Affirmed and Opinion filed December 2, 1999.

In The

Fourteenth Court of Appeals

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NO. 14-98-00829-CR

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ARON REYNA, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 209th District Court
Harris County, Texas
Trial Court Cause No. 741,552

O P I N I O N

After appellant was convicted of aggravated robbery, he pled true to two enhancement paragraphs in the indictment and was sentenced to thirty years imprisonment. On appeal, appellant raises four points of error.

Jorge Olivares, the complainant, stopped at a drug store in Houston to purchase some items. Upon leaving the store, the complainant met a co-worker, who asked complainant to show him his car, a yellow Geo Storm, equipped as a "lowrider." While the complainant was showing the car and its stereo system to the co-worker, he noticed appellant and another individual pass by them in the parking lot. The duo later

returned as the complainant was about to leave and asked appellant and his co-worker for directions to another part of town. As they related the requested directions, the appellant pulled a gun from the waistband of his pants and ordered the complainant out of his car. The complainant exited the vehicle and he and his friend ran away from the scene, seeking refuge behind a brick wall. From their vantage point, they witnessed the appellant enter the vehicle on the driver's side as his accomplice entered on the passenger side. They then watched the appellant and his cohort leave the scene with the complainant's car.

The car was recovered the next day. The vehicle's engine, body, and stereo equipment were damaged, and the car's rims were missing. Appellant's fingerprints were found on the outside surface of the vehicle's passenger-side window. Based on these fingerprints, police officers constructed a photographic lineup. The officers arrested appellant after the complainant and his co-worker identified him from this lineup.

Appellant raises four points of error. Appellant first complains that his sentencing was improper, since he was sentenced by the trial court prior to entering a plea to the enhancement paragraphs. Appellant's second point of error challenges the lack of an instruction on the lesser included offense of unauthorized use of a motor vehicle. In points of error three and four, appellant challenges the legal and factual sufficiency of the evidence supporting his conviction. We affirm.

In his first point of error, appellant asserts that he was improperly sentenced in violation of TEX. CODE CRIM. PROC. ANN. art. 36.01(a)(1), which outlines the proper order for the proceedings in a criminal trial. The particular provision in question states:

> "The indictment or information shall be read to the jury by the attorney prosecuting. When prior convictions are alleged for purposes of enhancement only and are not jurisdictional, that portion of the indictment or information reciting such convictions shall not be read until the hearing on punishment is held as provided in Article 37.07"

TEX. CODE CRIM. PROC. ANN. art. 36.01(a) (Vernon 1994).

Appellant contends that the trial court violated this provision by sentencing him prior to the time he entered pleas to the indictment's enhancement paragraphs. The State argues that appellant did not object

to this defect and, thus, failed to preserve any error. Even if the error were preserved, the State further claims that no error was committed. We agree with the State's arguments and find appellant's position untenable.

In an effort to show that he did not waive this error, appellant relies on *Welch v. State*, 645 S.W.2d 284 (Tex. Crim. App. 1983) (en banc). There, the prosecution presented evidence relevant to the defendant's punishment prior to the reading of the enhancement paragraphs. *Id*. at 284-85. Once the discrepancy was objected to, the enhancement paragraphs were read and defendant entered a plea of not true. *Id*. at 285. Rather than recall the witness, who was necessary to show that the defendant committed one of the crimes alleged in the enhancement paragraphs, the State proceeded with its case. *Id*. The defendant objected to the evidence and asked that it be removed from the jury's consideration. *Id*. The court held that the trial court committed reversible error because the jury was allowed to consider this evidence, and the defendant's objection was sufficient to point out this defect to the trial court. *Id*.

The present case is distinguishable from *Welch*. Here, unlike the situation in that case, defendant did not challenge the allegations in the enhancement paragraphs. Further, appellant in this case did not object to the order in which the enhancement paragraphs were read. Because appellant lodged no objections and filed no post-trial motions, we do not believe that appellant properly preserved this error, and thus has not properly presented this error to us for review. TEX. R. APP. P. 33.1(1); *Warren v. State*, 693 S.W.2d 414, 416 (Tex. Crim. App. 1985) (stating that the proper post-trial methods to preserve error when the trial court's failure to read enhancement paragraphs is discovered after trial are a motion for new trial, a bill of exception, or a motion to arrest the judgment). Even assuming, however, that this error was not waived, we do not believe that error was committed.

