Affirmed and Opinion filed November 18, 1999.

In The

Fourteenth Court of Appeals

NO. 14-98-00420-CR

LUIS ALONSO MARTINEZ, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 263rd District Court
Harris County, Texas
Trial Court Cause No. 767,426

O P I N I O N

A jury found Luis Alonso Martinez guilty of the offense of aggravated robbery as charged in the indictment and assessed his punishment at twenty years confinement. In three points of error, appellant claims the trial court erred (1) by improperly qualifying prospective jurors on specific sets of facts, (2) in refusing to give appellant's requested instruction on the lesser included offense of robbery, (3) by allowing police officers to testify at the punishment phase about specific bad acts committed by the Mara Salvatrucha gang. We affirm.

Statement of facts:

On September 19, 1997, at about 9:45 in the evening, appellant and two other persons, were walking behind the complainant, Michael Moreno. The complainant, a senior at Robert E. Lee High School, was walking home after finishing a basketball game with his friends. He heard footsteps behind him, turned around to his right and was hit in the jaw by appellant, causing his head to jerk to the left. He was then pushed from the left in his lower back, stumbled backwards, and turned around facing his attackers. There were three males in front of him. They kept asking him where he was from, but he did not answer. One of them said the complainant was in a gang, but the complainant told them he was not. They then asked him for money. The complainant responded that he had just come from the park where he had played basketball and he had no money. They asked for his pager and he did not respond. The man on the complainant's left side lifted up his jersey and showed a chrome pistol tucked in the waistband of his pants. The complainant became very scared and thought he was going to be shot. The complainant then took off the pager and gave it to appellant. Appellant and the other men told the complainant to give them his shoes. He hesitated and the man with the gun pulled up his jersey, placed his hand on the gun, began to pull it out, and the complainant said, "that's when I started taking my shoes off." After the complainant took off his shoes, appellant hit him on the jaw, causing his lip to be cut on his braces and bleed. The complainant testified that appellant was the one who hit him and took the pager and the shoes.

Appellant claims in his first point of error that the trial court committed error by improperly qualifying prospective jurors on specific sets of facts.

Prior to voir dire by the attorneys, the trial court, addressing the range of punishment for aggravated robbery, a first degree felony, gave an example of why the range was so broad, i.e. two to ten years:

> I'll give you a quick example which has nothing to do with this case, but I know this to be the case. If you go in to a grocery store, you're 17. You're an adult now. And as a prank with your friends, you take a pack of lunch meat and you stuff it in your pants and you walk out with that. What is that? Theft. If you stuff it in your pants and a clerk sees you and on the way out she tries to stop you and you push and in pushing her she hits her head against the wall and gets a bump on her head, that's aggravated robbery—excuse me—that's a robbery case. You've turned a simple theft case into a robbery case. Okay. If in the course of saying clerk, give me the $10 in the register, I've got this little penknife, it's this big here, you've just turned a robbery case into an aggravated robbery.
>
> Murder is the same thing . . . you've got a couple that's in their eighties. They've been married 58 years, based on a true story. Wife and husband have always agreed that they would never allow the other to suffer . . . . Sure enough the wife had cancer, suffering terribly. The doctor says to the husband, we can keep your wife in comfort on Demerol for about I think it was 60 days. Then we'll move to morphine which will last about three months. But, unfortunately, even morphine wears off and we think she's probably going to live six months longer than that in terrible pain and there is nothing we can do about that. During the night he listened to her screaming and suffering. He pulls the plug. She dies. That is murder in the State of Texas.

There was no objection by the appellant to either one of the above examples until after the court completed his talk with the jury. The defense attorney approached the bench while the court allowed the jury to stretch, and stated:

> MR. CASTILLO; Your Honor, counsel for the defendant, we'd object to the two—with all due respect, to the two examples cited by His Honor in that the murder case on the patient that is dying and the robbery with a penknife. We would submit to the Court that we would object to that because it's qualifying the jurors on a specific set of facts and we would request that the jury be instructed to disregard those examples and to be told that they cannot be used to qualify the jurors.

THE COURT: And what would you want me to tell the jurors, Mr. Castillo?

MR. CASTILLO: To disregard those examples, that it is improper in my opinion for the jury to be qualified for probation on a specific set of facts and I believe that was what Your Honor did in citing the near death or the death—

THE COURT: That's denied.

Appellant urges that by qualifying jurors on specific facts, the trial court forced them to commit to a given course of reasoning prior to their being selected and prior to their having heard any of the facts of the case. The State contends that appellant's objection was not timely, and that no error has been preserved for the purposes of appeal.

The trial court presented two hypothetical situations to assist the prospective jurors with why they would need to keep an open mind as to the range of punishment. It is proper to use hypothetical fact situations to explain the application of principles of law. *Cuevas v. State,* 742 S. W. 2d 331, 336. n.6 (Tex. Crim. App. 1987), *cert. denied,* 485 U.S. 1015 (1988); *Henry v State,* 800 S. W. 2d 612, 616 (Tex. App.—Houston [14th Dist.] 1990, no pet.). It is improper, however, to inquire how a veniremember would respond to particular circumstances as presented in a hypothetical question. *Henry,* 800 S.W.2d at 616. In this case, the trial court did not ask the veniremembers to commit to a certain set of facts; he merely explained a principle of law.

