Affirmed and Opinion filed May 11, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-98-00110-CR

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ANTONIO DEJUAN HENRY, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 351st District Court
Harris County, Texas
Trial Court Cause No. 720,381

O P I N I O N

Appellant, Antonio Dejuan Henry, was indicted for the offenses of capital murder and aggravated robbery. A jury convicted him of the lesser offense of aggravated robbery and assessed punishment at forty-five years confinement in the Texas Department of Criminal Justice – Institutional Division. In seven points of error, appellant challenges the legal and factual sufficiency of the evidence, the trial court's failure to give the jury an accomplice witness instruction, and the trial court's refusal to allow a witness to testify who violated the "Rule." We affirm the trial court's judgment.

FACTUAL BACKGROUND

Appellant and two friends, Chris Meullion and Jaray Henderson, went to the mall one evening in Henderson's dark green Nissan truck. Henderson was driving, appellant was in the passenger seat, and Meullion was in the bed of the truck. James Coker and Jason Ramirez, the complainants, were also at the mall. Coker was driving his dark colored Honda Civic. Coker noticed three black males in a dark Nissan truck staring at his car. Meullion liked the rims on the Civic and told Henderson to follow the complainants.

After stopping at a gas station, Coker again noticed the same three individuals staring at his Civic as he passed the truck. The complainants drove to a friend's house and the truck followed. Coker pulled into a driveway and Henderson stopped the truck in the road behind the Civic.

Appellant asked Meullion what he was going to do. Meullion replied, "I'm gonna jack em" and pulled out a chrome plated automatic pistol and "jacked a round into it." Appellant and Henderson laughed and told Meullion, "he wasn't gonna do it, he was scared." Meullion, with a blue bandana covering his face, jumped out of the bed of the truck and ran to the driver's side of the Civic. Meullion pointed the gun at Coker's head and told him he was being "jacked." Meullion ordered the complainants back into the Civic and he got in the back seat. Meullion instructed Coker to drive away and to not try anything stupid because his friends were following in the truck.

Meullion had Coker drive to a secluded parking lot at the Baytown Civic Center. Appellant and Henderson followed and parked the truck near the Civic. At gun point, Meullion ordered the complainants out of the Civic. He forced them to lie face down on the ground with their hands behind their heads while he had a conversation with appellant and Henderson. Meullion attempted to start Coker's car while Henderson and appellant (one of them holding the gun) stood watch over the complainants. Meullion attempted to drive the Civic, but did not know how to drive a car with manual transmission. Meullion asked Henderson and appellant

if either of them could drive a "stick shift" – neither could.

Appellant or Henderson told Meullion that a car was coming and suggested they all act normal. Meullion ordered the complainants back into the Civic and directed Coker to drive to Holloway Park. Appellant and Henderson continued to follow in the truck.

Once they arrived at the park, Meullion ordered the complainants out of the car. Again, the complainants were instructed to lie face down on the ground with their hands behind their heads. Coker heard Meullion whispering with appellant and Henderson. Appellant and Henderson asked Meullion what he planned to do with them. Meullion did not answer. Henderson suggested Meullion "knock them in the head" because there were houses nearby.

Meullion told the complainants to get up and walk down a trail into a wooded area. Appellant and Henderson stayed in the truck. When the complainants came to the bank of a ditch, Meullion instructed them to kneel. Meullion shot Ramirez in the back of the head. When Coker heard the shot, he jumped up and started running. Meullion shot four bullets at Coker, striking him twice. Appellant heard the gun shots. Severely wounded and bleeding, Coker ran and swam through the ditch and up to a road where he flagged down a passing car for help. Ramirez died at the scene as a result of the gunshot wound.

