Affirmed and Majority and Dissenting Opinions filed June 23, 2020.

In The

Fourteenth Court of Appeals

NO. 14-18-00760-CR

RAUL BAHENA, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 177th District Court
Harris County, Texas
Trial Court Cause No. 1552218

M A J O R I T Y O P I N I O N

Appellant Raul Bahena challenges his conviction for aggravated robbery. In three issues appellant asserts (1) the evidence is insufficient to support his conviction, (2) the trial court erred in failing to charge the jury on a lesser-included offense, and (3) the trial court abused its discretion in allowing a State's witness to give evidence of jailhouse calls. We affirm.

I. Factual and Procedural Background

The complainant, a high school student who worked as an assistant manager of a sandwich shop, closed the shop at ten o'clock in the evening. A friend picked her up from the shop to give her a ride home. On the way to the complainant's home, the two friends stopped at a nearby park to talk and listen to music.

As the friends sat in the parked car, a man, whom the complainant later identified as appellant, approached and asked for a cigarette. When the complainant's companion said he had none, the man walked away. Moments later the man returned wielding a gun. He took the complainant's backpack.

The next day, Detective Eusevio Del Toro with Harris County Constable Precinct 4 took a written statement from the complainant. The complainant made a positive identification of appellant from a photo array.

The same day, law-enforcement officers answered disturbance calls at the Bahena home in Cypress, Texas, located near the park where the complainant was robbed. They arrested appellant's brother after a short foot chase, and then returned to the same home an hour later for a disturbance involving appellant and appellant's cousin. Officers established a perimeter around the Bahena house and brought a canine unit to assist in locating appellant. After an hour of searching, a police dog found appellant hiding in a neighbor's backyard. At the time, the officers were unaware that appellant was a suspect in the complainant's case. Appellant was not in possession of the complainant's property at the time of the arrest.

In searching for appellant and appellant's brother, the officers found the complainant's debit card and another person's credit card in the brother's jacket when they apprehended him. Meanwhile, a Cypress homeowner who also lived near the park called the school district to report property scattered across the

homeowner's backyard. Among the items found were a backpack, the complainant's Cypress Woods High School identification card, the complainant's Texas driver's license, a sandwich-shop apron, a ball cap with the complainant's nametag, and the complainant's achievement certificate.

Indicted for the felony offense of aggravated robbery by use or exhibition of a deadly weapon, appellant elected to have a jury trial on guilt-innocence, and for the judge, if necessary, to assess punishment. The jury found appellant guilty of the offense charged in the indictment. At the conclusion of the punishment hearing before the trial judge, the State urged the court to assess punishment at forty years' confinement. The trial court assessed appellant's punishment at twenty-five years' confinement. On appeal, appellant presents only issues pertaining to the guilt/innocence phase of his trial.

II. ISSUES AND ANALYSIS

A. Is the evidence sufficient to support appellant's conviction for aggravated robbery?

In his first issue, appellant asserts that the evidence is insufficient to support his conviction. In evaluating this complaint, we view the evidence in the light most favorable to the verdict. *Wesbrook v. State*, 29 S.W.3d 103, 111 (Tex. Crim. App. 2000). The issue on appeal is not whether we, as a court, believe the State's evidence or believe that appellant's evidence outweighs the State's evidence. *Wicker v. State*, 667 S.W.2d 137, 143 (Tex. Crim. App. 1984). The verdict may not be overturned unless it is irrational or unsupported by proof beyond a reasonable doubt. *Matson v. State*, 819 S.W.2d 839, 846 (Tex. Crim. App. 1991). The jury "is the sole judge of the credibility of the witnesses and of the strength of the evidence." *Fuentes v. State,* 991 S.W.2d 267, 271 (Tex. Crim. App. 1999). The jury may choose to believe or

disbelieve any portion of the witnesses' testimony. *Sharp v. State*, 707 S.W.2d 611, 614 (Tex. Crim. App. 1986). When faced with conflicting evidence, we presume the jury resolved conflicts in favor of the prevailing party. *Turro v. State*, 867 S.W.2d 43, 47 (Tex. Crim. App. 1993). Therefore, if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, we must affirm. *McDuff v. State*, 939 S.W.2d 607, 614 (Tex. Crim. App. 1997).

