Affirmed and Opinion filed April 6, 2000.

In The

Fourteenth Court of Appeals

NO. 14-99-00271-CR

LEROY MAJOR, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 263rd District Court
Harris County, Texas
Trial Court Cause No. 793,773

O P I N I O N

Appellant, Leroy Major, appeals his conviction by a jury for robbery. The jury also found two enhancement paragraphs true and assessed ninety-nine years confinement. Appellant argues that: (1) the evidence was legally and factually insufficient to support his conviction for robbery; (2) he was denied effective assistance of counsel; and (3) the court erred in failing to hold a hearing on his motion to dismiss appointed counsel. We affirm.

Facts

Appellant and his unidentified companion, described as a heavy-set Hispanic male, went to the Home Depot store in Spring. Appellant accompanied his friend as he purchased two power painters. Allen Roseman, the cashier who rang up the sale, witnessed the two men exit the store at about 8:11 p.m.

At about 8:20 p.m., David Gilliam, the district loss control manager, saw appellant for the first time. He observed appellant, empty-handed, enter the store through the exit doors and proceed to the aisle where the power painters were located. He watched appellant put two power painters into a shopping cart. Gilliam then observed appellant push his cart through the store, past the last cash register. Via his walkie-talkie, Gilliam instructed an assistant manager, Lee Raimondo, to stop appellant at the exit. Raimondo asked appellant to see his receipt for the power painters. Appellant produced a receipt for two power painters. Raimondo noticed the receipt was for two power painters sold at "an earlier time" and returned it to appellant.

Within seconds, Gilliam arrived. He too asked appellant to show his receipt. This time, appellant became very hostile and refused to produce it. Gilliam told appellant to come back into the store to talk about the merchandise. Appellant backed out of the store, leaving the power painters. He then reached under his shirt and threatened, "If you don't leave me alone, I am going to shoot your f . . . . . a . ." Appellant threatened to shoot Gilliam several times. But when appellant pulled his shirt up further, Gilliam saw there was no weapon. Gilliam and another employee then followed appellant. Appellant yelled to a heavy-set Hispanic man sitting in a car, "Ron, get my gun so we can shoot these m . . . . . f . . . . . ." The car started to leave but Gilliam and two employees were able to detain appellant.

After the incident, Gilliam testified he checked the store's inventory by computer and saw there were supposed to have been six power painters in the store that day. Subtracting the two purchased by appellant's companion, he said there should have been four left. However, when he checked the shelf, there were only two left.

Legal Sufficiency

Appellant first claims the evidence was legally insufficient to prove the offense of robbery. In reviewing legal sufficiency, we view the evidence in the light most favorable to the verdict. *See Narvaiz v. State*, 840 S.W.2d 415, 423 (Tex. Crim. App.1992) The critical inquiry is whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *See McDuff v. State*, 939 S.W.2d 607, 614 (Tex. Crim. App. 1997). This same standard of review applies to cases involving both direct and circumstantial evidence. *See King v. State*, 895 S.W.2d 701, 703 (Tex. Crim. App. 1995). On appeal, this court does not re-evaluate the weight and credibility of the evidence; we consider only whether the jury reached a rational decision. *See Muniz v. State*, 851 S.W.2d 238, 246 (Tex. Crim. App. 1993).

Appellant argues that the evidence is insufficient because: (1) the State did not produce evidence that the power painters, the subject of the offense, were not the same as the ones that were purchased earlier; (2) his production of a "valid" sales receipt established he was in lawful possession of the two power painters, the subject of the offense; and (3) the facts and circumstances gave rise to the equally possible inference that appellant lawfully possessed those power painters. We disagree with each contention.

(1) Not the same power painters: The cashier, Roseman, testified that appellant left the store after the purchase of the power painters. Gilliam then testified that an *empty-handed* appellant later entered the store and took two power painters off the store's shelf. Roseman's and Gilliam's combined testimony, therefore, provides sufficient evidence that the power painters appellant removed from the shelf were not the earlier-purchased power painters.

(2) Not in lawful possession: In light of Roseman's testimony that appellant and his companion had bought two power painters moments earlier, the receipt merely establishes that appellant may have lawfully possessed the earlier purchase. It does not establish his lawful possession to the power painters he later took off the shelf. The evidence was therefore sufficient for a jury to conclude that appellant was not in lawful possession of the power painters he tried to remove from the store.

(3) Not an equally possible inference: Based on the evidence, it is difficult to envision a scenario in which appellant lawfully possessed the power painters. In the few minutes after the 8:11 p.m. purchase, appellant likely must have

- left the store,
- returned and put the two power painters back on the shelf,
- left the store again,
- returned again through the exit door,
- then taken the two power painters off the shelf and tried to leave with them.

Was such a tortuous sequence possible? Yes, but not, as appellant contends, equally probable as the one that leads to an inference of his guilt.

Our review of the record yields ample evidence to support appellant's conviction. Gilliam testified he saw an empty-handed appellant walk in the store, remove two power painters from the shelf, and try to leave the store without paying for them. The verdict is further supported by appellant's attempt to flee when asked to come back in the store,[1] appellant's multiple threats to shoot the employees, and two power painters being unaccounted for in the store's inventory.