After having been in the woods two to five minutes, Meullion ran out and told Henderson and appellant to drive to Terrance Arnold's house. Henderson and appellant went to Arnold's house. Fifteen minutes later, Meullion arrived at Arnold's house in the Civic and recruited another friend, Kendall Cagan, to help dispose of the stolen car. Meullion and Cagan drove the stolen Civic to a wooded area, with Appellant and Henderson following in Henderson's truck. Appellant took a cell phone from the Civic and, the next day, appellant was overheard discussing who was going to get the items taken from the complainant's car.

LEGAL AND FACTUAL SUFFICIENCY

In points of error one through four, appellant challenges the legal and factual

sufficiency of the evidence to support the jury's verdict. He avers the evidence was insufficient to prove he was a party to the offense.

In conducting a legal sufficiency review of the evidence, an appellate court must view the evidence in the light most favorable to the verdict and determine if any rational fact finder could have found the crime's essential elements to have been proven beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 319 (1979). The reviewing court will examine the entire body of evidence; if any evidence establishes guilt beyond a reasonable doubt, and the fact finder believes that evidence, the appellate court may not reverse the fact finder's verdict on grounds of legal insufficiency. *See id*. The standard of review is the same for both direct and circumstantial evidence. *See Geesa v. State*, 820 S.W.2d 154, 162 (Tex. Crim. App. 1991).

In reviewing the evidence for factual sufficiency, an appellate court will examine all the evidence without the prism of "in the light most favorable to the prosecution," and will set aside the jury's verdict only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *See Clewis v. State*, 922 S.W.2d 126, 129 (Tex. Crim. App. 1996). The court reviews the evidence weighed by the jury that tends to prove the existence of the elemental fact in dispute and compares it with the evidence that tends to disprove that fact. *See Jones v. State*, 944 S.W.2d 642, 647 (Tex. Crim. App. 1996). The appellate court is authorized to disagree with the jury's determination, even if probative evidence exists that supports the verdict. *See id*. However, a factual sufficiency review must be appropriately deferential so as to avoid substituting our own judgment for that of the fact finder. *See id*. Accordingly, we are only authorized to set aside a jury's finding in instances where it is manifestly unjust, shocks the conscience, or clearly demonstrates bias. *See id*.

The State alleged that appellant committed the offense of aggravated robbery and had the burden to prove that appellant, or someone for whom he is criminally responsible, in the course of committing theft, intentionally, or knowingly, threatened, or placed another person

in fear of imminent bodily injury or death, and exhibited a deadly weapon. *See* TEX. PEN. CODE ANN. § 29.03 (Vernon 1994). To establish liability as a party in addition to the illegal conduct by the primary actor, the evidence must show that the accused harbored the specific intent to promote or assist the commission of the offense. *See Pesina v. State,* 949 S.W.2d 374, 382 (Tex. App.—San Antonio 1997, no pet.). The State must prove that at the time of the commission of the offense, the parties were acting together, each doing some part of the execution of the common plan. *See Brooks v. State*, 580 S.W.2d 825, 831 (Tex. Crim. App. 1979). The essential elements of the parties' culpability is the common design to do a criminal act. *See id.* Although an agreement to act together to commit an offense may be proved by direct evidence, circumstantial evidence of the actions and events alone may be sufficient to show that one is a party to an offense. *See Burdine v. State*, 719 S.W.2d 309, 315 (Tex. Crim. App. 1986). The fact finder may make its determination based on the events occurring before, during, and after the commission of the offense and may rely on the actions of the defendant, which show an understanding and common design to do the criminal act. *See Beier v. State*, 687 S.W.2d 2,4 (Tex. Crim. App. 1985).

Appellant asserts the evidence was insufficient to show he was a party to the offense. We disagree. Appellant was present at the scene when Meullion robbed the complainants. Although his mere presence at the scene of the crime alone will not support a conviction, because he voluntarily followed Meullion to several locations, there is compelling evidence of appellant's intent. At any time after the commencement of the offense, appellant could have left. Instead, appellant followed Meullion and even participated in the offense by standing watch over the complainants while Meullion attempted to start Coker's car. He also assisted in disposing of the stolen car and received items taken from the car.

