a taxi down and persuaded the driver to help look for the truck. Porfirio spotted appellant and Matthew in the truck about two miles away, with appellant driving. Porfirio asked the taxi driver to follow the truck, but the taxi driver refused. Porfirio told the taxi driver to get out, and Porfirio drove the cab after the truck. Porfirio drove the cab in front of the truck, trying to slow the truck down, and appellant rammed the back of the cab with the front of the truck. Appellant drove away in Porfirio's truck, and Porfirio followed in the cab. Matthew shot at Porfirio, and the shotgun pellets broke the windshield of the taxi cab. Appellant turned into a dead-end street, and stopped. Porfirio stopped behind them, and appellant and Matthew got out of the truck and ran away. Shortly thereafter, the police arrived and arrested Matthew and appellant nearby.

In points one and two, appellant contends the evidence is legally and factually insufficient to support his conviction because there was no evidence to show Porfirio was in fear.

In reviewing the legal sufficiency of the evidence, we consider all the evidence, both State and defense, in the light most favorable to the verdict. *Houston v. State*, 663 S.W.2d 455, 456 (Tex. Crim. App. 1984); *Garrett v. State*, 851 S.W.2d 853, 857 (Tex. Crim. App.

1993). In reviewing the sufficiency of the evidence in the light most favorable to the verdict or judgment, the appellate court is to determine whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *Ransom v. State*, 789 S.W.2d 572, 577 (Tex. Crim. App. 1989), *cert. denied*, 110 S.Ct. 3255 (1990). This standard is applied to both direct and circumstantial evidence cases. *Chambers v. State*, 711 S.W.2d 240, 245 (Tex. Crim. App. 1986). The jury is the exclusive judge of the facts, credibility of the witnesses, and the weight to be given to the evidence. *Chambers v. State*, 805 S.W.2d 459, 462 (Tex. Crim. App. 1991). In conducting this review, the appellate court is not to re-evaluate the weight and credibility of the evidence, but acts only to ensure the jury reached a rational decision. *Muniz v. State*, 851 S.W.2d 238, 246 (Tex. Crim. App. 1993); *Moreno v. State*, 755 S.W.2d 866, 867 (Tex. Crim. App. 1988). In making this determination, the jury can infer knowledge and intent from the acts, words, and conduct of the accused. *Dues v. State*, 634 S.W.2d 304, 305 (Tex. Crim. App. 1982).

Under *Clewis v. State*, 922 S.W.2d 126, 133 (Tex. Crim. App. 1996), a court of appeals reviews the factual sufficiency of the evidence when properly raised after a determination that the evidence is legally sufficient. *Id.* In conducting a factual sufficiency review, the court of appeals views all the evidence without the prism of "in the light most favorable to the prosecution" and sets aside the verdict only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *Id.* In conducting a factual sufficiency review, the court of appeals reviews the fact finder's weighing of the evidence and is authorized to disagree with the fact finder's determination. *Id.* This review, however, must be appropriately deferential so as to avoid an appellate court's substituting its judgment for that of the jury. *Id.* If the court of appeals reverses on factual sufficiency grounds, it must detail the evidence relevant to the issue in consideration and clearly state why the jury's finding is factually insufficient. *Id.* The appropriate remedy on reversal is a remand for a new trial. *Id.*

A person commits aggravated robbery if, in the course of committing theft, and with intent to obtain or maintain control of the property, he intentionally or knowingly *threatens* or places another in fear of imminent bodily injury or death, and uses or exhibits a deadly weapon. TEX. PEN. CODE ANN. §§ 29.02(a)(2) & 29.03(a)(2)(Vernon 1994 & Supp. 1999). The indictment alleged that appellant intentionally or knowingly threatened ***and*** placed Porfirio in fear of imminent bodily injury or death by using a deadly weapon. The State had to prove that allegation beyond a reasonable doubt. *See Taylor v. State*, 637 S.W.2d 929, 930 (Tex.Crim.App. [Panel Op.] 1982); *Michel v. State*, 834 S.W.2d 64, 67 (Tex.App.-Dallas 1992, no pet.).

The application paragraph of the jury charge instructed the jury that they could find appellant guilty as either a principal or a party acting with Matthew. The jury charge further instructed the jury they could find him guilty if they found either appellant or Matthew did *threaten* ***or*** place Porfirio in fear of imminent bodily injury or death. An actor is criminally responsible as a party to an offense if, acting with intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids, or attempts to aid another person to commit the offense. TEX. PEN. CODE ANN. §§ 7.01(a), 7.02(a)(2) (Vernon 1994 & Supp. 1999); *Michel*, 834 S.W.2d at 67.

Although the indictment may allege the differing methods of committing the offense in the conjunctive [and], it is proper for the jury to be charged in the disjunctive [or]. *Kitchens v. State*, 823 S.W.2d 256, 258 (Tex.Crim.App. 1991); *Vasquez v. State*, 665 S.W.2d 484, 486-487 (Tex.Crim.App.1984); *Zanghetti v. State*, 618 S.W.2d 383, 387-388 (Tex.Crim.App.1981). It is appropriate where the alternate theories of committing the same offense are submitted to the jury in the disjunctive [or] for the jury to return a general verdict if the evidence is sufficient to support a finding under any of the theories submitted. *Kitchens*, 823 S.W.2d at 258; *Aguirre v. State*, 732 S.W.2d 320, 326 (Tex.Crim.App.1987) (opinion on rehearing); *Bailey v. State*, 532 S.W.2d 316, 322-323 (Tex.Crim.App.1976).

The jury in this case returned a general verdict that appellant was guilty of aggravated robbery, "as charged in the indictment."

The evidence is clear that Matthew threatened to kill Porfirio, and emphasized his threat by hitting him with the butt of the shotgun. Porfirio also stated he thought Matthew would kill him if he got on the floor. The State met their burden of proving appellant was guilty as a party to Matthew's aggravated robbery of Porfirio by threat of imminent bodily injury or death while exhibiting a deadly weapon, to-wit: a firearm. Based on the record before us, we find that the evidence considered in the light most favorable to the verdict, is legally sufficient to sustain appellant's conviction beyond a reasonable doubt. We further find that the evidence is factually sufficient and not so "contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust." *Clewis*, 922 S.W.2d at 129. Appellant's first and second issues are overruled.

We affirm the judgment of the trial court.

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Bill Cannon
Justice

Judgment rendered and Opinion filed November 18, 1999.

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

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

[*] Senior Justices Ross A. Sears, Bill Cannon, and Joe L. Draughn sitting by assignment.