The indictment alleged that appellant "on or about May 20, 2017, . . . while in the course of committing theft of property owned by [the complainant], and with intent to obtain and maintain control of the property, intentionally and knowingly threaten and place [the complainant] in fear of imminent bodily injury and death, and the Defendant did then and there use and exhibit a deadly weapon, namely, a firearm."

One commits the offense of aggravated robbery if one commits robbery and uses or exhibits a deadly weapon. Tex. Penal Code section 29.03(a)(2). One commits robbery if, in the course of committing theft and with intent to obtain or maintain control of the property, one intentionally or knowingly threatens or places another in fear of imminent bodily injury or death. Tex. Penal Code, section 29.02(a)(2). A deadly weapon is "a firearm or anything manifestly designed, made, or adapted for the purpose of inflicting death or serious bodily injury," or, "anything that in the manner of its use or intended use is capable of causing death or serious bodily injury." Tex. Penal Code, section 1.07(a)(17).

The trial court's jury-charge instructions tracked the indictment, and the instructions were consistent with the language for an aggravated-robbery offense under the Penal Code. Appellant contends in his sufficiency challenge that the State failed to prove that he "robbed [the complainant] with a firearm."

Use or Exhibition of a Firearm

The complainant testified that after the initial encounter with appellant and his request for a cigarette, appellant returned about 30 seconds later and pointed a black handgun at the complainant and her companion, stating, "This is a stick-up. Give me everything you have." According to the complainant, for "maybe three minutes," appellant pointed the handgun, waved the gun around, and demanded that the complainant turn over her purse. The complainant saw appellant "cock" the firearm when the two friends failed to comply with appellant's demand. The complainant had no purse, but she turned over what she did have—a backpack containing her wallet, a debit card, a gift certificate, her school identification, her hat, and the key to the sandwich shop. The companion turned over his hat. Then, when the companion attempted to start the car, appellant reached into the car and fought with him to keep him from doing so. Appellant's efforts proved unsuccessful. The companion started the car and "sped off" driving "on to the grass and off the curb."

The black handgun the complainant described was not offered into evidence. Nor does the record contain any mention of the handgun having been recovered. But the complainant testified that she believed the gun was real, that it could cause death or serious injury, and that appellant's wielding of the gun caused her to be scared. The complainant testified that when appellant approached the car with the handgun, he demanded that they give him their belongings. The complainant testified that appellant pointed the gun at her and her companion and that appellant waved the gun around for roughly three minutes and cocked the gun to prompt compliance with his demand. *See Johnson v. State*, 509 S.W.3d 320, 324 (Tex. Crim. App. 2017) (finding that a jury reasonably could have inferred that a butter knife, based on the wielder's threats, proximity to the complainant, the brandishing of it, the manner used, or intended to be used "rendered it capable of causing serious

bodily injury or death.").

Though at some point the complainant testified that she believed the gun was not loaded, this evidence does not mean that the evidence is insufficient to support a finding that appellant used or exhibited a deadly weapon. *See Thomas v. State*, 36 S.W.3d 709, 711 (Tex. App.—Houston [1st Dist.] 2001, pet. ref'd) ("The State is not required to show that a firearm was operable or even loaded."); *see also Aikens v. State*, 790 S.W.2d 66, 67–68 (Tex. App.—Houston [14th Dist.] 1990, no pet.) ("firearm discovered in complainant's car need not be serviceable in order to be classified as a deadly weapon"). The record contains sufficient evidence to sustain the deadly-weapon finding and to sustain a finding that the "black handgun" the complainant described was "used or exhibited" during the robbery. *See Johnson v. State*, 509 S.W.3d at 324 (knife found to be a deadly weapon even though the knife was not entered into evidence and complainant and video could provide only limited information that the blade of the knife was a couple of inches long and was used to threaten the complainant and other witnesses).

Identity

Based on a liberal construction of appellant's brief, he also challenges the sufficiency of the evidence identifying appellant — as opposed to his brother — as the perpetrator. As with every other element of an offense, the State must prove beyond a reasonable doubt that the accused is the person who committed the charged offense. *Miller v. State*, 667 S.W.2d 773, 775 (Tex. Crim. App. 1984). A defendant's identity and criminal culpability may be proved either through direct or circumstantial evidence, coupled with all reasonable inferences from that evidence. *Jenkins v. State*, 493 S.W.3d 583, 599 (Tex. Crim. App. 2016); *Fang v. State*, 544 S.W.3d 923, 928 (Tex. App.—Houston [14th Dist.] 2018, no pet.). The complainant testified that she recognized appellant when he first approached the car in the park.

