Opinion issued July 21, 2020

In The

Court of Appeals

For The

First District of Texas

NO. 01-19-00582-CR

CHRISTOPHER LYNN CAMPBELL, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 174th District Court
Harris County, Texas
Trial Court Case No. 1561167

MEMORANDUM OPINION

A Harris County jury convicted Christopher Lynn Campbell of aggravated robbery with a deadly weapon and sentenced him to 10 years' confinement in the Texas Department of Criminal Justice, Correctional Institutions Division. *See* TEX. PENAL CODE § 29.03(a)(2). On appeal, Campbell contends that the trial court

erroneously admitted testimonial evidence in violation of his Sixth Amendment right to confront witnesses. He also contends that the trial court erred by failing to include in the written charge an instruction on the lesser-included offense of robbery as delineated in Section 29.02 of the Penal Code.

We affirm.

Background

In 2017, Wood Forest National Bank employed M. Desai as a retail banker in a small branch located inside a Walmart. One afternoon, Desai and J. Rodriguez, another retail banker, went to the back of the bank to retrieve funds for their teller drawers. When they returned to their teller stations, several customers were waiting in line to be assisted. A man described as a "skinny, Black male" with a "thin build" in his "late 40s" was the first person in Desai's teller line. He was wearing dark sunglasses and a baseball cap. Two customers, M. Ortiz and L. Preza, were standing behind the man. As Desai was preparing her drawer, the man approached her teller station, placed a plastic McDonald's bag and a handwritten note on the counter, and set a black handgun on top of the note. He told her to "start putting everything in there, no noise, nothing" and demanded that she "just start putting everything in this bag."

Desai was "so nervous" that she initially had trouble opening the drawer. She eventually opened her drawer and placed "ones, fives, tens, and twenties" in the bag.

The man was not pleased by the small denominations that Desai was placing in the bag. He demanded "bigger bills." He had grown increasingly impatient and started drawing attention to himself. Ortiz, while still standing behind him in line, overheard him say to Desai, "Hurry, hurry. I'm going to F'ing kill you. I'm going to F'ing shoot you." Desai quickly put her last fifty- and hundred-dollar bills, along with a tracking device, in the bag. The man then grabbed the bag containing "roughly $862" and walked out of the bank.

J. Gonzalez, the branch manager, instructed Rodriguez to call the police to report the robbery. She also contacted the bank's regional manager as required by the bank's policies and procedures. J. Dousay, the lead investigator assigned to the case, and another officer arrived on the scene. The officers interviewed Desai, Gonzalez, Rodriguez, Ortiz, and Preza about what they had witnessed earlier. The officers also collected fingerprint and DNA samples, but the results later returned as inconclusive.

Afterwards, Dousay reviewed the video surveillances footage. He also reviewed the still photographs that were captured from the security video. Dousay gave the photographs to "members of the FBI media liaison." He asked them to distribute the photographs to Crime Stoppers and the local media to help identify the robber. Meanwhile, officers recovered the tracking device in the middle of a residential street located about two miles from the bank.

A few days after the robbery, law enforcement received a Crime Stoppers' tip identifying Campbell as the person involved in the bank robbery. The tipster provided Campbell's name, home address, and employer. Based on this information, Dousay obtained a booking photograph of Campbell and generated a photo array. Shortly thereafter, Dousay presented the photo array to Desai, Ortiz, and Preza. Upon viewing the photo array, Ortiz and Preza positively identified Campbell as the robber, even though they did not see him show or brandish a gun during the robbery. Desai, however, was unable to make an identification.

After securing a search warrant, Dousay arrested Campbell for aggravated robbery and searched his apartment. Officers did not find the handgun, money, or other evidence from the robbery. After a jury trial, Campbell was convicted of aggravated robbery with a deadly weapon. The jury sentenced him to 10 years' confinement in the Texas Department of Criminal Justice, Correctional Institutions Division. Campbell appealed.

Right of Confrontation

In his first issue, Campbell complains the trial court should not have permitted Dousay to testify about the Crime Stoppers' tip because such testimony amounted to a violation of his rights under the Confrontation Clause. Given that he did not get an opportunity to cross-examine the tipster who implicated Campbell as the robbery suspect, Campbell argues that the trial court committed reversible error in violation

of his Sixth Amendment right to confrontation under *Crawford v. Washington*, 541 U.S. 36 (2004). In response, the State points out that the trial court properly admitted Dousay's testimony about the tip because Campbell failed to preserve error for appellate review. We agree.

A. Standard of review

We review a trial court's rulings on the admissibility of hearsay evidence for an abuse of discretion but review Confrontation Clause objections to admission of evidence under *Crawford de novo*. *Tillman v. State*, 354 S.W.3d 425, 435 (Tex. Crim. App. 2011); *Cook v. State*, 199 S.W.3d 495, 497 (Tex. App.—Houston [1st Dist.] 2006, no pet.) (citing *Lilly v. Virginia*, 527 U.S. 116, 136 (1999)). We will uphold the trial court's ruling if it is reasonably supported by the record and is correct under any theory of law applicable to the case. *Brito Carrasco v. State*, 154 S.W.3d 127, 129 (Tex. Crim. App. 2005) (en banc).

