

Opinion issued December 16, 2010.



In The
Court of Appeals
For The
First District of Texas

NO. 01-09-00671-CR
NO. 01-09-00672-CR

ISAIAH ELAM THOMAS, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the 248th District Court
Harris County, Texas
Trial Court Cause No. 1141973
Trial Court Cause No. 1141974**

MEMORANDUM OPINION

A jury convicted Isaiah Elam Thomas of aggravated robbery and, after Thomas pleaded true to the allegations in an enhancement paragraph,

assessed punishment at twenty years' confinement. *See* TEX. PENAL CODE ANN. § 29.03(a) (Vernon 2003). On appeal, Thomas contends that factually insufficient evidence exists to support the jury's verdict because the complainants knew Thomas personally and gave a detailed description of the robbers to the police at the scene, but failed to identify Thomas by name until hours after the incident while at the police station, after they had a chance to confer with one another. We hold that the State presented factually sufficient evidence that Thomas committed the robbery and therefore affirm.

Background

Thomas lived next door to the complainants, Lakeisha Roberts and Antoinette Breed, for a few months before the robbery. During this time, Roberts and Thomas had become friends. Roberts occasionally invited Thomas to her apartment and over for dinner, and they would sometimes have "water fights" to pass the time. Roberts had also been to Thomas's apartment, where she met Jeremiah Curry, Thomas's brother, and Derrick Tillis, his cousin. A few days before the robbery, Thomas mentioned to Roberts that he had lost some money, and Roberts and Breed let Thomas come into their apartment and look around for the money. Shortly thereafter, Roberts and Breed purchased a new car with money Roberts had

received from an insurance settlement.

On the night of the robbery, Breed, Roberts, her son Kailen, Kailen's cousin Lakeisha Brown, and Roberts' goddaughter Denaisha were in the apartment. Around midnight, Brown was talking on her cell phone in the living room. Roberts, Breed, and Kailen were viewing a movie in the master bedroom, while Denaisha slept in Kailen's room. Brown heard a knock on the front door and told Roberts, who went to the door and asked who was knocking. Someone outside responded, "Mike." Roberts had a friend named Mike, so she opened the door. An assailant immediately "popped" Roberts in the face, twice, with the butt of a gun. The person, hitting her, yelled at her to get down on the ground. Two other men and two women also entered Roberts's apartment.

The man who hit Roberts wore a bandana that covered most of his face, but Roberts recognized Thomas's "baby fro" hairstyle, his distinctive "kid's" voice, and his physical build. Thomas was sixteen at the time of the robbery. According to Roberts, the only other person she knew at the apartment complex who had a voice like Thomas was her ten-year-old son, Kailen. She felt confident that Thomas was the one attacking her. Roberts also recognized Curry and Tillis's voices, and she heard the men refer to each other by their first names.

As Roberts opened the door, Breed and Kailen stood in the doorway to the master bedroom. Thomas bound Roberts's hands and covered her eyes with duct tape, while Curry ordered Breed to lie down on the living room floor and Kailen to sit on the couch. Curry then taped Breed's hands together and put duct tape over her eyes, but the tape did not stick. Breed watched the remainder of the robbery. Breed saw Thomas, Curry, and Tillis ransack the apartment and decide which items to steal. Breed recognized Thomas from his hairstyle, shoes, and his voice when he said Curry's name.

Brown did not know any of the robbers; however, she heard Thomas and Curry call each other by name during the robbery. Thomas asked Curry if he should take Roberts's computer, and Curry replied, "No, Isaiah[, it] is going to take too much space." According to Brown, as the men searched the apartment, they asked about Thomas's missing money, as well as kicked and hit the occupants with their guns. As Thomas left the apartment, he kicked Roberts and said, "Bitch, this is for taking my money so I'm repaying you back." After the robbers left, Breed broke out of her bindings. She and Roberts locked the door and then called the police.

Upon arriving at the apartment, Baytown Police Department Officer Dillow noticed that Roberts was bleeding from a head wound and that the apartment was in total disarray. Dillow and BPD Officer Pentecost testified

that the complainants appeared very excited and upset. Pentecost spoke with Roberts at the scene and obtained a physical description of the robbers. Pentecost did not ask Roberts if she personally knew the robbers. Although Breed testified that she gave Pentecost the names of the robbers at the scene, Detective Latta testified that, when he arrived at the scene, he asked the other officers who may have been involved, and none of the officers identified the robbers.