She testified that she went to middle school with appellant and was friends with his cousin. During her trial testimony, the complainant identified appellant as the one who committed the offense, and a law-enforcement officer testified that the complainant identified appellant during the police investigation. When presented with photos of both appellant and his brother, the complainant affirmatively and unequivocally identified appellant as the gun-wielding robber, and stated that appellant's brother was not the person who robbed her. The complainant's testimony alone is sufficient to support the element of identity. *Walker v. State*, 180 S.W.3d 829, 832–33 (Tex. App.—Houston [14th Dist.] 2005, no pet.) ("A conviction may be based on the testimony of only one eyewitness.").

Intent

Although appellant has not specifically challenged the element of intent, we note that criminal intent may be inferred from an accused's acts, words, or conduct, as well as the surrounding circumstances of the acts. *Moore v. State*, 969 S.W.2d 4, 10 (Tex. Crim. App. 1998); *Neelys v. State*, 374 S.W.3d 553, 559 (Tex. App.—Houston [14th Dist.] 2012, pet. ref'd) (finding evidence sufficient to establish defendant's criminal intent to not return his sister's phone when he forcibly took the phone and fled from her home); *Williams v. State*, 770 S.W.2d 948, 949 (Tex. App.—Houston [14th Dist.] 1989, no pet.) (concluding that sufficient evidence supported conviction for theft because the record reflected the accused took a necklace from a person and fled without making any efforts to return the necklace). Jailhouse calls revealed that a caller with a male voice using appellant's identification numbers and codes tried to convince others to bribe the complainant so that she would either recant her allegations or not cooperate with the State. *See Guevara v. State*, 152 S.W.3d 45, 50 (Tex. Crim. App. 2004) (holding that "[a]ttempts to conceal incriminating evidence. . .are probative of wrongful conduct

and are also circumstances of guilt."). We conclude that the record evidence suffices to establish the element of appellant's intent.

Sufficiency of the Evidence

Under the applicable standard of review, a rational trier of fact could have found beyond a reasonable doubt that appellant intentionally threatened the complainant with fear of imminent bodily injury or death, by using and exhibiting a deadly weapon, in the course of committing theft and with intent to obtain or maintain control of the property. *See Johnson v. State*, 509 S.W.3d at 324; *Walker v. State*, 180 S.W.3d at 832–33; *Neelys v. State*, 374 S.W.3d 553, 559; *Guevara v. State*, 152 S.W.3d at 50. Finding no merit in appellant's challenge to the sufficiency of the evidence supporting his conviction for aggravated robbery, we overrule appellant's first issue.

B. Did the trial court reversibly err when it denied appellant's requested jury instruction for the lesser-included offense of robbery?

In his second issue, appellant argues that the trial court erred by omitting from the jury charge an instruction on the lesser-included offense of robbery. The trial court overruled appellant's objection to the trial court's omission of a charge on this lesser-included offense.

The Texas Code of Criminal Procedure provides, "[i]n a prosecution for an offense with lesser included offenses, the jury may find the defendant not guilty of the greater offense, but guilty of any lesser included offense." Tex. Code Crim. Proc. Ann. art. 37.08 (West, Westlaw through 2019 R.S.). We apply a two-prong analysis to determine whether the trial court should have included a lesser-included offense instruction in the jury charge. *State v. Meru,* 414 S.W.3d 159, 162 (Tex. Crim. App. 2013); *Hall v. State,* 225 S.W.3d 524, 535–36 (Tex. Crim. App. 2007).