Accordingly, we find the evidence legally and factually sufficient to show appellant had the intent to promote or assist the commission of the offense and aided another person's commission of the offense. Thus, we conclude a rational trier of fact could have found the essential elements of criminal responsibility for conduct of another, as well as the underlying

offense, beyond a reasonable doubt. Further, the jury's verdict was not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust.

ACCOMPLICE WITNESS CHARGE

In his fifth point of error, appellant contends the trial court erred in refusing to give an accomplice witness jury instruction regarding Kendall Cagan's testimony. Cagan testified that he was at Terence Arnold's home when appellant, Henderson, and Meullion arrived. Terrence Arnold asked Cagan to drive the Civic because Arnold did not know how to drive a car with a manual transmission. Cagan drove the car to Meullion's grandparent's home. Cagan learned after driving the car that it was stolen. Appellant argues the evidence raised a fact issue as to whether Cagan was an accomplice. At trial, appellant requested an instruction that would have made Cagan's accomplice status an issue of fact. The trial court denied appellant's request.

Accomplice witness testimony must be corroborated by other evidence connecting the defendant with the offense before a conviction is warranted. *See* TEX. CODE CRIM. PROC. ANN. art. 38.14 (Vernon 1979). This rule reflects the Legislature's determination that accomplice testimony implicating the defendant should be viewed cautiously because accomplices often have an incentive to lie. *See Blake v. State*, 971 S.W.2d 451, 454 (Tex. Crim. App. 1998). Appellant is entitled to an accomplice witness charge if there is sufficient evidence in the record to support a charge against the alleged accomplice witness. *See id*. To determine if the evidence is sufficient, we examine the record for evidence of the witness's participation in the crime, regardless of whether he is actually charged or prosecuted. *See id*. If there is a conflict in the evidence, and it is not clear whether the witness is an accomplice, the jury must be instructed to decide whether the witness was an accomplice as a matter of fact. *See id*. However, if it is clear from the evidence that the witness was not an accomplice, then the trial court should not give an accomplice instruction, either as a matter of law or as a matter of fact. *See Gamez v. State*, 737 S.W.2d 315, 322 (Tex. Crim. App. 1987).

To be an accomplice, the witness must have committed an affirmative act to promote

the commission of the offense. *See McFarland v. State*, 928 S.W.2d 482, 514 (Tex. Crim. App. 1996). Also, a person is an accomplice if sufficient evidence connects him as a blameworthy participant to the criminal offense for which the defendant was charged. *See Blake*, 971 S.W.2d 454-55. However, mere presence during the commission of the crime does not make one an accomplice, nor is one an accomplice for knowing about a crime and failing to disclose it, or even concealing it. *See Medina v. State*, 7 S.W.3d 633, 641 (Tex. Crim. App. 1999). Thus, even if the record shows that a person was present during the commission of the crime *and* participated in concealing the crime, such evidence is not sufficient to raise the issue of accomplice witness status. *See id*.

Appellant asserts Cagan's driving of the Civic after he had been informed it was stolen renders him an accomplice to the aggravated robbery and capital murder. There is no evidence, however, that Cagan was present at, participated in, or even knew about, the offenses appellant was charged with committing. Cagan's only involvement was moving the stolen Civic after the offenses were committed. Further, Cagan's failure to report the offense and his concealment of the crime and its fruits do not make him an accomplice. *See Medina*, 7 S.W.3d at 641. The trial court did not err in denying appellant's requested accomplice witness instruction. Accordingly, appellant's fifth point of error is overruled.

VIOLATION OF THE RULE

In his sixth and seventh points of error, appellant complains the trial court violated his sixth amendment right to present evidence and abused its discretion in denying him the opportunity to present the testimony of Henderson's mother after she violated Texas Rule of Evidence 614, otherwise known as the rule of sequestration of witnesses. At the start of trial, the trial court invoked the Rule as to all witnesses except the immediate family of appellant and the complainants. After the State rested, appellant attempted to call Jaray Henderson's mother to testify. The State objected because Mrs. Henderson had been present in the courtroom during the trial.

