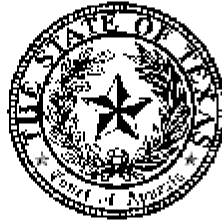
Affirmed and Opinion filed February 1, 2001.



In The

Fourteenth Court of Appeals

____

NO. 14-98-01348-CR

____

JOSEPH MOSES LEWIS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 337th District Court
Harris County, Texas
Trial Court Cause No. 745,665

O P I N I O N

Joseph Moses Lewis appeals his jury conviction for aggravated robbery. The jury assessed his punishment at 45 years imprisonment. In four points of error, appellant contends: (1) the evidence legally insufficient to sustain his conviction either as a principal or a party (points one and two); (2) his federal and state constitutional rights prohibiting double jeopardy were violated when he was convicted of aggravated robbery after the State had abandoned that allegation in the indictment (points three and four). We affirm.

On February 20, 1997, at about 7:00 p.m., Moises Lopez was working as a fry cook in a McDonald's restaurant when a black man wearing a black ski mask, blue jeans, and a white "starter" jacket came in the front door. The gunman pointed his gun at Ezekiel Sanchez and said, "open the drawer

and give me the money." Lopez turned to tell the manager about the robbery, and then heard a gunshot. He turned and looked toward the sound of the gunshot and saw Sanchez, an employee, lying on the floor. Sanchez died at the scene from a bullet wound to his heart. Lopez described the gunman as "tall and skinny."

Kefawn Smith was working the drive-through window, and saw the gunman point his gun at Sanchez. She heard the gunman tell Sanchez to open the register. She saw Sanchez put his hands up, and then saw the gunman shoot Sanchez once. Sanchez fell to the floor and the gunman ran out of the restaurant. Kefawn described the gunman as a black male, about 5'9" tall, wearing a ski mask, starter jacket, and blue jeans.

An hour later, a black male wearing a ski mask and a white and yellow jacket went in a nearby Whataburger restaurant. He pointed a gun at Rosa Salas and told her to "open the register" and give him the money or he would "blast" her. Salas gave the gunman about $56.00 in bills and rolls of coins and the gunman fled.

Anthony Stewart, the maintenance man at Whataburger, saw the gunman come out of the restaurant and get in the passenger side of a car. He testified that a black male was sitting in the driver's seat of the car. After getting in the car, the gunman took off his mask and Stewart observed that he was a black male. Stewart could not positively identify either man.

Several police cars were dispatched to the scene. Based on the description of the car and the suspects, Officer Sneed stopped the suspects' car and waited for back-up. When other officers arrived, Sneed approached the suspects' car and observed a white jacket and a ski mask in the backseat with some rolls of coins. Sneed got a good look at the driver and the passenger, and later identified the driver as Johnny Cobb, and the passenger as appellant. Before Sneed could tell them to get out of the car, Cobb accelerated and drove away. Cobb drove at high speed for about two miles, then lost control and slid to a stop in a vacant lot. At this point, appellant jumped out of the car and ran. Officers later found appellant at his home where they arrested him.

Officer Collins searched Cobb's car and found two jackets, a ski mask, a pink bag with money in it, and rolls of coins. A .380 automatic pistol and latex gloves were found hidden behind the glove box on the passenger's side of the vehicle. Detective Baldwin, a ballistics expert, later testified that the bullet

taken from Sanchez's body was fired from the .380 automatic pistol taken from Cobb's car. Cobb and appellant were both tested for primer residue to determine if they had recently fired a gun, but the tests were inconclusive.