In their statements taken later at the police station, both Roberts and Breed identified Thomas as one of the robbers. Roberts testified that her formal statement was a more accurate statement than the earlier oral statement she gave to the officers at the scene, and she attributed the greater detail and specific identification of Thomas in the latter to the fact that, by this point, she had had a chance to calm down and get her thoughts together. When asked on cross-examination why she did not give the police Thomas's name at the scene, she stated that she was worried about her family and, at that time, she was a "startled, nervous wreck" and "wasn't thinking straight." Breed noted that, although she and Roberts rode in the same police car to the station, they did not talk about what happened because they were too shaken up. Breed also testified that the police put her and Roberts in separate rooms as soon as they arrived at the station. Detective Latta

noted that when he started Roberts's statement approximately four hours after the robbery, she had calmed down, but she still seemed upset, scared, and worried for her children.

Thomas testified on his own behalf, denying involvement in the robbery. He claimed that he was at a cousin's house on that night. Thomas suggested that Roberts and Breed made up his involvement in the robbery because Roberts had unrequited affection for him. He also stated that Roberts and Breed had briefly exchanged pleasantries with Curry and Tillis, which was not enough speech to have recognized the men's voices. Thomas believed that either Roberts or Breed had made up the story of his involvement and now felt afraid to change the story. On cross-examination, Thomas conceded that he spoke to Roberts and Breed much more often than his cousin and brother, and therefore if they recognized any voice from the robbery, it would likely be his.

Discussion

Thomas contends that the State failed to present factually sufficient evidence to prove that he committed the aggravated robbery of Roberts and Breed. An appellate court reviews both legal and factual sufficiency challenges using the same standard of review. *Brooks v. State*, PD-0210-09, 2010 WL 3894613, at *14, 21–22 (Tex. Crim. App. Oct. 6, 2010); *Ervin v.*

State, No. 01-10-00054-CR, 2010 WL 4619329, at *2–4 (Tex. App.—Houston [1st Dist.] Nov. 10, 2010, no pet. h.) (construing majority holding in *Brooks*). Under this standard, evidence is insufficient to support a conviction if, considering all the record evidence in the light most favorable to the verdict, no rational fact finder could have found that each essential element of the charged offense was proven beyond a reasonable doubt. See *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979); *In re Winship*, 397 U.S. 358, 361, 90 S. Ct. 1068, 1071 (1970); *Laster v. State*, 275 S.W.3d 512, 517 (Tex. Crim. App. 2009); *Williams v. State*, 235 S.W.3d 742, 750 (Tex. Crim. App. 2007). Viewed in the light most favorable to the verdict, the evidence is insufficient under this standard in two circumstances: (1) the record contains no evidence, or merely a “modicum” of evidence, probative of an element of the offense; or (2) the evidence conclusively establishes a reasonable doubt. See *Jackson*, 443 U.S. at 314, 318 n.11, 320, 99 S. Ct. at 2786, 2789 n.11, 2789; *Laster*, 275 S.W.3d at 518; *Williams*, 235 S.W.3d at 750. An appellate court presumes that the fact finder resolved any conflicting inferences in favor of the verdict and defers to that resolution. See *Jackson*, 443 U.S. at 326, 99 S. Ct. at 2793; *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007). An appellate court may not re-evaluate the weight and credibility of the record evidence and

thereby substitute its own judgment for that of the fact finder. *Williams*, 235 S.W.3d at 750.

Thomas contends that the evidence is factually insufficient primarily because Roberts and Breed, who were friends with Thomas and knew him relatively well, did not immediately identify Thomas and give his name to the police upon their arrival at the scene, and this delay wholly undermines Roberts and Breed's credibility as complaining witnesses. Thomas suggests that their delay in identifying him by name indicates that, after spending time together on the way to and at the police station, Roberts and Breed fabricated a story that Thomas committed the robbery.

But other testimony supports the jury's implied determination that Roberts and Breed were credible when they testified that they recognized Thomas by his hairstyle, distinctive voice, physical build, and shoes. Both women and Lakeisha Brown, who did not know any of the robbers, heard the men refer to each other by their first names, "Isaiah" [Thomas] and "Jeremiah." All of the women also testified that, during the robbery, they heard the robbers shouting about missing money. A few days before the robbery, Thomas had approached Roberts and Breed to ask about some money that he had lost, and Breed let him look around in their apartment for the money. Roberts testified that, as Thomas left her apartment during the

robbery, he kicked her and said, “Bitch, this is for taking my money, so I’m repaying you back.” Although Officer Pentecost and Detective Latta testified that they did not receive names of the suspects at the scene, Breed stated that she told Pentecost of the attackers’ names while still at the apartment. Pentecost further explained that he did not specifically ask Roberts whether she knew her attackers.

