

Affirmed and Memorandum Opinion filed December 7, 2010.



In The

Fourteenth Court of Appeals

NO. 14-09-00673-CR

DUANE EDWARD BUCK, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the 232nd District Court
Harris County, Texas
Trial Court Cause No. 1223479**

MEMORANDUM OPINION

After a bench trial, appellant Duane Edward Buck was convicted of one count of aggravated robbery and sentenced to fifteen years' imprisonment. In a single issue, appellant argues on appeal that the evidence is factually insufficient to sustain his conviction. We affirm.

BACKGROUND

One night in April 2008, an armed robbery occurred at the A.J. Game Room in Houston. Surveillance video captured most of the events inside the Game Room. This video was admitted into evidence and played for the court. Although the quality of the

video is poor, it shows three armed individuals forcing their way into the Game Room, threatening patrons and employees, hitting at least one employee, and taking what appears to be money. Two of the suspects are seen exiting through a rear door.

Six witnesses testified at trial. Claudio Teran was a security guard at the Game Room, and he called police after seeing people armed with guns enter the building. He was not able to identify appellant as one of the robbers, and he noticed nothing distinctive about the clothes the robbers were wearing.

Naushad Manasiya, an employee of the Game Room and native of Pakistan, was struck in the head by one of the robbers and remembered hearing a gunshot during the robbery. Before the surveillance video was played, he could only remember there being one robber. He could not recall the race or gender of any of the robbers (although he used male pronouns to describe the person that hit him), and he could not remember anything distinctive about the robbers' clothing. Finally, he testified that he never identified any suspect at the scene of the crime, and he was unable to make an in-court identification of appellant.

The first police officer to arrive on the scene was Officer Clifford Jackson. As he pulled up to the Game Room in his patrol vehicle, some individuals outside told him that people had just exited the Game Room through the back door. Upon driving to the rear of the building, he saw two people about 200 yards away running through a field toward an apartment complex. He could not tell what the suspects were wearing or what race they were, and he assumed they were male because of the way they ran. He radioed for a perimeter to be set up around the apartment complex.

Officer Jason Streety arrived in his patrol vehicle near the apartment complex. He saw two black males run by his vehicle into the apartment complex, and he pursued them on foot from a distance of about thirty yards. He could not recall anything distinctive about the suspects' clothing at that time, nor did he recall seeing either of the suspects carrying a bag.

Officer Streety followed the men into the apartment complex where the two suspects kicked in the door of a vacant second story apartment. Rather than enter the apartment, Officer Streety waited three to five minutes for backup to arrive. A resident from a first floor apartment came outside and told Officer Streety that he saw two men jumping from the second floor onto a patio on the first floor. Officer Streety then searched the ground floor patios and found appellant and another man lying on their stomachs. He testified that appellant and the other man were out of breath, sweating, and appeared nervous. Officer Streety testified further that the other man was wearing a white shirt, but he could not recall what appellant was wearing. Officer Streety found a brown mesh bag with three pistols inside lying near appellant's head.

The third and final police officer to testify was Officer Bernard Salley. He went directly to the Game Room and testified about events occurring after appellant and his accomplice were apprehended and brought back to the crime scene. Officer Salley saw appellant being taken out of a patrol car and being identified by two witnesses—one man, one woman. He said the man was Pakistani or Indian, but he could not recall the name of either witness. Officer Jackson was more specific—he testified that Manasiya identified appellant as one of the robbers. But Officer Jackson admitted he was not present at the time of any identification of appellant, and he was not involved in the identification process. Further, Officer Jackson wrote in his report that it was unlikely either Manasiya or another witness would be able to identify any of the robbers. Appellant testified that he was never taken out of the vehicle for identification. However, he testified that Manasiya walked up to the patrol car that appellant was in and pointed at him. He also testified that ten people were brought to the crime scene, of which he was one of the four persons identified.

Officer Salley further testified that \$45, a \$500 money wrap, and a glove were found on appellant. The glove found on appellant matched a glove found near the front

entrance of the Game Room. The surveillance video shows one of the robbers dropping a glove as he attempts to enter the Game Room.

Appellant testified that he was shooting dice in the apartment complex at the time of the robbery. He said that he saw the police chasing somebody through the apartment complex, and everyone took off running. He feared being caught gambling, and he hid on the patio where he was discovered. He testified that he did not see the brown bag until police showed it to him. He also explained that he did not have a glove on him, and he did not see the glove until police produced it and showed it to him.

The court found appellant guilty of aggravated robbery and sentenced him to fifteen years' imprisonment. This appeal followed.