In the first prong, we compare the elements of the offense as charged in the

indictment or information with the elements of the asserted lesser-included offense. *Meru,* 414 S.W.3d at 162; *Hall,* 225 S.W.3d at 535–36. This first-prong inquiry presents a question of law and does not depend on evidence adduced at trial. *Hall,* 225 S.W.3d at 535; *Shakesnider v. State*, 477 S.W.3d 920, 924 (Tex. App.—Houston [14th Dist.] 2015, no pet.). The State does not dispute that the first prong is met—the offense charged in the indictment, aggravated robbery, contains all of the elements of the proposed lesser-included offense of robbery. *See* Tex. Code Crim. Proc. Ann. art. 37.09(1); *Palacio v. State*, 580 S.W.3d 447, 454 (Tex. App.—Houston [14th Dist.] 2019, pet. ref'd) ("An offense is a lesser-included offense of the charged offense if the indictment for the greater offense. . . alleges all of the elements of the lesser-included offense."); *see Penaloza v. State*, 349 S.W.3d 709, 711 (Tex. App.—Houston [14th Dist.] 2011, pet. ref'd)("Robbery is a lesser included offense of aggravated robbery."). The only difference between the two offenses is that aggravated robbery, as charged in this case, requires an additional finding that the defendant used or exhibited a deadly weapon. *See* Tex. Penal Code Ann. §§ 29.02, 29.03 (West 2010); *Penaloza v. State*, 349 S.W.3d at 711. So, we turn to the second-prong inquiry and consider whether the record contains some evidence from which a jury rationally could find that appellant is guilty of robbery but not guilty of aggravated robbery. *Penaloza*, 349 S.W.3d at 711; *Sweed v. State*, 351 S.W.3d 63, 68 (Tex. Crim. App. 2011). The evidence must establish the lesser-included offense as a "valid rational alternative to the charged offense." *Sweed*, 351 S.W.3d at 68.

We review all of the evidence presented at trial. *Id*. Anything more than a scintilla of evidence suffices to entitle a defendant to a lesser charge. *Sweed v. State*, 351 S.W.3d at 68. Although a scintilla of evidence presents a low threshold, "it is not enough that the jury may disbelieve crucial evidence pertaining to the greater

offense, but rather, there must be some evidence directly germane to the lesser-included offense for the finder of fact to consider before an instruction on a lesser-included offense is warranted." *Id*. If some evidence refutes or negates other evidence establishing the greater offense or if the evidence presented is subject to different interpretations, then the standard is met and the instruction is warranted. *Id*. We review the trial court's decision on the submission of a lesser-included offense for an abuse of discretion. *Davison v. State*, 495 S.W.3d 309, 311 (Tex. App.—Houston [14th Dist.] 2016, no pet.).

Appellant argues that the jury reasonably could have found that appellant committed the offense of robbery without using a firearm based on what appellant interprets as a contradiction within the complainant's testimony. First, the complainant testified that she was not that familiar with guns. Specifically, she stated that she was not that familiar with the difference between a semi-automatic gun and a revolver. Appellant juxtaposes this testimony with the complainant's later testimony that she knew the gun appellant was holding was not loaded because he cocked it twice without a shell being discharged. Appellant contends these statements are contradictory, and argues that from this purported contradiction we can infer that the complainant believed the gun was a toy. We disagree with the reasoning appellant would have us follow.

The complainant's testimony was not contradictory—one may know quite a bit about one type of gun without knowing anything about another type of gun, including how the two types differ. But even presuming for the sake of argument that the complainant's statements were contradictory, appellant's proposed inference—that the complainant believed the gun to be a toy—is a giant leap, not a logical step or a reasonable deduction. At no point did the complainant testify that she believed appellant's gun to be a toy, nor was the complainant even asked the

question. No toy guns were ever found, and appellant never produced or offered any evidence on the use or exhibition of toy guns. Rather, the complainant's uncontroverted testimony shows that appellant was holding a real gun, and that the complainant knew this to be true because she saw it.

The only evidence concerning the events of the robbery came from the complainant's testimony and she described the offense as one carried out with a "black handgun." Because the record contains no other evidence directly germane to the lesser-included robbery-without-a-firearm offense for the finder of fact to have considered, an instruction on the lesser-included offense of robbery was not warranted. *Sweed v. State*, 351 S.W.3d at 68; *Penaloza v. State*, 349 S.W.3d at 713. The trial court did not err in omitting the instruction.

We overrule appellant's second issue.

C. Did the trial court reversibly err by permitting Deputy Franks to testify?

In his third issue, appellant asserts the trial court abused its discretion when it admitted the testimony of Sergeant Larry Franks with the Harris County Sheriff's Office, whom the State called as a witness to authenticate the recordings of jailhouse telephone calls.