B. *Crawford* objection not preserved

To preserve error for appeal, the complaining party must make a timely, specific objection. TEX. R. APP. P. 33.1(a)(1); *Turner v. State*, 805 S.W.2d 423, 431 (Tex. Crim. App. 1991) (en banc). An objection is timely if it is raised at the earliest opportunity or as soon as the ground of objection becomes apparent. *See Martinez v. State*, 867 S.W.2d 30, 35 (Tex. Crim. App. 1993) (en banc); *see also Gonzalez v. State*, 563 S.W.3d 316, 320 (Tex. App.—Houston [1st Dist.] 2018, no pet.). In

addition, the complaining party must obtain an adverse ruling from the trial court or object to the trial court's refuse to rule on the objection. TEX. R. APP. P. 33.1(a)(2); *Thierry v. State*, 288 S.W.3d 80, 85 (Tex. App.—Houston [1st Dist.] 2009, pet. ref'd). If the complaining party fails to obtain an adverse ruling from the trial court, then the complained-of error is not preserved.

Here, the person who provided the tip did not testify at trial. The State sought to elicit testimony from Dousay about the Crime Stoppers' tip. Dousay testified about suspecting someone of the robbery during his investigation. The State asked him, "And who was the suspect?" Defense counsel objected to this question as hearsay. Outside the presence of the jury, defense counsel clarified that he was objecting to "the hearsay issue" and "the *Crawford* issue." The trial court and the parties spent a significant amount of time discussing the hearsay objection but did not discuss the applicability of *Crawford* or the Sixth Amendment right-of-confrontation issue. After the discussion, the trial court concluded that Dousay's testimony did "not constitute hearsay" because it was "not offered to prove the truth of what [wa]s being asserted." Instead, the trial court determined that Dousay's testimony was offered to show "why [Campbell] was developed as a suspect."[1]

[1] To reconcile this issue, the trial court suggested that a limiting instruction was necessary to explain to the jury the purpose of the challenged testimony, which was later provided to the jury as agreed by the parties.

Unlike the hearsay objection, however, a review of the record shows no adverse ruling by the trial court for the *Crawford* objection.

Campbell's hearsay objection was insufficient to preserve a Confrontation Clause challenge. *Reyna v. State*, 168 S.W.3d 173, 179 (Tex. Crim. App. 2005) ("When a defendant's objection encompasses complaints under both the Texas Rules of Evidence and the Confrontation Clause, the objection is not sufficiently specific to preserve error. An objection on hearsay does not preserve error on Confrontation Clause grounds."). We therefore hold that Campbell's failure to preserve error by obtaining an adverse ruling on Confrontation Clause grounds at trial waives his Confrontation Clause complaint on appeal. *See Linney v. State*, 401 S.W.3d 764, 774 (Tex. App.—Houston [14th Dist.] 2013, no pet.) (holding that appellant failed to preserve error because he objected on Confrontation Clause grounds at trial but failed to obtain an adverse ruling on his objection.). We overrule Campbell's first issue.

Lesser-Included Offenses

In his second issue, Campbell asserts that the trial court erred in failing to instruct the jury on robbery as a lesser-included offense of aggravated robbery. He argues that there was no evidence that a gun was used during the robbery because witnesses testified that they did not see a gun and no gun was recovered in the search of his apartment. In response, the State asserts that Campbell was not entitled to a

jury instruction on robbery because the record lacks affirmative evidence that Campbell did not use a gun during the bank robbery.

A. Standard of review

In determining whether a charge on a lesser-included offense is required, we apply the two-step analysis set forth in *Rousseau v. State*, 855 S.W.2d 666 (Tex. Crim. App. 1993) (en banc). Under the first prong of *Rousseau*, a defendant must establish that the lesser-included offense is included within the proof necessary to establish the charged offense. *Rousseau*, 855 S.W.2d at 672. Under the second prong of *Rousseau*, the record must include some evidence that would permit a jury to rationally find that, if guilty, the defendant is guilty only of the lesser-included offense. *See id*.

B. No jury instruction error

With respect to the first *Rousseau* prong, the State concedes that robbery is legally a lesser-included offense of aggravated robbery.[2] *Hamilton v. State*, 563 S.W.3d 442, 446 (Tex. App.—Houston [1st Dist.] 2018, pet. ref'd) ("Robbery is a

[2] A person commits robbery if, in the course of committing theft and with the intent to obtain or maintain control over the property the person has appropriated or is appropriating, the person intentionally or knowingly threatens or places another in fear of imminent bodily injury or death. *See* TEX. PENAL CODE §§ 29.02(a)(2), 31.03(a). "To prove aggravated robbery, the State must prove robbery plus an aggravating factor, such as the defendant 'uses or exhibits a deadly weapon.'" *Sweed v. State*, 351 S.W.3d 63, 69 (Tex. Crim. App. 2011) (citing TEX. PENAL Code § 29.03(a)(2)).

lesser-included offense of aggravated robbery."). The issue is whether Campbell carried his burden of establishing the second part of the *Rousseau* test.

