Opinion issued April 5, 2001 withdrawn; Affirmed as Modified in Part, Reversed and Remanded in Part and Substituted Opinion filed August 16, 2001.

In The

Fourteenth Court of Appeals

NO. 14-00-00031-CR

ABU BOIKA KANNEH, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 183rd District Court
Harris County, Texas
Trial Court Cause No. 804,037

S U B S T I T U T E D O P I N I O N

The State's motion for rehearing is overruled, the opinion issued in this case on April 5, 2001 is withdrawn, and the following opinion is issued in its place.

Abu Boika Kanneh appeals a conviction for aggravated robbery[1] on the grounds that: (1) the trial court erred by refusing to instruct the jury on the lesser included offense of robbery; (2) the evidence was legally insufficient to prove he was guilty of aggravated robbery; (3) the judgment ordering cumulation of the sentence is void; (4) the trial court

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[1] Appellant was charged by indictment with aggravated robbery, found guilty by a jury, and sentenced by the jury to thirty years confinement.

erred by cumulating a sentence appellant previously served; and (5) the trial court erred by denying him credit for time served prior to sentencing. We affirm as modified in part and reverse and remand in part.

Legal Sufficiency

Appellant's second point of error contends that the evidence was legally insufficient to prove he was guilty of the aggravating element of the offense, *i.e.*, the use or exhibiting of a deadly weapon. Because this issue is dispositive of the appeal, we address it first.

Standard of Review

When reviewing legal sufficiency, we view the evidence in the light most favorable to the verdict and determine whether a rational trier of fact could have found the elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *Curry v. State*, 30 S.W.3d 394, 406 (Tex. Crim. App. 2000).

A person commits robbery if, "in the course of committing theft"[2] and with intent to obtain or maintain control of the property, he intentionally or knowingly threatens or places another in fear of imminent bodily injury or death. TEX. PEN. CODE ANN. § 29.02(a)(2) (Vernon 1994). The offense is elevated to aggravated robbery if, during its commission, the person uses or exhibits a deadly weapon. *Id*. at § 29.03(a)(2).

A person is criminally responsible as a party to an offense if the offense is committed by his own conduct, the conduct of another for which he is criminally responsible, or both. *Id*. at § 7.01(a). A person is criminally responsible for an offense committed by another if, acting with intent to promote or assist the commission of the

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[2] "In the course of committing theft" means conduct that occurs in an attempt to commit, during the commission, or in immediate flight after the attempt or commission of theft. TEX. PEN. CODE ANN. § 29.01(1) (Vernon 1994).

offense, he solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense. *Id*. at § 7.02(a)(2).[3]

A conviction for an aggravated offense must be supported by evidence that the defendant committed, or was criminally responsible for committing, the aggravating element. *See Stephens v. State*, 717 S.W.2d 338, 340 (Tex. Crim. App. 1986). In *Stephens*, a woman was abducted, taken to the bedroom of an apartment, threatened with physical harm, and raped. *Id*. at 338. Although there was evidence that the appellant rented the apartment where the rape occurred, was present in the apartment when the complainant was raped, and had sex with the complainant after she had been in the apartment for awhile, there was no evidence that he was in the room when the complainant was actually threatened or that he even knew such a threat had been made. *Id*. at 339. The jury was charged only on the offense of aggravated rape, where the aggravating element was a threat of serious bodily injury or death.[4] *Id*. at 339-40. The Court of Criminal Appeals upheld the reversal of the appellant's conviction because it concluded the appellant could not be guilty as a party of *aggravated* rape where there was no evidence that he was at least aware that the complainant had been threatened. *Id*. at 341-42.

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[3] In this case, the jury charge authorized finding appellant criminally responsible as a party, but not as a conspirator. *Compare* TEX. PEN. CODE ANN. § 7.02(a)(2) (Vernon 1994) ("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 . . . ."), *with id*. at § 7.02(b) ("If, in the attempt to carry out a conspiracy to commit one felony, another felony is committed by one of the conspirators, all conspirators are guilty of the felony actually committed, though having no intent to commit it, if the offense was committed in furtherance of the unlawful purpose and was one that should have been anticipated as a result of the carrying out of the conspiracy.").

[4] *Compare* TEX. PEN. CODE ANN. § 29.03(a)(2) (Vernon 1994) (A person commits aggravated *robbery* if, among other things, the person: (1) causes serious bodily injury to another; or (2) uses or exhibits a deadly weapon.), *with id*. at § 22.021(a)(2)(A)(i)-(iv) (A person commits aggravated *sexual assault* (rape) if, among other things, the person: (1) causes serious bodily injury or attempts to cause the death of the victim or another person in the course of the same criminal episode; (2) by acts or words places the victim in fear that death, serious bodily injury, or kidnaping will be imminently inflicted on any person; (3) by acts or words occurring in the presence of the victim threatens to cause the death, serious bodily injury, or kidnaping of any person; or (4) uses or exhibits a deadly weapon in the course of the same criminal episode.).