We therefore hold the evidence was sufficient to enable a rational jury to find beyond a reasonable doubt appellant was guilty of robbery. We overrule this point of error.

Factual Sufficiency

In reviewing factual sufficiency, we 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 and unjust. *See Cain v. State*, 958 S.W.2d 404, 407 (Tex. Crim. App.1997); *Clewis v. State*, 922 S.W.2d 126, 129 (Tex. Crim. App.1996). When conducting a factual sufficiency review, we must observe the principle of deference to jury findings. *Cain*, 958 S.W.2d at 407. The jury is the judge of the facts, and an appellate court should only exercise its fact jurisdiction to prevent a manifestly unjust result. *Id.; Clewis*, 922 S.W.2d at 135.

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[1] Evidence of flight can circumstantially support an inference of guilt. *See Bigby v. State*, 892 S.W.2d 864, 884 (Tex. Crim. App. 1994).

Appellant fares no better under this standard. The verdict is not contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Rather, the evidence, viewed in its entirety, clearly supports the conclusion that appellant tried to get four power painters for the price of two. This point of error is overruled.

Ineffective Assistance of Counsel

Next, appellant contends he was denied effective assistance of counsel because trial counsel did not request the lesser included offense of misdemeanor assault.

The standard of review for evaluating claims of ineffective assistance of counsel is set forth in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). *See Hernandez v. State*, 726 S.W.2d 53 (Tex. Crim. App. 1986). It is the appellant's burden to prove ineffective assistance of counsel. *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064. In meeting his burden, he must overcome the strong presumption that, under the circumstances, the challenged action might be considered sound trial strategy. *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2064.

Although appellant filed a motion for new trial, he did not raise his ineffective assistance of counsel claim and failed to develop a record that might have supported his claim. Thus, to find that trial counsel was ineffective based on appellant's asserted ground would call for speculation, which we will not do. *See Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App.1994).[2]

In the absence of a record supporting his claim, appellant has failed to overcome the strong presumption that trial counsel's strategy was reasonable from counsel's perspective at trial. This point is overruled.

Hearing to Remove Court-Appointed Counsel

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[2] We note that it is not uncommon for the trial counsel to forego the lesser-included offense and employ an "all or nothing" tactic to increase the chances of an acquittal. There is nothing in the record to suggest that this was not the case here. *See, e.g., Wood v. State,* 4 S.W.3d 85, 87-88 (Tex. App.–Fort Worth 1999, no pet. h.); *Lynn v. State*, 860 S.W.2d 599, 603 (Tex. App.--Corpus Christi 1993, pet. ref'd).

Finally, appellant argues the court erred in not holding a hearing to remove his court-appointed counsel and appoint other counsel. Appellant filed two pro se motions prior to trial listing numerous grievances with his counsel. Appellant did not request a hearing on either motion. On the day of trial, appellant filed a pro se motion to recuse the trial judge because appellant was forced to go to trial with counsel with whom he had a "conflict of interest." The motion to recuse did not state the nature of the conflict.[3] Appellant did not request a hearing on the recusal motion but the docket sheet reflects "Came to be heard defendant's motion for recusal. Court denied said motion."

Appellant has not preserved anything for review because: (1) the record does not reflect he ever requested a hearing on his motions to remove counsel; and (2) his motion to recuse was not timely brought.

In *Malcom v. State*, 628 S.W.2d 790 (Tex. Crim. App. 1982), the court of criminal appeals held that to preserve error on the trial court's failure to conduct a hearing on the defendant's pro se motions to dismiss counsel, the defendant was required to request a hearing. *Id*. at 792. Appellant has likewise waived error by failing to request a hearing on his motions.

Further, the motion to recuse was not timely brought to the court's attention. If an accused is dissatisfied with appointed counsel, he must bring his complaint to the trial court's attention in a timely manner. *See Hubbard v. State*, 739 S.W.2d 341, 344 (Tex. Crim. App.1987). An accused may not wait until the day of trial to demand different counsel or to request that counsel be dismissed so that he may retain other counsel. *See Keys v. State*, 486 S.W.2d 958 (Tex. Crim. App. 1972).

Finally, appellant has failed to present a record showing what action was taken on his motion to recuse. The docket sheet reflects that the motion was "heard," however, we have no way to determine what transpired. Appellant did not present a record for us to determine how or whether the merits of his claim were reviewed. Therefore, he has not presented anything to support his claim of error. *Accord Jones v. State*, 496 S.W.2d 566, 571 (Tex. Crim. App. 1973) (failure to request court reporter to take voir dire examination of jury panel constituted a waiver and not basis for reversal). This issue is overruled.

The judgment of the trial court is affirmed.

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[3] Though it is doubtful the motion to recuse should also be construed as a motion to dismiss counsel, we will examine it as if it were.

/s/ Don Wittig
Justice

Judgment rendered and Opinion filed April 6, 2000.

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

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