Further, the contemporaneous objection rule states that "appellate courts will not consider any error that counsel for the accused could have called, but did not call, to the attention of the trial court at the time when such error could have been avoided or corrected by the trial court." *Henry,* 800 S.W.2d at 616; TEX. R. APP. P. 33.1(a)(1). Appellant's first point of error is overruled.

Appellant contends in his second point of error that the trial court erred in refusing

to give appellant's requested instruction on the lesser included offense of robbery. Appellant claims there is no evidence to show that he knew that a deadly weapon had been used.

In determining whether a defendant is entitled to a charge on a lesser included offense, we must consider all the evidence introduced at trial, whether produced by the State or the defendant. *Penry v State,* 903 S. W. 2d 715, 755 (Tex. Crim. App. 1995), *cert denied,* 516 U.S. 977 (1995). The court uses a two prong test to make this determination. First, the lesser included offense must be included within the proof necessary to establish the offense charged. Second, there must be some evidence in the record that if the defendant is guilty, he is guilty only of the lesser included offense. *Id.* at 755. 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. *Id*. at 755. Thus, if evidence from any source raises the issue of a lesser included offense, a charge on that offense must be included in the court's charge. *Saunders v. State,* 840 S.W.2d 390, 391 (Tex. Crim. App. 1992).

Robbery is a lesser included offense of aggravated robbery. *Jones v. State,* 921 S.W.2d 361, 363 (Tex. App.—Houston [1st Dist.] 1996, pet. ref'd). A person commits 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. TEX. PENAL CODE ANN. § 29.02(a)(2) (Vernon 1994). If, in the course of committing a robbery, a person uses or exhibits a deadly weapon, he has committed aggravated robbery. TEX. PENAL CODE ANN. § 29.03(a)(2) (Vernon 1994).

A review of the charge of the court indicates that the jury was charged in accordance with the law of parties. TEX. PENAL CODE ANN. Sec. 7.02(a)(2) (Vernon 1994). *Brown v. State*, 716 S. W. 2d 939, 944 (Tex. Crim. App. 1986). Appellant does not challenge the

evidence that shows his co-defendant exhibited a deadly weapon. Appellant claims he was entitled to a charge on the lesser included offense of robbery because he did not know his co-defendant had exhibited a gun. Because it is uncontroverted that a weapon was used in the offense, appellant, if guilty as a party, could only have been guilty of aggravated robbery. *Bruton v. State,* 921 S.W.2d 531, 538 (Tex. App.—Fort Worth 1996, pet. ref'd). The trial court did not err in denying appellant's request for a charge on the lesser included offense of robbery. Appellant's second point of error is overruled.

In his third point of error, appellant contends the trial court erred by allowing police officers to testify at the punishment phase about specific bad acts committed by the Mara Salvatrucha gang.

A hearing was held outside the presence of the jury, at which time the State presented two witnesses. Officer Faulhaber testified that appellant admitted he was a member of MS 13, the Mara Salvatrucha street gang. He testified that the gang was known to be associated with "any criminal activity such as murder all the way to theft." On cross-examination Officer Faulhaber admitted he was unaware of any of these gang-related offenses being committed by appellant. Officer Tillery also testified that he was aware of appellant's membership in a gang and the gang's reputation for violent crime. The trial court ruled that the evidence was admissible.

Article 37.07 § 3(a) of the Code of Criminal Procedure states that evidence, so long as it is permissible under the Rules of Evidence, may be offered as to "any matter the court deems relevant to sentencing, including but not limited to the prior criminal record of the defendant, his general reputation, his character [and] an opinion regarding his character[.]"

Gang membership is admissible to show the character of the accused. *Beasley v State*, 902 S. W .2d 452, 457 (Tex. Crim. App. 1995). To prove the relevance of a defendant's membership in an organization or group, the State must show: (1) proof of the

group's violent and illegal activities and (2) the defendant's membership in the organization. *Mason v State,* 905 S. W. 2d 570, 577 (Tex. Crim. App. 1995), *cert. denied,* 516 U.S. 1051 (1996). Officer Faulhaber's testimony establishes this relevancy. It is not necessary to link the accused to the bad acts or misconduct generally engaged in by the gang so long as the jury is (1) provided with evidence of the defendant's gang membership, (2) provided with evidence of character and reputation of the gang, (3) not required to determine if the defendant committed the bad acts or misconduct and (4) only asked to consider reputation or character of the accused. *Beasley v State*, 902 S.W.2d. at 457. In this case, Officer Faulhaber testified that appellant admitted gang membership and the gang had a reputation for violent crime. Further, he testified he had no evidence that appellant had committed the crimes attributed to the gang. Lastly, the evidence was admitted solely as character evidence during the punishment phase of trial. The trial court did not err in allowing the officer to testify as to the specific bad acts committed by the Mara Salvatrucha gang. Appellant's third point of error is overruled.

The judgment of the trial court is affirmed.

/s/ D. Camille Hutson-Dunn
Justice

Judgment rendered and Opinion filed November 18, 1999.

Panel consists of Justices Amidei, Edelman and Hutson-Dunn.[1] (J. Edelman concurs in the result only).

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

[1] Senior Justice D. Camille Hutson-Dunn sitting by assignment.