Opinion issued November 18, 2010

In The

Court of Appeals

For The

First District of Texas

NO. 01-09-00379-CR

DOMINIQUE PIERRE LEONARD, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 185th District Court
Harris County, Texas
Trial Court Case No. 1136957

MEMORANDUM OPINION

A jury convicted appellant, Dominique Pierre Leonard, of robbery.[1] After appellant pleaded true to the allegations in an enhancement paragraph, the jury

[1] TEX. PENAL CODE ANN. § 29.02 (Vernon 2003).

assessed punishment at confinement for life and a $10,000 fine. In two issues, appellant contends that the State failed to present legally and factually sufficient evidence to support the jury's verdict.

We affirm.

Background

During the summer of 2007, the Houston Police Department ("HPD"), the FBI, and the Sugar Land Police Department cooperated in investigating a string of grocery store bank robberies with similar factual circumstances occurring in the Houston and Sugar Land areas. Between late August and mid-September of 2007, a man matching appellant's description approached three separate grocery store bank counters, asked for ones in exchange for a large bill or bills, and then passed the teller a handwritten business card that demanded that the teller empty the cash drawer and give him all of the "100s, 50s, and 20s."

On the morning of August 23, 2007, the complainant in this case, Angele Ricard, was working as a bank teller for the Wells Fargo bank inside the Randall's grocery store at 11041 Westheimer in Houston. Between nine and ten o'clock in the morning, appellant, who was holding a blue bank bag, entered the store and approached the bank counter. He first asked the complainant for fifty one dollar bills in exchange for his fifty dollar bill. After the complainant complied, appellant pulled out a business card with the hand-written words "empty the cash drawer"

and held it so that the complainant could read it. He asked the complainant to give him all of the hundred, fifty, and twenty dollar bills, and she did so. Appellant matched the physical description given to police by the tellers in two other Houston area grocery-store bank robberies which occurred around the same time. Appellant used the same method of obtaining the money and displayed the same calm manner in each of the three robberies.

After police published a surveillance photo from one of the incidents, they received a Crime Stoppers tip from appellant's cousin identifying appellant as a suspect. On September 18, 2007, police arrested appellant during a traffic stop and discovered that he was driving with a suspended license. During the inventory search of the vehicle, police found two bank bags containing $3,022 in cash in the glove compartment.

The complainant and the two other bank tellers all identified appellant as the perpetrator in photograph lineups. On October 12, 2007, HPD Sergeant D. Ryza obtained an arrest warrant in Harris County for appellant on robbery charges based on the events of August 23, 2007.

The State indicted appellant for robbery. The indictment alleged that appellant, "while in the course of committing theft . . . and with intent to obtain and maintain control of the property, intentionally and knowingly threatened and placed the Complainant in fear of imminent bodily injury and death, by HOLDING

A BAG COMPLAINANT BELIEVED HAD A WEAPON IN THE BAG AND DEMANDING CASH."

At trial, witnesses from all three incidents positively identified appellant in person. The complainant testified that she was "in shock" during the incident, that she was afraid, and that she "didn't know if [appellant] had a gun or not." The State asked the complainant, "As far as you know . . . in that bag there could have been a gun?" She answered, "Yeah." She also testified that she was so afraid that she forgot all of her training for what to do during robberies and that she was unable to return to work for a week after the incident.

HPD Officer D. Taylor, who was the first officer to respond to the scene, testified that the complainant was still shaking when he arrived minutes after the incident. Sergeant Ryza, who interviewed the complainant at the scene, also testified that she was still upset when he arrived between thirty and forty-five minutes after the incident. He further testified that the complainant told him that there was or might possibly be a weapon in the bag appellant was holding and that she had been too afraid to place a tracking device in the bank bag with the cash.

Sufficiency of the Evidence

In two issues, appellant contends that the State failed to present legally and factually sufficient evidence to support the conviction.[2]

A. Standard of Review

We review the legal sufficiency of the evidence by viewing the evidence in the light most favorable to the verdict to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979); *King v. State*, 29 S.W.3d 556, 562 (Tex. Crim. App. 2000). The fact finder is the sole judge of the weight and credibility of the evidence. *Brown v. State*, 270 S.W.3d 564, 568 (Tex. Crim. App. 2008). Although our analysis considers all of the evidence presented at trial, we may not re-weigh the evidence and substitute our judgment for that of the fact finder. *King*, 29 S.W.3d at 562. We presume that the fact finder resolved all conflicts in the evidence in favor of the verdict and we defer to that resolution. *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007).

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[2] In *Brooks v. State*, the Court of Criminal Appeals overruled *Clewis v. State* and held that claims of factual insufficiency should now be analyzed under the *Jackson v. Virginia* standard used for legal sufficiency review. *Brooks*, ____ S.W.3d ____, 2010 WL 3894613, at *14 (Tex. Crim. App. Oct. 6, 2010) ("[W]e decide that the *Jackson v. Virginia* standard is the only standard that a reviewing court should apply in determining whether the evidence is sufficient to support each element of a criminal offense that the State is required to prove beyond a reasonable doubt."). Because appellant makes the exact same arguments for why the evidence is both legally and factually insufficient, we solely address appellant's legal sufficiency contention.

