

**Affirmed and Opinion filed August 16, 2001.**



**In The**

**Fourteenth Court of Appeals**

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**NO. 14-99-01241-CR**

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**FELIPE PINALES GONZALES, Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

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**On Appeal from the 337th District Court  
Harris County, Texas  
Trial Court Cause No. 582,378**

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**OPINION**

Over his plea of not guilty, a jury convicted appellant of aggravated robbery and assessed punishment at forty years' confinement in the Institutional Division of the Texas Department of Criminal justice, and a \$2,500.00 fine. Appellant brings two points of error to this Court, complaining that the evidence is factually insufficient to support the guilty verdict, and that the trial court erred in denying appellant's hearsay objection to a witness's testimony concerning how she had learned appellant's name. We affirm the judgment of the trial court.

## FACTUAL BACKGROUND

On October 6, 1990, the complainant, Damares Canela, lived in Houston with her husband Bienbenito “Bennie” Canela. At that time, Damares and Bennie owned a photography business. Also at that time, Bennie’s mother, Clementina Canela, was visiting them from the Dominican Republic, and had been living with them for about two months. In the evening of October 6, 1990, Damares answered the door after she heard the doorbell ring. When she opened the door, a man pointing a gun at her pushed his way into the house and pushed her to the floor. There were four to five men at the door. They made their way into the house and tied up Damares and Clementina, putting them in separate rooms of the house. The intruders also gagged Damares. Damares was in the room for several hours and testified that she heard the intruders going through her house as if they were robbing it.

Later, a man named Jim West who worked for the Damares’s photography business, arrived at the home to drop off some film. When he got there he rang the doorbell. The intruders, wearing masks of pillowcases and pantyhose, met him at the door, took him into the house, asked him if he knew where “the money” was, beat him, and then bound and gagged him.

The doorbell rang again. This time it was Bennie Canales. The intruders, still wearing masks, answered the door and pushed Bennie into the room with his wife. Once in the room, the intruders bound and gagged Bennie. They asked Bennie for the money, and when they apparently determined he did not have any to give them, they beat him severely about the head with a gun. One of the men cocked the gun to shoot him. However, another man pulled the gun away just as it was being fired. The bullet went into the ceiling.

At about this time Damares heard police sirens. The intruders ran out of the house.

Houston Police Officer R.G. Pederson responded to a burglary in progress dispatch to the Canales’s residence in Harris County. When Pederson entered the slightly open

door of the residence, he observed West sitting inside. West gave Pederson an account of what had happened. As Pederson and West searched through the house, they found Damares and Bennie in one of the bedrooms. Damares was hysterical, and Bennie was dazed. Bennie was found laying with his head in a pool of blood. Pederson then found Clementina.

A neighbor observed a suspicious vehicle leave the house. This neighbor took down the license plate number and gave that number to Pederson. She further described the car as being a blue Ford Ventura.

Several officers arrived on the scene later that night. The residence appeared to have been ransacked and searched. Though the officers collected many items from which they hoped to obtain fingerprints, such as the bindings used on the victims, and beer and wine bottles found at the house, no fingerprints were recovered.

Damares testified that when the intruders entered her home, she immediately knew they were Dominican. She is from the Dominican Republic and recognized their accents. The fact that both the intruders and Damares were Dominican upset her. She testified that she voiced her anger to them by asking the intruders “Why would you do this to your own people?” Bennie also testified that when the robbers asked him, in Spanish, where the money was, he recognized their accents as being Dominican in origin.

A couple of months after the incident, the police had been unable to follow any good leads on the case. On a friend’s recommendation, Damares contacted Officer Jaime Escalante, who agreed to take on the case. After he initially interviewed all of the witnesses, he showed Damares a photo array. All of the men in the photo array were Columbian. Damares identified one of the men in the array as “looking like” one of the intruders, but added that it was not one of the intruders because the man in the photograph was Columbian. However, Damares signed a written statement saying that the man in the photo array was one of the intruders. At trial, Damares explained that she did not fully read the statement before signing it, but that the Columbian man was most definitely not

one of the intruders.

