Affirmed and Opinion filed December 9, 1999.

In The

Fourteenth Court of Appeals

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NO. 14-98-00212-CR

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WALTER EARL MCNULTY, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 209th District Court
Harris County, Texas
Trial Court Cause No. 743,272

O P I N I O N

A jury found Appellant Walter Earl McNulty (McNulty) guilty of robbery and assessed punishment at forty years' confinement. In two points or error, McNulty appeals that 1) there is factually insufficient evidence to support his conviction and 2) the State's final argument deprived him of his right to a unanimous verdict. We overrule McNulty's points of error because there is factually sufficient evidence to support the jury's verdict, and McNulty waived complaint about the State's jury argument. Thus, we affirm.

BACKGROUND

McNulty and his co-defendant, Dennis Washington (Washington) were accused of robbing a Discount Tire store. The robbers had entered the store, grabbed four tires, and ran out the door. Their getaway was not easy, however, because employees of the store briefly pinned one of the robbers and broke the getaway car's rear passenger window. An employee also managed to note the car's license plate number, which the police traced to McNulty's ex-girlfriend. The night after the robbery, police found the abandoned car, a Geo Spectrum, doused in gasoline. It had a broken window, bent front wheel, a flat tire, and it had been stripped of its radio and speakers.

At trial, McNulty argued that he did not commit the robbery because the Geo Spectrum found by police had been stolen from Washington and him on the day of the robbery. They had reported the theft to police at about 5:30 p.m. To additionally support his defense, McNulty offered three persons' testimony: the cashier of the gas station where the car had been stolen, a friend who helped look for the stolen car, and Washington. McNulty also contested three eyewitnesses' identification of Washington or him as the Discount Tire robbers.

SUFFICIENCY OF THE EVIDENCE

In his first point of error, McNulty appeals that there is factually insufficient evidence to support the jury's verdict. When reviewing the factual sufficiency of the evidence, we 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. *Clewis v. State*, 922 S.W.2d 126, 129 (Tex. Crim. App.1996). Although reviewing courts frequently apply the principles enunciated in *Clewis*, factual sufficiency review rarely results in reversal of criminal convictions. *See Reina v. State*, 940 S.W.2d 770, 773 (Tex. App.–Austin 1997, pet. ref'd). Because much of the evidence in this case contradicts the jury's guilty verdict, we will carefully detail the evidence presented at trial.

A. Evidence of Identification

The identification of McNulty and Washington as the Discount Tire robbers was hotly contested. As there were no fingerprints taken at store, the only evidence directly linking McNulty to the robbery was eyewitness testimony. Of six or seven witnesses to the robbery, police found that only three had "usable"

information: Cedric Ferrell, David Terrill, and Tod DeVillier. As admitted by the State in closing argument, these witnesses' testimony was somewhat confusing.

Discount Tire employee Cedric Ferrell testified the robbery occurred around three or four o'clock in the afternoon on January 14, 1997. He described a customer who was wearing a green army jacket and a dark cap with the words "No Fear" on it. After using the restroom, this customer spent almost fifteen minutes with Ferrell at the store counter discussing tires and wheels. Then, the customer and another man grabbed two tires each and ran out the door. Ferrell yelled for his office manager, and they ran after the two robbers. Outside, they caught and pinned the man who was wearing the army jacket and the No Fear cap. This robber yelled for his partner to shoot them, and his partner gestured like he was pulling a gun out of his jacket. Ferrell released the pinned man because he did not want to be shot. As the robbers left in their light blue, four-door car, Ferrell broke out the rear passenger window.

A few days later, Ferrell looked at a photographic lineup of six men. Although number six, McNulty, looked most similar to the man he had pinned, he was not completely sure. Ferrell testified that he also picked number one, Washington, as the other robber, but it was not a "sure identification." The police officer who administered the photographic lineup testified that Ferrell had mentioned only one man, McNulty, from the lineup, and that Ferrell was unsure about this identification. During trial thirteen months later, Ferrell identified McNulty as the robber who had worn a camouflage jacket and a cap and whom he had pinned.