B. Legal Sufficiency

In his first issue, appellant asserts that the State failed to present legally sufficient evidence to support his conviction for robbery because the State did not establish that the complainant believed that the bank bag contained a weapon, as alleged in the indictment. A person commits the offense of theft if he unlawfully appropriates property with the intent to deprive the owner of property. TEX. PENAL CODE ANN. § 31.03 (Vernon 2003). A person commits the offense of robbery if, in the course of committing theft and with intent to obtain or maintain control of the property, he: (1) intentionally, knowingly, or recklessly causes bodily injury to another; or (2) intentionally or knowingly threatens or places another in fear of imminent bodily injury or death. *Id.* § 29.02 (Vernon 2003). The State must show every essential element of the offense listed in the indictment beyond a reasonable doubt. *Juarez v. State*, 198 S.W.3d 790, 793 (Tex. Crim. App. 2006).

Appellant does not dispute that the State proved the theft element of robbery; rather, he asserts that the State did not prove beyond a reasonable doubt that the complainant was threatened or placed in fear of imminent bodily injury. Appellant contends that the complainant never testified that she believed appellant had a weapon. "Proving robbery by showing the defendant placed another in fear does not require an actual threat." *Burton v. State*, 230 S.W.3d 846, 852 (Tex. App.—Houston [14th Dist.] 2007, no pet.); *see also Williams v. State*, 827 S.W.2d

614, 616 (Tex. App.—Houston [1st Dist.] 1992, pet. ref'd) (noting that factfinder can determine that complainant perceived fear when accused made no actual threats). We look to the circumstances surrounding the robbery to determine if appellant's conduct reasonably placed the complainant in fear of imminent bodily injury. *Burton*, 230 S.W.3d at 853; *see also Welch v. State*, 880 S.W.2d 225, 226–27 (Tex. App.—Austin 1994, no pet.) (finding evidence sufficient to support robbery conviction when appellant disguised his clothing, gave bank teller a robbery demand note, and reached to his pocket to pull out what teller initially thought was gun but turned out to be paper bag for holding money). A demand note is a sufficient threat, and politeness does not mitigate a threat. *See, e.g.*, *Burton*, 230 S.W.3d at 853 (citing *Welch*, 880 S.W.2d at 226–27). The fact finder may conclude that an individual perceived fear or was placed in fear in circumstances where no actual threats were conveyed by the accused. *Id.* at 852.

Here, appellant demanded money from the complainant and she complied. The complainant testified that she was afraid during the incident, that she was "scared for [her] life," and that she was too afraid to return to work for a week after the incident. She also testified that she was not sure whether appellant actually had a weapon in the bank bag he was carrying because she was "in shock," although she stated that there could have been a weapon in the bag. Officer Taylor testified that the complainant was still shaking when he arrived at the scene minutes after

the incident. Sergeant Ryza likewise testified that the complainant was too afraid to put a tracking device in the bank bag as she had been trained to do and that she was still upset when he interviewed her thirty to forty-five minutes after the incident. A rational trier of fact could have determined that appellant's conduct reasonably placed the complainant in fear of imminent bodily injury. *See Burton*, 230 S.W.3d at 853.

Thus, we conclude that the State presented legally sufficient evidence to establish that appellant committed theft with the intent to obtain or maintain control of the property and that he intentionally or knowingly threatened or placed the complainant in fear of imminent bodily injury or death. *See* TEX. PENAL CODE ANN. § 29.02; *see also Juarez*, 198 S.W.3d at 793 (holding that must show every essential element of offense listed in indictment beyond reasonable doubt); *King*, 29 S.W.3d at 562 (holding that evidence is legally sufficient when evidence, view in light most favorable to the verdict, would allow rational trier of fact to find essential elements of crime beyond reasonable doubt).

The State contends that we should construe appellant's first issue as an argument that the evidence against him is legally insufficient based upon a variance between the indictment and the proof offered at trial. "A 'variance' occurs when there is a discrepancy between the allegations of the charging instrument and the proof at trial." *Gollihar v. State*, 46 S.W.3d 243, 246 (Tex.

Crim. App. 2001). "In a variance situation, the State has proven the defendant guilty of a crime, but has proven its commission in a manner that varies from the allegations in the charging instrument." *Id.* Only material variances require reversal because only a material variance prejudices a defendant's substantial rights. *Fuller v. State*, 73 S.W.3d 250, 253 (Tex. Crim. App. 2002). We decide if the variance is material by determining "whether the indictment, as written, informed the defendant of the charge against him sufficiently to allow him to prepare an adequate defense at trial, and whether prosecution under the deficiently drafted indictment would subject the defendant to the risk of being prosecuted later for the same crime." *Gollihar*, 46 S.W.3d at 257.

Appellant does not argue that the indictment was inadequate to inform him of the charge against him sufficiently to allow him to prepare an adequate defense, nor does he argue that prosecution under the allegedly deficiently drafted indictment would subject him to the risk of being prosecuted later for the same crime. Thus, we hold that appellant has failed to show a fatal variance between the indictment and the proof at trial.

We overrule appellant's first issue.

Conclusion

We affirm the judgment of the trial court.

Evelyn V. Keyes
Justice

Panel consists of Justices Keyes, Higley, and Bland.

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