In his written statement to the police, appellant stated that Cobb picked him up and told him that he wanted to "pull a stunt." Believing Cobb wanted to commit a robbery, appellant went with him. Cobb drove around, checked out a Subway restaurant, and decided "not to do it." Cobb then drove to the McDonald's and decided to "do it" because "ain't hardly nobody in there." Cobb parked the car, retrieved a .380 automatic pistol from a space near the glove compartment, pulled a gray and black ski mask over his face, and ran in the McDonald's while appellant sat in the car. About "seven seconds later," Cobb ran out of the McDonald's and told appellant, "I shot a Mexican guy because he was rejecting [*sic*]." Cobb then drove to the Whataburger because he "didn't get anything" from McDonald's. At Whataburger, Cobb asked appellant for his shoes, and appellant gave Cobb his shoes. Cobb put appellant's shoes on, then ran into the Whataburger and robbed Rosa Salas at gunpoint. Cobb then ran back to the car and gave appellant the money. Appellant counted the money and stated it came to $56.00. They again exchanged shoes, and Cobb drove away. When they were stopped by the police, Cobb drove off and appellant jumped out and ran to his home.

In point one, appellant challenges the legal sufficiency of the evidence to sustain his conviction for aggravated robbery acting as principal. In point two, he challenges the legal sufficiency of the evidence to sustain his conviction as a party. Appellant argues that there is no evidence to show appellant's involvement in the McDonald's robbery. No one identified him as the gunman at the McDonald's, and the only evidence of his involvement comes from his statement. Appellant asserts that there is no independent evidence of "willing participation in the offense." In his statement, appellant said he did not think that Cobb would commit the robbery.

In reviewing the legal sufficiency of the evidence, we consider all the evidence in the light most favorable to the verdict. *Houston v. State*, 663 S.W.2d 455, 456 (Tex.Crim.App.1984); *Garrett v. State*, 851 S.W.2d 853, 857 (Tex.Crim.App. 1993). In reviewing the sufficiency of the evidence in the light most favorable to the verdict or judgment, the appellate court is to determine whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *Ransom v. State*, 789 S.W.2d 572, 577 (Tex.Crim.App.

1989), *cert. denied*, 110 S.Ct. 3255 (1990). This standard is applied to both direct and circumstantial evidence cases. *Chambers v. State*, 711 S.W.2d 240, 245 (Tex.Crim.App. 1986). The jury is the exclusive judge of the facts, credibility of the witnesses, and the weight to be given to the evidence. *Chambers v. State*, 805 S.W.2d 459, 462 (Tex.Crim. App. 1991). In conducting this review, the appellate court is not to re-evaluate the weight and credibility of the evidence, but act only to ensure the jury reached a rational decision. *Muniz v. State*, 851 S.W.2d 238, 246 (Tex.Crim.App.1993); *Moreno v. State,* 755 S.W.2d 866, 867 (Tex.Crim.App1988). In making this determination, the jury can infer knowledge and intent from the acts, words, and conduct of the accused. *Dues v. State*, 634 S.W.2d 304, 305 (Tex.Crim.App.1982).

The sufficiency of the evidence to support a conviction should no longer be measured by the jury charge actually given but rather measured by the elements of the offense as defined by a hypothetically correct charge. *See Curry v. State,* 975 S.W.2d 629, 630 (Tex.Crim.App.1998). "Such a charge would be one that accurately sets out the law, is authorized by the indictment, does not unnecessarily increase the State's burden of proof or unnecessarily restrict the State's theories of liability and adequately describes the particular offense for which the defendant was tried." *Malik v. State,* 953 S.W.2d 234, 240 (Tex.Crim.App.1992).

In the trial court's jury charge, appellant was charged in the disjunctive as a principal or as a party acting with Johnny Cobb in committing capital murder or the lesser included offense of aggravated robbery. In a general verdict, the jury found appellant guilty of aggravated robbery.

At final argument, the State emphasized primarily appellant's participation as a party with Johnny Cobb. A person is criminally responsible for an offense committed by the conduct of another if "acting with intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids or attempts to aid the other person to commit the offense." TEX. PENAL CODE ANN. § 7.02(a)(2) (Vernon 1994 & Supp. 2000). Under the law of parties, the State is able to enlarge a defendant's criminal responsibility to acts in which he may not be the primary or principal actor. *See Goff v. State*, 931 S.W.2d 537, 544 (Tex.Crim.App.1996), *cert. denied*, 117 S.Ct. 1438 (1997).