Appellant stated that Mrs. Henderson's testimony was necessary to rebut Kendall Cagan's testimony. Specifically, Mrs. Henderson would have testified that Jaray Henderson spent all day Sunday with her and could not have been at Terrence Arnold's house where Cagan overheard appellant, Henderson, and Arnold discussing what to do with items stolen from the Civic. Appellant claimed this testimony was crucial to his defense in that it tended to discredit Cagan's testimony.

Texas Rule of Evidence 614 provides for the exclusion of witnesses from the courtroom during trial. The purpose of the Rule is to prevent the testimony of one witness from influencing the testimony of another. *See Bell v. State*, 938 S.W.2d 35, 50 (Tex. Crim. App. 1996). While Rule 614 does not indicate what sanction a court should impose in the event the Rule is violated, courts may refuse to allow a witness to testify who has violated the Rule. *See id*.

Exclusion of a defense witness's testimony implicates a defendant's constitutional right to have witnesses testify on his behalf. *See* U.S. CONST. amend. VI; TEX. CONST. art. I, §§ 10, 19. Generally, a defense witness cannot be excluded solely for violation of the Rule, although the right to exclude under particular circumstances is within the sound discretion of the trial court. *See Davis v. State*, 872 S.W.2d 743, 745 (Tex. Crim. App. 1994) (citing *Webb v. State*, 766 S.W.2d 236, 241 (Tex. Crim. App. 1989)). In determining whether to disqualify a witness under the Rule, the trial court must balance the interest of the State and the accused, consider alternative sanctions, and consider the benefit and detriment arising from a disqualification in light of the nature and weight of the testimony to be offered. *See Webb*, 766 S.W.2d at 244.

To review whether a trial court abuses its discretion in disqualifying a witness, the appellate court must determine (1) whether there are particular circumstances, other than the mere fact that the Rule was violated, which would tend to show the defendant or his counsel consented, procured, or otherwise had knowledge of the witness's presence in the courtroom, together with knowledge of the context of that witness's testimony; and (2) if no particular

circumstances existed to justify the disqualification, whether the excluded testimony is crucial to the defense. *See Davis*, 872 S.W.2d at 746 (citing *Webb*, 766 S.W.2d at 245). Where the particular circumstances show neither the defendant, nor his counsel have consented, procured, connived or have knowledge of the testimony of a witness or potential witness who is in violation of the sequestration rule, and the testimony of the witness is crucial to the defense, it is an abuse of discretion for the trial court to disqualify the witness. *See Davis*, 872 S.W.2d at 746 (citing *Webb*, 766 S.W.2d at 244).

In calling Henderson's mother, defense counsel acknowledged he knew of her presence in the courtroom and the possibility that he would call her as a witness. Further, he knew the content of her testimony because he made an oral proffer of what she would have testified to. Because defense counsel acknowledged Henderson's courtroom presence and possible witness status, we find appellant has not satisfied the first prong of the *Davis* test.[1] Thus, the trial court did not abuse its discretion in excluding the testimony of Henderson's mother. Appellant's sixth and seventh points of error are overruled.

The judgment of the trial court is affirmed.

/s/ Leslie Brock Yates
Justice

Judgment rendered and Opinion filed May 11, 2000.

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[1] Though we need not determine if appellant satisfied the second prong of *Davis*, we do not find the excluded testimony was crucial to the defense. Henderson's mother would have testified that Henderson was at home all day. The purpose of such testimony was to impeach Cagan's testimony that Henderson was present with Arnold and appellant at Arnold's house the day after the offense discussing the division of items stolen from the Civic. This purpose was served by the testimony of Henderson's father, who testified that he had the Nissan truck the day after the offense and Henderson could not have driven it to Arnold's house as Cagan testified.

Panel consists of Justices Yates, Fowler and Edelman.

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