Officer Escalante testified that the picture of the Columbian man did resemble appellant. Escalante testified they both had the same type of hair, skin coloring, and facial features. He also testified that the picture Damares identified depicted the Columbian man at a younger age. When he showed her a new array including a current photo of the Columbian, Damares did not identify him.

Later, Escalante showed Damares a photo spread which included appellant. Damares immediately identified appellant as one of the intruders. The police had recently arrested appellant when they found him driving the suspicious car the neighbor had seen driving away on the night of the robbery.

After appellant was arrested for this robbery, he posted bond on April 16, 1991, and was set to appear in court on July 10, 1991. He did not appear on that date. His bond was forfeited and a *capias* issued. Appellant was not arrested and brought back to Texas until November of 1998.

## **DISCUSSION AND HOLDINGS**

### **A. Factual Sufficiency**

In his first point of error, appellant complains that the State produced factually insufficient evidence to identify appellant as one of the robbers. We disagree.

When conducting a factual sufficiency review, we do not view the evidence in the light most favorable to the verdict, and we 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 0126, 129 (Tex. Crim. App. 1996). To do this, “[t]he 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.” *Johnson v. State*, 23 S.W.3d 1, 7 (Tex. Crim. App. 2000). Since the State bears the burden of proving each element of a criminal offense at trial, an appellant may challenge the sufficiency of

the evidence used to establish an element of the offense by claiming that evidence supporting the adverse finding is “so weak as to be factually insufficient.” *Id.* at 11. We are mindful, however, that we must give appropriate, but not absolute, deference to the judgment of the fact finder so as not to supplant the fact finder’s function as the exclusive judge of the weight and credibility given to witness testimony. *Id.* at 7.

Appellant contends that Damares’s identification of appellant is not credible due to inconsistencies. The inconsistencies appellant complains of are: (1) on the night of the offense, the complainant told Pederson (the first officer on the scene) that the intruders were Columbian; (2) on the night of the offense, Damares told Pederson that her daughter, who lived in New York, had experienced problems with Columbians, and offered this as a possible explanation for the robbery, but at trial, she denied telling that story; (3) before identifying appellant, the complainant positively identified another man as the gunman; (4) the other identified man was Columbian; and (5) Damares gave conflicting versions of when the perpetrators were wearing masks.

These seeming inconsistencies were explained at trial. Damares testified that she never thought that any of the intruders were Columbian. Rather, she stated that she knew one was Puerto Rican and the rest were Dominican. She recognized the Dominican accents, and the Puerto Rican intruder apparently told her he was Puerto Rican. Testimony at trial also established that when the police arrived at the scene of the robbery, Damares was hysterical. Evidence also showed that Pederson was attempting to quickly assimilate information so that he could quickly make a general broadcast.

As for the positive identification of the Columbian, Damares testified that she only said he looked similar to the actual robber. Even Officer Escalante testified that when the complainant picked out the eight-year-old picture of the Columbian, she merely said it looked similar to one of the men inside her house. Additionally, when presented with a more recent picture of the Columbian, Damares did not identify him. Finally, Escalante testified that appellant and the eight-year-old picture of the Columbian did look similar.

The appellant also contends that the testimony of Clementina Canela was contradictory and therefore unreliable. The record makes it clear that the use of an interpreter at trial made Clementina's testimony confusing and difficult to follow. Some of her testimony was, in fact, contradictory. However, at least two portions of her testimony were clear and unequivocal. Those were her identification of appellant as the perpetrator who initially entered the house with a gun, and her testimony that the men did not wear masks when they entered, but put some on before her son, Bennie, came home.

We note that there are inconsistencies in both Damares's and Clementina's testimony. However, their identifications of appellant as the perpetrator were clear and unequivocal. Any inconsistencies in their testimony created a credibility issue for the fact finder to resolve in determining what weight to give these witnesses' testimony. This court must defer to the factfinder's credibility determination. *Cain v. State*, 958 S.W.2d 404, 408-09 (Tex. Crim. App. 1997). The identification evidence supporting the jury's verdict is not so weak as to be factually insufficient, and is not outweighed by the great weight and preponderance of the evidence. Appellant's first point of error is overruled.