In order to establish liability as a party, the State must show that, in addition to the illegal conduct by the primary actor, the accused harbored the specific intent to promote or assist the commission of the offense. *See Lawton v. State*, 913 S.W.2d 542, 555 (Tex.Crim.App.1995), *cert. denied*, 117 S.Ct.

88 (1996). The evidence must show 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 design. *See Brooks v. State*, 580 S.W.2d 825, 831 (Tex.Crim.App.1979). The essential principle of parties' culpability is the common design to do a criminal act. *Id*.

While an agreement of the parties to act together in a common design seldom can be proved by direct evidence, reliance may be had on the action of the parties, showing by either direct or circumstantial evidence an understanding and common design to do a certain act. *See Burdine v. State*, 719 S.W.2d 309, 315 (Tex.Crim.App.1986). In determining whether one participated as a party committing an offense, the fact finder may look to events occurring before, during and after the offense and may place reliance on acts showing an understanding and common design to do a certain act. *Porter v. State*, 634 S.W.2d 846, 849 (Tex.Crim.App.1982). Evidence is sufficient where an accused is present and encourages the commission of the offense by words or other agreement so long as the evidence shows that the parties were acting together. *Cabrera v. State*, 959 S.W.2d 692, 695 (Tex.App.--Dallas 1998, pet. ref'd). If evidence shows the mere presence of an accused at the scene, or even his flight from the scene, without more, it is insufficient to sustain a conviction as a party to the offense. *Valdez v. State*, 623 S.W.2d 317, 321 (Tex.Crim.App.1979). However, evidence is sufficient under the law of parties if it shows that the defendant was physically present at the commission of the offense and encouraged its commission by words or other agreement. *Ransom v. State*, 920 S.W.2d 288, 302 (Tex.Crim.App.1994) (opinion on reh'g), *cert. denied,* 117 S.Ct. 587(1996).

Standing alone, proof that an accused assisted the primary actor in making his getaway is insufficient to support a conviction as a party even though the accused's conduct may constitute the independent offense of hindering apprehension or prosecution. On the other hand, presence at or flight from the crime scene may combine with other facts to show that an accused was a participant and a party. *Guillory v. State*, 877 S.W.2d 71, 74 (Tex.App.--Houston [1st Dist.] 1994, pet. ref"). *See also Rivera v. State,* 990 S.W.2d 882, 887-888 (Tex.App.–Austin 1999, pet. ref'd), *cert. denied,* 120 S.Ct. 1191 (2000).

Appellant argues that his statement does not show that he solicited, encouraged, directed, aided, or attempted to aid Johnny Cobb in the McDonald's robbery. He argues that his statement shows he did not know Cobb was going to commit an offense until he actually did commit the offense. In his statement he states he thought Cobb "was crazy" and thought Cobb would shoot him. He stated he gave Cobb his

shoes at Whataburger because Cobb had the gun with him.

Appellant claims he was an unwilling participant in the robberies and did not aid or encourage Cobb in anyway. However, before the robberies Cobb told him he was going to "pull a stunt," and he suspected that Cobb wanted to rob someone. Despite knowing Cobb was looking for a store to rob, he went along with Cobb anyway. This is circumstantial evidence that appellant was going to participate in the "stunt." He remained in Cobb's car when Cobb went in McDonald's knowing Cobb was carrying a gun. Again, a reasonable jury could infer that he was encouraging or aiding Cobb by waiting in the car while Cobb robbed McDonald's. He made no attempt to leave when Cobb came back and stated he shot a "Mexican guy." A reasonable jury could infer that by staying with Cobb knowing he had shot someone, appellant was aiding or encouraging the offense. After McDonald's, they went to Whataburger where appellant further demonstrated he had been aiding Cobb by loaning Cobb his shoes, staying in the car while the motor was running, and counting the money Cobb took from Whataburger. The jury could reasonably infer that appellant stood to gain financially by these robberies, and motive is circumstantial evidence of guilt. Also the jury could disbelieve appellant's statement to the extent he contented he only loaned the shoes to Cobb because he was scared. Finally, when Cobb lost control of the car and stopped in a vacant lot, appellant ran away on foot to avoid the police. Flight is circumstantial evidence of guilt. *Foster v. State*, 779 S.W.2d 845, 859 (Tex.Crim.App. 1989).