On cross-examination, Roberts explained that she did not initially give Thomas’s name to the officers because she was startled, nervous, not “thinking straight,” and worried about her family. At the scene, she was still asking herself what happened, asking why this incident happened to her, and she wondered what she and her family did to deserve the attack. All of the officers agreed that, at the scene, Roberts was very excited, upset, and alarmed, and she was bleeding from a head wound. Latta testified that, although she had calmed down by the time he took her statement four hours later, she still seemed upset, scared, and worried for her family. Breed stated that, although she and Roberts rode to the police station in the same car, they did not discuss what happened because they were too shaken up. She further testified that the officers placed her and Roberts in separate rooms immediately after arriving at the station.

Thomas cites to the Court of Criminal Appeals’ decision in *Johnson v.*

State for the proposition that Roberts and Breed’s identification of Thomas is unreliable based upon the record. *See Johnson v. State*, 23 S.W.3d 1, 12 (Tex. Crim. App. 2000). In *Johnson*, the Court of Criminal Appeals affirmed the Corpus Christi Court of Appeals’ reversal of the case based on factually insufficient evidence that Johnson committed aggravated sexual assault. *Id.* at 12. An assailant unknown to the victim forced his way into her car, drove the car to a remote location, and raped the victim. *Id.* at 4. The victim “never got a lengthy, unobstructed view of [her attacker’s] face,” and could only provide “scant details” to the police regarding the attacker’s appearance. *Id.* The victim could not positively identify her attacker from a line-up, though she noted that Johnson’s eyes looked similar to her attacker’s. *Id.* At trial, the victim admitted that her identification of Johnson could not be absolutely certain “because of the conditions and her state of mind.” *Id.* at 5.

In contrast to the facts of *Johnson*, both Roberts and Breed knew Thomas, Curry, and Tillis. Although the robbers wore bandanas partially covering their faces, the women recognized Thomas by his hairstyle, voice, and physical build. Although Curry attempted to cover Breed’s eyes, the tape loosened, and she watched the robbery. The robbers bound Brown’s hands, but did not cover her eyes. Roberts, Breed, and Brown all heard

Thomas and Curry refer to each other by their first names. Roberts and Breed both positively identified Thomas as a robber at the police station and during trial, and they never equivocated on their belief that he was involved. Roberts specifically stated that she “felt confident” that Thomas was one of her attackers. We conclude that the jury rationally could have found that each element of the charged offense was proven beyond a reasonable doubt. Accordingly, we hold that the evidence was factually sufficient to support Thomas’s conviction for aggravated robbery.

Thomas further contends that the evidence of identification is factually insufficient to support the verdict because the jury deliberated for over eight hours on “a case that ostensibly should have been a slam dunk with two eyewitnesses identifying a friend and neighbor.” We do not consider the length or difficulty of jury deliberations when conducting a sufficiency of the evidence review. *See Scott v. State*, 202 S.W.3d 405, 411 (Tex. App.—Texarkana 2006, pet. ref’d); *Perez v. State*, 113 S.W.3d 819, 837 (Tex. App.—Austin 2003, pet. ref’d), *overruled on other grounds by Taylor v. State*, 268 S.W.3d 571, 586-89 (Tex. Crim. App. 2008) (noting that difficulty of deliberations and receipt of *Allen* charge are “interesting,” but not evidence to consider in factual sufficiency analysis). Lengthy deliberations do not mean that the jury “arrived at an incorrect verdict or one

not supported by sufficient evidence,” but could instead support a conclusion that the jury engaged in “thoughtful consideration of the evidence presented and that such consideration, in turn, lends itself to correctness of the verdict.” *Scott*, 202 S.W.3d at 411. The length of the jury’s deliberations does not affect our conclusion that factually sufficient evidence exists to support the jury’s verdict.

Conclusion

We hold that the State presented factually sufficient evidence to support the jury’s determination that Thomas committed the aggravated robbery of Roberts and Breed. We therefore affirm the judgment of the trial court.

Jane Bland
Justice

Panel consists of Justices Keyes, Higley, and Bland.

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