Appellant relies on *Turner v. State*, 897 S.W.2d 786 (Tex. Crim. App. 1995), to support his contention that the trial court erred. In *Turner*, the Court of Criminal Appeals points out that the reading of the enhancement paragraphs at the penalty stage of a criminal trial is mandatory. *Id*. at 788. The reason for this rule is that reading the enhancement paragraphs informs the defendant of the charges against him and informs the jury of the particular charge against the defendant. *Id*. Unless a plea is entered to the

enhancement paragraphs, no justiciable issue is joined between the State and the defendant. *Id*. Thus, a failure to read the enhancement paragraphs is not subject to harmless error analysis, particularly since "a defendant's right, under Article 36.01, to stand before the jury and plead 'untrue' to the enhancement paragraphs is a valuable right" which might give the jury "the impression the defendant concedes the State's case against her relieving the State of the obligation to prove what it alleged." *Id*. at 789.

We do not believe that *Turner* is controlling in this case. The trial court judge read the enhancement paragraphs, the sentence was assessed by the trial court rather than the jury, and the appellant conceded the truth of the enhancement paragraphs, making it unnecessary for the State to provide any further evidence on those issues. *See Harvey v. State*, 611 S.W.2d 108, 111 (Tex. Crim. App. 1981); *Martin v. State*, 795 S.W.2d 289, 291-92 (Tex. App.–Houston [14th Dist.] 1990, no pet.). Also, appellant agreed at trial that if the jury returned a verdict of guilty, the trial court would enter a thirty-year sentence. All of these facts distinguish *Turner* from the present case.

A case with a greater factual similarity to the present case is *Ridge v. State*, 855 S.W.2d 234 (Tex. App.–Fort Worth 1995, no pet.). In that case, the enhancement paragraphs were not read until after the State presented character witnesses at the punishment phase of the defendant's trial. *Id*. at 235. After defendant objected, the enhancement paragraphs were read but the character witnesses were not recalled. *Id*. The court held that issues upon which to try the case were joined once the indictment was read, and the delay in reading the indictment did not contribute to his punishment. *Id*. at 236.

Here, we cannot fathom appellant's assertion that the trial court erred, especially since the enhancement paragraphs were read to the appellant, and the appellant agreed to the thirty year sentence prior to the jury's verdict. It is obvious that the delay in reading the enhancement paragraphs did not contribute to appellant's punishment. Since the trial court committed no error, we overrule appellant's first point of error.

In his second point of error, appellant asserts that the trial court committed reversible error by failing to include an instruction on the lesser included charge of unauthorized use of a motor vehicle. The State challenges this assertion by arguing that the appellant failed to properly request this charge or object

to its absence, therefore waiving any error. We disagree with the State's waiver argument in light of *Almanza v. State*, 686 S.W.2d 157 (Tex. Crim. App. 1984), and its progeny.

In *Abdnor v. State*, 871 S.W.2d 726 (Tex. Crim. App.1994), the Court of Criminal Appeals set forth the appropriate method for analyzing errors in jury charges, which recognizes the intent of the Texas Legislature as evidenced in TEX. CODE CRIM. PROC. ANN. art. 36.19. First, the reviewing court must determine whether the jury charge contains error. Second, the court must determine whether sufficient harm resulted from the error to require reversal. The standard to determine whether the charging error was sufficiently harmful to require reversal depends upon whether appellant objected. Where there has been a timely objection made at trial, an appellate court will search for only "some harm." By contrast, where the error is urged for the first time on appeal, a reviewing court will search for "egregious harm." *Abdnor*, 871 S.W.2d at 731-32 (citing *Almanza*, 686 S.W.2d at 171, and *Arline v. State*, 721 S.W.2d 348, 351 (Tex. Crim. App.1986).