Appellant's argument goes to the credibilty of the witnesses and weight to be given their testimony, which is a matter solely for the jury. *See Adelman v. State*, 828 S.W.2d 418, 421 (Tex.Crim.App.1992); *Bonham v. State*, 680 S.W.2d 815, 819 (Tex.Crim.App.1984), *cert. denied*, 106 S.Ct. 184 (1985). It can believe or disbelieve any part of any witness's testimony. *Sharp v. State*, 707 S.W.2d 611, 614 (Tex.Crim.App.1986), *cert. denied*, 109 S.Ct. 190 (1988). The jury may also draw reasonable inferences and make reasonable deductions from the evidence within the context of the crime. *Benavides v. State*, 763 S.W.2d 587, 588-89 (Tex.App.-Corpus Christi 1988, pet. ref'd).

A defendant may be held criminally responsible even if he was not present during the offense. *See, e.g.*, *Thompson v. State*, 697 S.W.2d 413, 417 (Tex.Crim.App.1985) (evidence that a defendant drove the getaway car to and from a burglary was sufficient to convict the driver as a party to the offense); *Webber v. State*, 757 S.W.2d 51, 55-56 (Tex.App.-Houston [14th Dist.] 1988, pet. ref'd). A person cannot escape criminal liability merely "by insulating himself from the actual perpetrator of the offense."

Scott v. State, 754 S.W. 2d 268, 275 (Tex.App.-Corpus Christi 1988, pet. ref'd).

Viewing the evidence in the light most favorable to the verdict, we hold that there was sufficient evidence for a jury to have found beyond a reasonable doubt that appellant intended to aid Cobb in the commission of the aggravated robbery. Because he knew Cobb was planning a robbery, the jury could infer appellant "encouraged" Cobb by going with him. Appellant knew Cobb was going to rob McDonald's, but elected to remain in Cobb's car and watch Cobb go into McDonald's armed with a .380 automatic; a jury could infer from this that appellant was watching the car and acting as a lookout, thus participating in the offense. The shoe exchange at Whataburger would further show participation in the double robberies. The jury did not have to believe appellant's statement that he cooperated with Cobb because he was scared. Appellant had an opportunity for some financial gain and appellant ran from the police; both of these circumstances indicate guilt.

The trial court's jury charge authorized the jury to find appellant guilty of aggravated robbery to the McDonald's restaurant as a principal actor, or in the alternative, as a party acting with Johnny Cobb. The jury returned a general verdict finding appellant guilty of aggravated robbery. The principle is well established that when the jury returns a general verdict and the evidence is sufficient to support a guilty finding under any of the allegations submitted, the verdict will be upheld. *Rabbani v. State*, 847 S.W.2d 555, 558 (Tex.Crim.App.1992), *cert. denied*, 113 S.Ct. 3047 (1993). Having found the evidence is legally sufficient to uphold appellant's conviction as a party acting with Cobb, we need not determine if the evidence is sufficient to find appellant guilty as a principal actor. We overrule appellant's points of error one and two.

In points three and four, appellant contends his state and federal constitutional right not to be twice placed in jeopardy for the same offense was violated when he was convicted of the offense of aggravated robbery after the State had abandoned that allegation. In two counts, the indictment alleged that appellant committed the offense of capital murder and aggravated robbery. After resting its case, the State abandoned the allegation of aggravated robbery in the indictment, and elected to proceed on the capital murder allegation only. The trial court included an aggravated robbery charge in its jury charge as a lesser included offense of capital murder. For the first time on this appeal, appellant makes the novel constitutional argument that when the State proceeded to judgment on the capital murder allegation after abandoning the aggravated robbery allegation, for which the defendant had been placed in jeopardy, and the jury returned

its verdict of guilty for the very offense which the State abandoned, appellant was subjected to the prohibition against double jeopardy.