Desai testified that she saw the robber place a black handgun, a plastic bag, and a note on the counter in front of her teller station as he demanded money from her drawer. But, Ortiz, Preza, and Rodriguez testified that they had not seen the gun. Ortiz and Rodriguez testified about why there were not properly positioned to see the gun used in the robbery. Ortiz, one of the bank customers, stated she "did not see" the gun because "most" of her view was "blocked." She was standing behind the robber, waiting for service. "A divot in the counter" that "dropped off and then picked back up" obstructed her from seeing the gun from where she was standing. She "believe[d]" the robber had likely hidden the gun "above the counter . . . in that divot."

In addition, Rodriguez, the other teller, described the teller station area. Her teller station was about an "arm's length" or "1 to 2 feet at most" from Desai's teller station. She was alerted of the robbery in progress because she "started hearing and noticing [Desai] was [acting] very weird." Rodriguez first heard Desai "stuttering" and then she "heard her keys jiggling too much, like she couldn't open the drawer," which was abnormal behavior for her. On cross-examination, when defense counsel asked Rodriguez whether she had seen the gun, she replied, "No. From where I was,

you couldn't have seen it." In other words, she was blocked from viewing the area where the gun was placed from where she was seated in her teller station.

Desai's testimony is some affirmative evidence that a deadly weapon was used during the bank robbery. The other witnesses' testimony about failing to see a gun is not affirmative evidence. "A witness's failure to see something is not affirmative evidence; thus, it cannot negate an element of the greater offense." *Hamilton*, 563 S.W.3d at 448; *see Tutson v. State*, 530 S.W.3d 322, 330 (Tex. App.—Houston [14th Dist.] 2017, no pet.) ("The witness's testimony that he saw something that looked like a gun is not affirmative evidence that appellant did not use a gun."). The mere possibility that the jury could have simultaneously credited Desai about being held at gunpoint during the robbery while also disbelieving Ortiz, Preza, and Rodriguez's testimony about not seeing a gun is inadequate to entitle Campbell to an instruction on robbery. *Bignall v. State*, 887 S.W.2d 21, 24 (Tex. Crim. App. 1994) (en banc) ("[I]t is not enough that the jury may disbelieve crucial evidence pertaining to the greater offense; there must be some evidence directly germane to a lesser included offense for the factfinder to consider before an instruction on a lesser included offense is warranted.").

Defense counsel did not adduce any testimony or proffer any affirmative evidence showing that a deadly weapon was not used. *See Penaloza v. State*, 349 S.W.3d 709, 713 (Tex. App.—Houston [14th Dist.] 2011, pet. ref'd) ("To be entitled

to an instruction on robbery, the record must contain affirmative evidence that a deadly weapon was not used."). In fact, the trial court observed that the witnesses' testimony about not seeing the robbery suspect with the gun was not affirmative evidence of showing that a gun was not actually used or exhibited during the commission of the crime. When denying Campbell's request for a robbery instruction, the trial court acknowledged this vital distinction and said, "But they didn't say there was not a weapon. They said they didn't see one . . . . That's the difference." There was no affirmative evidence directly germane to the offense of robbery. *See, e.g., James v. State*, 425 S.W.3d 492, 498 (Tex. App.—Houston [1st Dist.] 2012, pet. ref'd) (determining no reversible error for denying appellant's request for a lesser-included-offense instruction where the record was devoid of "testimony directly germane to the offense of theft").

Because Campbell adduced no testimony and proffered no affirmative evidence showing that a gun was not used during the robbery, we hold that the trial court did not err in denying Campbell's request for a jury instruction on the lesser-included offense of robbery. *See, e.g.*, *Hamilton*, 563 S.W.3d at 447–48 (upholding trial court's refusal of lesser-included-offense instruction witness's testimony that she had not seen a firearm was not affirmative evidence that no gun was used); *Holiday v. State*, 14 S.W.3d 784, 788 (Tex. App.—Houston [1st Dist.] 2000, pet. ref'd) (affirming trial court's denial of requested instructions for lesser-included

offenses when there was no evidence in the record showing that the appellant could have been guilty only of lesser-included offenses). Accordingly, we overrule Campbell's second issue.

Conclusion

We affirm the trial court's judgment.

Sarah Beth Landau
Justice

Panel consists of Justices Keyes, Kelly, and Landau.

Do not publish. TEX. R. APP. P. 47.2(b).