Error in the charge can be preserved in two ways. Error in the charge can be preserved by tendering a written instruction to the trial court, requesting that it be given to the jury in the charge. TEX. CODE CRIM. PROC. ANN. art. 36.15 (Vernon 1994). Error in the charge can also be preserved if the party complaining about the charge objects with enough specificity to inform the trial court of the grounds of the objection and afford it an opportunity to correct the error before the charge is read to the jury. *Id*. art. 36.14; *Pennington v. State*, 697 S.W.2d 387, 390 (Tex. Crim. App. 1985); *Jones v. State*, 962 S.W.2d 96, 98-99 (Tex. App.–Houston [1st Dist.] 1997), *aff'd*, 984 S.W.2d 254 (Tex. Crim. App. 1998).

Here, appellant did neither. Rather, appellant contends that a failure to instruct the jury on the lesser included offense was fundamental error. Accordingly, under *Almaza*, we must analyze the jury charge, evidence, arguments of counsel, and all other relevant information in determining if the error in denying the charge was so egregious that the defendant did not have a fair and impartial trial. *See* 686 S.W.2d at 171. Our first step, therefore, is to analyze whether or not appellant was entitled to an instruction on the lesser-included offense.

In determining whether an instruction on a lesser included offense is required, a two-step analysis must be used. *Royster v. State*, 622 S.W.2d 442, 446 (Tex. Crim. App. 1981). First, the lesser included offense must be included within proof necessary to establish the offense charged. *Id*. Secondly, there must be some evidence in the record that would permit a jury rationally to find that if the accused is guilty, he is guilty of only the lesser offense. *Rousseau v. State*, 855 S.W.2d 666, 672-73 (Tex. Crim. App. 1993).

Appellant correctly notes that under certain circumstances, unauthorized use of a motor vehicle may be a lesser included offense of aggravated robbery. *See Griffin v. State*, 614 S.W.2d 155, 158 n. 4 (Tex. Crim. App.1981); *Pierson v. State*, 689 S.W.2d 481, 482 (Tex. App.–Houston [14th Dist.] 1985, pet. ref'd). However, an instruction on the lesser offense is not required merely because a lesser crime is included within the proof of the greater violation. *Royster*, 622 S.W.2d at 446 (citing *McBrayer v. State*, 504 S.W.2d 445, 447 (Tex. Crim. App.1974)). Rather, there must be evidence in the record permitting the jury to find rationally that the defendant, if guilty, is guilty only of the lesser offense. *Rousseau*, 855 S.W.2d at 672-73.

An individual is guilty of unauthorized use of a motor vehicle if he intentionally or knowingly operates another's vehicle without the effective consent of the owner. TEX. PEN. CODE ANN. § 31.07 (Vernon 1994). A person commits aggravated robbery if, while unlawfully appropriating property with the intent to deprive the owner of the property, he uses or exhibits a deadly weapon or causes serious bodily injury to another. TEX. PEN. CODE ANN. § 29.03(a)(2) & § 31.03(a) (Vernon 1994). To justify an instruction on the lesser included offense of unauthorized use in an aggravated robbery case, some evidence must be present in the record that would allow a jury rationally to find that appellant did not use or exhibit a deadly weapon and did not intend to permanently deprive the victim of his property. We find no such evidence to support these distinctions.

Appellant offered no evidence tending to establish that he did not use a deadly weapon in the robbery. Further, he offered no evidence that he had no intent to permanently deprive the victim of his property. Though the jury is entitled to believe or disbelieve evidence in finding a defendant guilty of a

lesser included offense, *Bell v. State*, 693 S.W.2d 434, 442 (Tex. Crim. App.1985), this discretion is limited to conflicting evidence. *Aikens v. State*, 790 S.W.2d 66, 70 (Tex. App.–Houston [14th Dist.] 1990, no pet.). Since appellant presented no evidence to contradict the State's assertions that he used a firearm during the course of the robbery and intended to permanently deprive the complainant of his property, there was no evidence upon which to find appellant guilty only of the lesser included offense. Accordingly, we find no error in the trial court's failure to instruct the jury on the lesser included offense of unauthorized use of a motor vehicle and overrule appellant's second point of error.