### **B. Hearsay Testimony**

In his second point of error appellant claims that the trial court erred in denying appellant's hearsay objection to Clementina's testimony that she learned appellant's name from his brother, who told her that appellant was involved in the robbery.

In response to this point of error, the State contends that appellant waived error, if any, by failing to make a timely, specific objection on the record.

During Clementina's testimony on direct examination regarding her out-of-court photo spread identification of appellant, the following exchange occurred:

Q (STATE): When Officer Escalante showed you the photographs, which photograph did you say was the defendant?

A: I said, This is "Felipe Pinales Gonzales."

...

Q (STATE): How did you find out what the name of that man was that you had pointed out in those photographs?

A: How did I find out?

Q (STATE): Yes, ma'am.

A: Because I recognized him when he came in the house.

THE COURT: Ma'am, please listen to the question, and I don't want you saying anything else other than just answering the question.

The question was: How did you find out his name?

A: I found out his name because I reared a young man in the Dominican Republic, a brother of his. The young man told me, "That is my brother."

Q (STATE): Did he tell you that –

DEFENSE: Objection, Your Honor; move to strike.

THE COURT: Overruled.

...

Q (STATE): That person that called and said that his brother's name was Felipe Pinales Gonzales – did that person call you before or after you told Officer Escalante that that [sic] was the man in your home?

...

A: After I saw the photograph.

The following day, after the conference on the jury charge, appellant's trial counsel clarified his objection for the record by explaining that there was an unrecorded bench conference on this matter:

DEFENSE: . . . There's an issue that I didn't get to put on the record yesterday. . . . We spoke at the bench about it: but it wasn't on the record, I believe, in terms of my objection to the hearsay testimony from Clementina Canela, who testified as to a conversation that she had with a person by the name of Enrique Pinales concerning Mr. Gonzales' involvement in this event.

I would object to that as being hearsay. . . .

THE COURT: I don't recall exactly how it arose, but I believe it was a conference at the bench that the court reporter didn't get. I overruled your objection at that time. . . .

And it's still overruled.

In order to preserve error for appeal, appellant must make a timely objection with sufficient specificity to make the trial court aware of the complaint, unless the specific grounds were apparent from the context. TEX. R. APP. P. 33.1(1)(A); TEX. R. EVID. 103(a)(1). The first objection did not specifically state the grounds for exclusion, however, we find the grounds for exclusion were probably apparent from the context.

Rule 801 defines hearsay as “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” TEX. R. EVID. 801. Further, testimony is hearsay when its probative value depends in whole or in part on the credibility or competency of some person other than the person from whom the testimony is sought. *Chandler v. Chandler*, 842 S.W.2d 829, 831 (Tex. App.—El Paso 1992, writ denied).

The statement made by Clementina was not offered to prove that the young man in the Dominican Republic was appellant's brother. Rather, it was offered to show that she learned appellant's name well after she identified him, and she learned it from a source independent of the Houston Police Department. In other words, it was offered to clarify her testimony regarding the circumstances surrounding her photo spread identification of appellant. Moreover, the probative force of the statement does not depend on the competency or credibility of the young man in the Dominican Republic. Therefore, it is not hearsay.<sup>1</sup> We overrule appellant's second point of error.

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<sup>1</sup> Even if this were hearsay, it did not affect appellant's substantial rights because it did not have a substantial and injurious effect or influence in determining the jury's verdict. TEX. R. APP. P. 44.2(b); *King v. State*, 953 S.W.2d 266, 271 (Tex. Crim. App. 1997). Appellant argues that this testimony amounted to an additional witness against appellant who was immune from cross-examination. Appellant contends that because identity was the sole issue in this case, his supposed brother's implication of him in this robbery substantially prejudiced him. We disagree. A fair reading of the record reveals no such implication. In fact, the record reveals that, at most, the young man in the Dominican Republic confirmed his brother had been indicted for the crime – not that he did it.

Having overruled both points of error, we affirm the judgment of the trial court.

/s/ Norman R. Lee  
Justice

Judgment rendered and Opinion filed August 16, 2001.

Panel consists of Justices Yates, Wittig, and Lee.<sup>2</sup>

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

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<sup>2</sup> Senior Justice Norman R. Lee sitting by assignment.