The State had not listed Deputy Franks on the State's witness list. Franks testified about recorded telephone calls made from the Harris County Jail. He explained that the telephone calls are stored according to each inmate's specifically assigned number (SPN number), which the inmate enters along with the inmate's personal identification number into the phone before any call can be made. Franks testified that he recorded on a disc telephone calls placed from the jail by a caller who was using appellant's identification numbers and codes. Franks played recordings of telephone calls made on May 25, 2017, September 6, 2017, September 20, 2017, November 23, 2017, December 31, 2017, January 11, 2018, and May 1,

2018. In these recordings, a caller with a male voice discusses the robbery of the complainant and the possibility of paying the complainant for recanting or not cooperating with the prosecution. In some calls, the caller can be heard speaking with individuals about not attending trial and evading subpoenas. In one call, on November 23, 2027, the caller expresses regret for pointing his gun at his cousin, Yessica,[1] and considers that to be the reason he was in jail, noting that it prompted her to "call the law."

Appellant complains that the trial court abused its discretion (1) in overruling appellant's objection that Franks should not be allowed to testify because the State had not designated him timely on its witness list, and (2) in overruling appellant's objection that Franks was not the custodian of records for the recordings of the jailhouse calls.

Allowing an Untimely-Designated Witness to Testify

Appellant complains that the trial court erred in overruling appellant's objection to Franks's testimony based on the State's failure to designate him timely on its witness list. Appellant alleges that he suffered surprise as a result of the untimely designation. The decision to allow a witness that was not on the State's witness list to testify falls within the trial court's discretion. *See Martinez v. State*, 867 S.W.2d 30, 39 (Tex. Crim. App. 1993). A reviewing court considers whether the State acted in bad faith and whether the accused reasonably could have anticipated the witness's testimony in determining whether the trial court abused its discretion in allowing testimony from a witness not identified on the State's witness

[1] The record indicates that appellant's cousin, is "Yessica Bahena" or "Jessica Bahena", as both spellings were used to describe the same person at trial and in the clerk's record.

list. *See id.*

Appellant does not contend that the State acted in bad faith when it failed to disclose Franks on its witness list, and the record contains no evidence that would support such a finding. Appellant does not dispute the State's contention that appellant had access to the recordings of the jailhouse calls or that he was aware these records exist.[2] A month before trial, the State listed Franks's name on the subpoena list filed with the trial court and publicly available. These facts suggest that the State intended to make appellant aware that it would present evidence of the jailhouse calls at trial yet failed to reveal how it would present proof of the records. The record does not suggest that the prosecutor acted in bad faith or intended to deceive appellant by the omission. *See Irvine v. State*, 857 S.W.2d 920, 927 (Tex. App.—Houston [1st Dist.] 1993, pet. ref'd).

We next consider whether appellant reasonably could have anticipated that the State would call Franks to testify. We take into account (1) the degree of surprise to the defendant; (2) the degree of disadvantage inherent in that surprise (i.e., the defendant was aware of what the witness would say, or the witness testified about cumulative or uncontested issues); and (3) the degree to which the trial court was able to remedy that surprise (i.e., by granting the defense a recess, postponement, or continuance, or by ordering the State to provide the witness's criminal history). *Hamann v. State*, 428 S.W.3d 221, 227–28 (Tex. App.—Houston [1st Dist.] 2014, pet. ref'd).

Without proper notice, appellant fairly can claim some degree of surprise

[2] The Clerk's Record shows that on June 11, 2018, the State filed its notice of intent to use "PCT 4 CALL LOG RECORDS" and named another individual as the custodian of records. The notice indicates that the records were uploaded on the same date, roughly two months before trial. Neither party has indicated whether these records are the pertinent records.

from the omission. But the State called Franks to introduce the jailhouse call records, and appellant has not argued that these records presented a surprise. Appellant does not dispute the State's contention that appellant had access to the recordings or that he was aware these recordings existed. Finally, when the trial court discovered that the State had not timely designated Franks as a witness, the trial court provided appellant a recess, and an opportunity to interview Franks before he took the stand to testify. Under these circumstances, taking into account the State's omission, Franks's role (to authenticate the recordings of the jailhouse calls), and the low degree of surprise or inherent prejudice from that surprise, we conclude the trial court's measures for addressing the untimely designation afforded appellant an appropriate remedy. *See Nobles*, 843 S.W.2d at 515 (surprise remedied by recess called by trial court to allow trial counsel to interview witness); *Hamann*, 428 S.W.3d at 228 (recess to allow trial counsel to interview fingerprint expert remedied any surprise by lack of inclusion on witness list). The trial court did not abuse its discretion in allowing this testimony.