In his third and fourth points of error, appellant challenges the legal and factual sufficiency of the State's evidence. Specifically, appellant contends that the complainant's description of appellant contained errors. Appellant asserts that since the complainant mistakenly told the investigating officer that appellant was taller than the complainant and failed to mention the teardrop tattoo under appellant's eye, the State did not have sufficient evidence to convict appellant.

In reviewing legal sufficiency challenges, appellate courts are to view the evidence in the light most favorable to the prosecution, overturning the lower court's verdict only if a rational trier of fact could not have found all of the elements of the offense beyond a reasonable doubt. *Santellan v. State*, 939 S.W.2d 155, 160 (Tex. Crim. App. 1997) (citing *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2871, 2789, 61 L.Ed.2d 560 (1979)).

In the present case, when all of the evidence is viewed in the light most favorable to the prosecution, the State's evidence is sufficient to support appellant's conviction. Here, though the complainant testified that he was shorter than the appellant, the testimony of one police officer showed that this was not an uncommon occurrence and it had been his experience that height was not generally useful in identifying suspects. The State also provided an explanation for this difference based on the types of shoes worn by appellant and the complainant on the night the robbery occurred. Further, though the complainant and his friend failed to mention appellant's facial tattoo in describing the suspect to the police, the State presented testimony that both had no problem identifying appellant in a photographic lineup. The State also presented testimony that appellant's fingerprints were found on the vehicle. Based on this evidence, we hold that a

rational jury could have found that appellant was the person who committed the crime. We overrule appellant's third point of error.

In reviewing factual sufficiency questions, the court of appeals must view all 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 or unjust. *Clewis v. State*, 922 S.W.2d 126, 129 (Tex. Crim. App. 1996). The court accomplishes this objective by viewing all of the evidence adduced at trial, using enough deference to keep the appellate court from substituting its own judgment for that of the fact finder. *Santellan*, 939 S.W.2d at 164. The appellate court will overrule the fact finder only when its finding is "manifestly unjust," "shocks the conscience," or "clearly demonstrates bias." *Id*. at 165 (citing *Clewis*, 922 S.W.2d at 135).

In the present case, appellant claims that the incorrect description provided by the complainant makes his conviction factually insufficient. After a careful review of the entire record, we find appellant's conviction to be based on factually sufficient evidence, and do not find the verdict shocking, manifestly unjust, or clearly biased.

Here, the complainant testified that the appellant was about five feet eight inches tall. In contrast, the complainant testified that he was five feet six to five feet seven inches tall. Appellant points out that this assertion was not supported by an in-court height comparison between appellant and complainant, which revealed that the complainant was taller than appellant. Further testimony revealed, on the date of the robbery, appellant was wearing tennis shoes, while the complainant was wearing slippers, showing that the difference in height could have been due to the shoes worn by the two men on the day of the robbery. Further, the State presented police testimony showing that most crime victims perceive the perpetrator as being taller than he actually is, making the height of the suspect less important than other features.

Appellant further attacks the factual sufficiency of the evidence based on complainant’s failure to tell police about appellant’s tattoo. Appellant put on testimony that he had a teardrop-shaped tattoo under one eye on the date the robbery occurred–a fact not noted by the complainant or his friend in describing the suspect to police. Police officers testified that they asked the complainant about tattoos, which are

important for identification purposes, but neither the complainant nor his friend mentioned the presence of the tattoo. Further evidence revealed that the parking lot where the robbery occurred was brightly lit, making the tattoo visible. The complainant testified that he saw the tattoo and told the investigating officer about it, but did not know whether or not the officer put this in his report. The complainant's friend testified that he did not remember the suspect having a tattoo. Other evidence showed that, despite the presence of the tattoo on appellant's face in the photographic lineup shown to the complainant and his friend, neither had a problem independently identifying appellant as the person who took the car from the complainant at gunpoint. The State also presented evidence that the photographic lineup was prepared based on the presence of appellant's fingerprints on the car after it was recovered.

Based on this evidence, we find that appellant's conviction was based on factually sufficient evidence and overrule his fourth point of error.

The judgment of the trial court is affirmed.

/s/ Paul C. Murphy
Chief Justice

Judgment rendered and Opinion filed December 2, 1999.

Panel consists of Chief Justice Murphy and Justices Anderson and Hudson.

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