David Terrill, the manager of the Discount Tire Store, also testified. He recalls Ferrell telling him that some men were stealing wheels. Outside, he, Ferrell, and one other employee caught and pinned one of the robbers. When pinned, the robber urged his partner to, "Shoot them, man, shoot them." His partner gestured like he was pulling out a gun and Terrill and the others released the pinned robber. As the robbers drove away, Terrill noted the car's license plate number. A few days later, Terrill looked at the photographic lineup of six men. Consistent with Ferrell's identification, Terrill testified that he chose number six, McNulty, as the man they had pinned. However, the administering police officer contradicted Terrill's testimony. While he agreed that Terrill chose McNulty from the lineup, he testified Terrill was positive that

McNulty was the man who pretended to reach for a gun. In court, however, Terrill again identified McNulty as the man he helped pin.

The third eyewitness to testify was Tod DeVillier, a customer at Discount Tire. Around 4:30 p.m., he noticed a heavy man with a distinctive cough outside the store. This man wore an "army colored" jacket and a black cap that said "No Fear" on it. A thinner man, whom he identified in court as McNulty, was talking to the attendant at the counter. At some point, the man in the cap and McNulty grabbed tires in the store and ran through the front door with them. At first, DeVillier remained seated in the store, but after Discount Tire employees ran after the robbers, DeVillier followed them outside. The employees had pinned the man who was wearing the No Fear cap, and he urged McNulty to shoot the store employees. Additionally, DeVillier testified that McNulty reached behind his back as though he had a gun, after which the employees released the pinned robber. The two robbers then escaped.

A few days later, DeVillier also looked at the photographic lineup. Unlike Ferrell, he picked number one, Washington, as the man who had been pinned and who had worn a camouflage jacket and a cap. DeVillier testified that he also picked number six, McNulty, but was not sure of the identification. Again, the administering police officer disagreed with the eyewitness's in-court testimony. He testified that at the time of the lineup, DeVillier had only selected Washington's picture.

B. The Stolen Car

As additional evidence that McNulty did not rob Discount Tire, several witnesses testified that the getaway car had actually been stolen from Washington and McNulty on the day of the robbery. First, Washington testified on his and McNulty's behalf. He denied that he and McNulty were at the Discount Tire store on the day of the robbery. Instead, he testified that McNulty paged him at about 2:30 p.m. on January 14, 1997. McNulty's Geo Spectrum was having car trouble, and he needed Washington's help. Washington left work, helped McNulty tighten the battery posts, and told McNulty to follow him home in Washington's white Ford Explorer. On the way home, Washington stopped at a Chevron to use its pay telephone to return another page. Because of the earlier battery trouble with the Geo Spectrum, he left the car running. As Washington started to make his telephone call, someone jumped in the car and drove away. Washington chased the car on foot down the road until McNulty picked him up in the Ford

Explorer. For ten minutes, they looked for the Geo Spectrum in the area. When they did not find it, they returned to the Chevron, and Washington questioned the female cashier to see if she knew the man who had taken the car. He and McNulty then looked for the car for an hour longer. Finally, shortly after 5:30 p.m., they went home and called the police. After making the police report, Washington, McNulty, and two friends searched the area for the car once again.

The police officer who took the report on the stolen Geo Spectrum was Officer Maurice Toler. He arrived at Washington's home at about 6:00 p.m. and interviewed him for fifteen to twenty minutes.[1] Washington told him that the car had been stolen around 4:15 p.m. from the Chevron station. Other than taking the report, Officer Toler did not conduct any further investigation. He never even visited the Chevron station where the car had been taken.

Barbara Jean Senegal, the cashier at the Chevron, corroborated Washington's testimony. On January 14, 1997, she remembered seeing Washington stop in a small, blue car to use the payphone. As he used the telephone, she saw a second man jump into the blue car and drive away. Washington ran after the car, waving his hands in the air. About five minutes later, Washington and another man returned in a white Ford Explorer to ask her questions about the car thief, but she could not help them. Although Ms. Senegal worked until 10:00 p.m. that night, the police never came to question her.

Finally, a friend of Washington and McNulty testified that around 4:00 or 5:00 p.m. on January 14, he saw McNulty and Washington at the Chevron station, apparently after the Geo Spectrum had been stolen. He helped them look for the stolen car for an hour and was with them when Washington called the police. After the police arrived and took Washington's report, this friend helped look for the Geo Spectrum again. The men saw the stolen car at about 8:00 or 9:00 p.m., and they chased it for several minutes until Washington's Ford Explorer ran out of gas. While waiting for gasoline for the Ford Explorer, they saw a police car on patrol. They described the stolen car to the police officer, and he announced the description over his walkie-talkie radio.