Appellant cites *Ex parte Preston*, 833 S.W.2d 515, 517 (Tex.Crim.App. 1992) as authority for the proposition that "after jeopardy attaches, any charge which is dismissed, waived, abandoned or on which the jury returns an acquittal, may not be retried." *Id.* However, "[T]he Fifth Amendment guarantee against double jeopardy which is enforceable against the states through the Fourteenth Amendment protects against a *second* prosecution for the same offense after acquittal or conviction and against multiple criminal punishments for the same offense." *Reynolds v. State,* 4 S.W.3d 13, 19 (Tex.Crim.App. 1999). This case was the *first* prosecution for capital murder and aggravated robbery, and the trial court properly charged the jury with the lesser included offense of aggravated robbery because it was raised by the evidence. *See Gottlich v. State,* 822 S.W.2d 734, 739 (Tex.App.–Fort Worth 1992, pet. ref'd). In *Gottlich,* the State abandoned the lesser included offense in the indictment and proceeded on the greater offense. *Id.* The *Gottlich* court held, "[T]he fact that the lesser included offense may have been pled in the indictment does not prevent that lesser included offense from being submitted as a lesser included offense rather than a principal offense." *Gottlich,* 822 S.W.2d at 739.

A similar jeopardy contention was raised by the appellant in *Privett v. State,* 635 S.W.2d 746, 751-752 (Tex.App.–Houston[1st Dist.] 1982, pet. ref'd). In that case, Privett was charged with attempted capital murder and aggravated robbery in two separate allegations in the same indictment. The court of appeals found that the two offenses were the "same" for jeopardy purposes. *Id.* After jeopardy had attached, the State abandoned the greater offense of attempted capital murder and proceeded with the lesser included offense of aggravated robbery. The jury convicted appellant of aggravated robbery. On appeal, Privett's argument was similar to that raised in this appeal. He contended that by abandoning the greater offense allegation in the indictment, he was "acquitted" of the greater offense in the "prior prosecution" before being prosecuted for the lesser offense. Privett argued that because the aggravated robbery was a lesser included offense of attempted capital murder, the "acquittal" [abandonment by the State] of the greater offense operated as a bar, or jeopardy, to the "subsequent" prosecution for the lesser offense of aggravated robbery.

The *Privett* court concluded:

However, what double jeopardy prohibits is not a prosecution for a lesser included offense

> based on an indictment that also alleges the greater offense, but which greater offense has previously been abandoned during the *same trial* and before the *same jury*; rather, double jeopardy prohibits a *subsequent trial* on a lesser offense (with a new jury) after the defendant has been previously tried and acquitted for the greater offense (emphasis added).

Privett, 635 S.W.2d at 752.

The main point is that jeopardy does not attach until the *first* case has become final, and on retrial of the same matter, *double* jeopardy is a defense. *Privett,* 635 S.W.2d at 752. Accordingly, we find that appellant has no cognizable claim of double jeopardy.

Appellant has also waived his double jeopardy claim on appeal by failing to preserve error by presenting his complaint to the trial court prior to the time the charge was submitted to the jury. *See Gonzalez v. State,* 8 S.W.2d 640, 642 (Tex.Crim.App. 2000). The record in this case did not on its face show a double jeopardy violation, as the jury's general verdict of guilty of aggravated robbery rested on finding appellant guilty as a party to the lesser included offense of aggravated robbery, and appellant has never been previously convicted or acquitted of the same aggravated robbery. The appellant was therefore required to have timely raised his claim in trial court because the State had legitimate "interests in avoiding problems which would interfere with its lawful prosecution of alleged crimes and in being able to research and prepare responses to claims of double jeopardy." *Id.* at 646. The requirement that appellant must timely raise his double jeopardy claim is "consistent with the underlying policies of the general rules of procedural default." *Id.* at 645. We overrule appellant's points of error three and four.

We affirm the judgment of the trial court.

/s/ Ross A. Sears
Justice

Judgment rendered and Opinion filed February 1, 2001.

Panel consists of Justices Robertson, Sears, and Lee.[*]

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

---

[*]Senior Justices Sam Robertson, Ross A. Sears, and Norman Lee sitting by assignment.