Overruling of Objections that Witness was not Custodian of Records

Appellant also complains on appeal that Franks was not the custodian of the jailhouse call records and that the evidence of the jailhouse calls lacked trustworthiness based on Franks' testimony that many of the inmates rent their identification numbers to other inmates for those inmates to make telephone calls from the Harris County Jail. The trial record reflects that appellant did not preserve error in the trial court as to the latter complaint that the audio recordings lacked trustworthiness. *See Melendez v. State*, 194 S.W.3d 641, 644 n.4 (Tex. App.—Houston [14th Dist.] 2006, pet. ref'd). Appellant did not object to the testimony or the recordings as hearsay, or contend that the recordings lacked trustworthiness based on Franks's testimony that many of the inmates rent their identification

numbers to other inmates for those inmates to make telephone calls from the Harris County Jail. *See Melendez*, 194 S.W.3d at 644 n.4. Appellant's only objection under Texas Rule of Evidence 803(6) was that Franks was "not the custodian of records of these calls. It's Secure's company is." So, the only preserved issue before this court as to Rule 803(6) is whether the trial court abused its discretion by overruling this objection. *See Rothstein v. State*, 267 S.W.3d 366, 373 (Tex. App.—Houston [14th Dist.] 2008, pet. ref'd) (stating that "[a] defendant's appellate contention must comport with the specific objection made at trial" and that "[a]n objection stating one legal theory may not be used to support a different legal theory on appeal."); *Melendez*, 194 S.W.3d at 644 n.4 (holding two complaints as to Rule 803(6) testimony were not before the appellate court because appellant had not preserved error in the trial court).

Though appellant preserved error in the trial court on his complaint that Franks was not the custodian of records of the recordings of these jailhouse calls, under Rule 803(6), a party may satisfy the required conditions through the in-court testimony of either "the custodian or another qualified witness." Tex. R. Evid. 803(6)(D) (stating that "all these conditions [the three required conditions stated in subsections (A) through (C)] [must be] shown by the testimony of the custodian or another qualified witness, or by an affidavit or unsworn declaration that complies with Rule 902(10)"). Appellant did not object in the trial court that Franks was not "another qualified witness" or that Franks was not qualified to offer testimony under Rule 803(6). On appeal, appellant likewise complains that Franks was not the custodian of records but does not assert that Franks was not "another qualified witness" or that Franks was not qualified to offer testimony under Rule 803(6). In substantially similar circumstances, this court has held that the appellant's appellate issue failed to show that the witness was not a qualified witness for Rule 803(6)

purposes when the appellant complained that the record contained no evidence showing the witness was the custodian of records but did not complain that the witness was not "another qualified witness." *See Melendez*, 194 S.W.3d at 644. Following this precedent, we conclude that in his third issue appellant has failed to demonstrate that Franks was not a witness qualified to testify to the elements of the hearsay exception under Rule 803(6). *See id*. Even presuming that Franks was not the custodian of records, that status would not mean that he was unqualified to give Rule 803(6) testimony. *See id*. So, the trial court did not abuse its discretion in overruling appellant's objections to Franks's testimony authenticating the jailhouse call recordings. *See id*.

We overrule appellant's third issue.

III. CONCLUSION

We conclude the evidence is legally sufficient to support appellant's conviction for aggravated robbery. We find no merit in appellant's argument that the trial court erred in failing to charge the jury on robbery as a lesser-included offense. And, we find no abuse of discretion in the trial court's overruling of appellant's objections to the testimony of the witness authenticating the jailhouse call recordings. Having overruled all of appellant's challenges on appeal, we affirm the trial court's judgment.

/s/ Kem Thompson Frost
Chief Justice

Panel consists of Chief Justice Frost and Justices Wise and Hassan (Hassan, J., dissenting).

Publish — TEX. R. APP. P. 47.2(b).