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[1] Officer Toler inadvertently demonstrated the difficulty witnesses can have in identifying a person. Although he had interviewed Washington about the stolen Geo Spectrum, he repeatedly misidentified McNulty in court as the man from whom he had taken the police report.

C. Holding

Accordingly, there was both substantial and conflicting identification and alibi evidence at trial. After a thorough review of all of the evidence, we hold that the jury's verdict was not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. We agree that there are discrepancies between the eyewitnesses' identification of the robbers. We agree that McNulty's defensive evidence concerning the stolen Geo Spectrum seriously contradicts the State's evidence that he committed robbery. The weight given to contradictory testimonial evidence, however, is within the province of the jury because they alone evaluate the witnesses' credibility and demeanor. *See Cain v. State*, 958 S.W.2d 404, 408-09 (Tex. Crim. App. 1997). Additionally, we cannot set aside a jury verdict merely because we may feel that a different result is more reasonable. *See Santellan v. State*, 939 S.W.2d 155, 164 (Tex. Crim. App. 1997); *Grant v. State*, 989 S.W.2d 428, 435 (Tex. App.–Houston [14th Dist.] 1999, no pet.). In this case, the jury must have disbelieved McNulty's stolen car defense and believed the identification made by the eyewitnesses. Accordingly, we overrule McNulty's first point of error.

JURY ARGUMENT

In his second point of error, McNulty claims that the State's improper jury argument deprived him of the right to a unanimous verdict. In this case, the jury charge authorized the jury to convict McNulty of robbery if he were the primary actor in the offense. The charge also included the law of parties, meaning that McNulty could be found convicted of robbery if he was a party to the offense. To this end, the State argued that the jury did not have to unanimously choose guilt as a primary actor or guilt as a party. Instead, it could convict McNulty if some jurors believed he was guilty as a primary actor and the rest believed he was guilty as a party. Texas's constitution and statutes require a unanimous verdict in criminal cases. *See* TEX. CONST. art. V, § 13; TEX. CODE CRIM. PROC. ANN. art. 36.29 (Vernon Supp.1999); *Brown v. State*, 508 S.W.2d 91, 93 (Tex. Crim. App.1974). McNulty contends that the State's argument misstated the law because the jury must be unanimous that McNulty was guilty as a primary actor, or the jury must be unanimous that he was guilty as a party.

McNulty incorrectly argues that he need not object to the State's argument to preserve error for appeal. To preserve jury argument error for appellate review, a defendant must object at trial and pursue

the objection to an adverse ruling. *Cockrell v. State*, 933 S.W.2d 73, 89 (Tex. Crim. App. 1996), *cert. denied*, 520 U.S. 73, 117 S. Ct. 1442, 137 L. Ed.2d 548 (1997); *Boston v. State*, 965 S.W.2d 546, 549 (Tex. App.–Houston [14th Dist.] 1997, pet. ref'd). Because McNulty did not object to the State's jury argument, he has waived any error and cannot raise the issue on appeal. Even if he had preserved error, such an argument is not error. Where alternative theories of committing the same offense are submitted to the jury in the disjunctive, it is appropriate for the jury to return a general verdict. *Kitchens v. State*, 823 S.W.2d 256, 258 (Tex. Crim. App. 1991), *cert. denied*, 504 U.S. 958, 112 S. Ct. 2309, 119 L. Ed.2d 230 (1992). There is no requirement in a general verdict for the jury to be unanimous on the means of committing the offense. *Gray v. State*, 980 S.W.2d 772, 775 (Tex. App.–Fort Worth 1998, no pet.). Point of error two is overruled.

CONCLUSION

There is factually sufficient evidence to support the jury's finding of guilt. Despite the sometimes confusing testimony from eyewitnesses about identification, the jury is the sole trier of fact and can reconcile conflicts in the testimony and judge the credibility of the witnesses. Thus, we overrule the first point of error. Second, McNulty failed to object at trial to the jury argument that is the basis of his second point of error. Because he has waived any error, we overrule McNulty's second point of error. Having addressed both points of error, we affirm.

/s/ Norman Lee
Justice

Judgment rendered and Opinion filed December 9, 1999.

Panel consists of Justices Sears, Cannon, and Lee*

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* Senior Justices Ross A. Sears, Bill Cannon, and Norman Lee sitting by assignment.