In this case, the State contends that appellant is guilty of the aggravated robbery as a party because he was present during the robbery and actively participated in it before, while, and after his companion used and displayed the knife. However, we interpret *Stephens* to mean that there must be direct or circumstantial evidence that appellant not only participated in the robbery before, while, or after the knife was displayed, but did so while being aware that the knife would be, was being, or had been, used or exhibited during the offense. If appellant was never aware of the knife, then he could not have solicited, encouraged, directed, aided, or attempted to aid the other person in committing the aggravating element of the offense.[5] In the absence of evidence suggesting any actual awareness by appellant of the knife, we believe that evidence would at least be necessary to support an inference that in the manner the knife was handled before, during, or after the robbery, it would have been visible to someone in the area where appellant was positioned at those times or some mention was made of it by someone in appellant's presence.

Sufficiency Review

According to the complainant's testimony, in November of 1998, appellant and a companion approached her in a parking lot a few feet from her car, and appellant's companion, who was closer to the complainant, whispered for her to get in her car. The complainant did not see anything in the companion's hand when he first approached her. In response, she started backing up so she could escape, threw her keys in the parking lot next to her car, and then threw her purse. While appellant was retrieving those items,[6] his companion grabbed the complainant's arm, pulled out a knife from the front of his pants, and placed the knife at the complainant's waist.

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5 Conversely, if he did not have to be aware of the knife, then the evidence necessary to convict him as a party to aggravated robbery would be no different than that to convict him as a party to (ordinary) robbery, *i.e.*, mere participation in the robbery.

6 The complainant's testimony conflicts as to whether she threw her purse before or after the knife was pulled out. She first said she threw the purse after the knife was pulled but later said she threw the purse first and then the knife was pulled out because she would not get in her car.

The complainant testified that the knife was covered by the companion's shirt before he pulled it out, appellant never spoke to her, and appellant was behind his companion when the knife was drawn. The complainant further testified that she threw her keys four to five feet away and the purse two feet away, and after appellant retrieved her keys and purse he was going around her car toward the passenger side, *i.e.*, away from the driver's side of the vehicle, where she and the companion were standing. The complainant then hit appellant's companion, causing him to lose his balance, and she escaped.

The State argues that a rational inference can be drawn from this evidence that appellant was aware of his companion's use of the knife. However, there is no direct or circumstantial evidence suggesting that appellant was ever aware of the knife and the evidence is, at best, ambiguous whether it was ever even visible to him. Appellant was behind his companion and then on the other side of the car while the knife was drawn, and, while drawn, the knife was held at the height of complainant's waist. Moreover, there is no evidence of how the knife was handled or what appellant and his companion did immediately after the complainant escaped.

Although it would intuitively seem likely that appellant would have known of or seen his companion's knife before, during, or after such an encounter, without at least circumstantial evidence to support it, such a conclusion cannot properly be based on speculation or assumption. Accordingly, the evidence was insufficient to support appellant's conviction of aggravated robbery, and appellant's second point of error is sustained.

A court of appeals may reform a judgment to reflect a conviction of a lesser included offense if: (1) the court finds that the evidence is insufficient to support conviction of the charged offense, but sufficient to support conviction of the lesser included offense; and (2) either the jury was instructed on the lesser included offense or one of the parties asked for, but was denied, such an instruction. *Collier v. State*, 999 S.W.2d 779, 782 (Tex. Crim. App. 1999). In this case, as reflected by appellant's first point

of error, he requested and was refused a jury charge instruction on the lesser included offense of robbery.

Had we instead concluded in this case that the evidence was sufficient to prove aggravated robbery but that there was also evidence that would have permitted a jury to rationally find that appellant was guilty of only robbery, the appropriate disposition would have been a reversal and remand in order to give a jury an opportunity to consider conviction of robbery as an alternative to conviction of aggravated robbery. In this case, there is no reason for such a remand because the evidence is insufficient to prove that appellant was guilty of the greater offense and, by finding appellant guilty of aggravated robbery, the jury also thereby necessarily found him guilty of the lesser included offense of robbery. *See Bigley v. State*, 865 S.W.2d 26, 27 (Tex. Crim. App. 1993). Accordingly, we modify the trial court's judgment to reflect a conviction for robbery, affirm the conviction as modified, reverse the imposition of punishment, and remand the case for a new determination of punishment.

/s/ Richard H. Edelman
Justice

Judgment rendered and Opinion filed August 16, 2001.

Panel consists of Justices Edelman, Frost, and Murphy.[7]

Do not publish — TEX. R. APP. P. 47.3(b).

[7] Senior Chief Justice Paul C. Murphy sitting by assignment.