ANALYSIS

Appellant argues that the evidence is factually insufficient to support his conviction because there was insufficient evidence to prove his identity. In particular, appellant argues that (1) no eyewitnesses to the robbery who testified at trial could identify appellant as one of the robbers, (2) the surveillance video does not show—and no testifying eyewitnesses could describe—the distinctive clothing that appellant was wearing when he was apprehended shortly after the crime occurred, and (3) the State failed to adduce forensic scientific evidence linking appellant to the crime, including DNA testing on the glove or gunpowder residue testing on appellant.

While this appeal was pending, the Court of Criminal Appeals held that only one standard should be used to evaluate the sufficiency of the evidence in a criminal case: legal sufficiency. *Brooks v. State*, No. PD-0210-09, — S.W.3d —, 2010 WL 3894613, at *1 (Tex. Crim. App. Oct. 6, 2010) (plurality opinion); *id.* at *22 (Cochran, J., concurring). Accordingly, we review the sufficiency of the evidence in this case under a rigorous and proper application of the *Jackson v. Virginia*, 443 U.S. 307 (1979), legal sufficiency standard. *Brooks*, 2010 WL 3894613, at *11 (plurality opinion).

When reviewing the sufficiency of the evidence, we view all of the evidence in the light most favorable to the verdict to determine whether the fact finder was rationally justified in finding guilt beyond a reasonable doubt. *Id.* at *5; *Williams v. State*, 235 S.W.3d 742, 750 (Tex. Crim. App. 2007). This court does not sit as a thirteenth juror and may not substitute its judgment for that of the fact finder by re-evaluating the weight and credibility of the evidence. *Brooks*, 2010 WL 3894613, at *7; *Williams*, 235 S.W.3d at 750. We defer to the fact finder’s resolution of conflicting evidence unless the resolution is not rational. *Brooks*, 2010 WL 3894613, at *7 & n.8, *11. Our duty as a reviewing court is to ensure that the evidence presented actually supports a conclusion that the defendant committed the crime. *Williams*, 235 S.W.3d at 750.

Reviewing the witness testimony in this case with the appropriate level of deference to the trial court’s credibility determinations, we note the following evidence supports the conclusion that appellant was one of the robbers: (1) a glove matching one left at the scene of the crime and worn by one of the robbers was found on appellant, (2) a satchel with three pistols—one for each gunman observed in the surveillance video—was found near appellant when he was hiding from police, (3) appellant attempted to evade police by hiding on the patio of an apartment complex near the scene of the crime, (4) Officer Streety chased two people to the same area in which appellant was located, (5) Officer Jackson observed two people running in Officer Streety’s direction, away from the crime scene, and (6) Officer Salley observed appellant being identified by two eyewitnesses. Regarding appellant’s testimony about the glove, the bag, and shooting dice, the trial court was free to make credibility determinations and adopt one version of the evidence over another. The testimony regarding Manasiya’s identification is weak, but eyewitness testimony is not necessary to determine identity. *See Earls v. State*, 707 S.W.2d 82, 85 (Tex. Crim. App. 1986) (“Evidence as to the identity of the perpetrator of an offense can be proved by direct or circumstantial evidence.”); *Roberson v. State*, 16 S.W.3d 156, 167 (Tex. App.—Austin 2000, pet. ref’d) (“[I]dentity may be proven by inferences.”); *see also Conyers v. State*, 864 S.W.2d 739, 740–41 (Tex. App.—Houston

[14th Dist.] 1993, pet. ref'd) (rejecting legal sufficiency challenge when there was no eyewitness identification, but surveillance screenshots were available, “and the jury could compare the photos with the physical appearance” of the defendant).

Appellant also argues that he cannot be identified from the surveillance video because the distinctive shirt he was wearing the night of the robbery is not visible on the video. The shirt was black and had the print of a large white hand on the front with red lettering on the chest. We have reviewed the video and State’s Exhibits 13–16. Exhibits 13–16 are photographs showing the clothing appellant was wearing the night of the robbery. Contrary to appellant’s assertion, this evidence bolsters the State’s case. One of the robbers in the video is wearing clothing that bears a sufficient resemblance to appellant’s clothing to allow a fact finder to infer that appellant was one of the robbers. For example, both the video and the photographs show (1) dark pants with red markings on the back, (2) black shoes with white writing, (3) red markings on the upper chest area of the black shirt, and (4) large white tags on the upper rear part of the shirt. The large white hand on appellant’s shirt in Exhibit 13 is mostly obscured by the brown mesh bag in the surveillance video, but the video still shows the robber wearing a shirt with two thick, white, vertical lines on the front with gray shading between the lines, consistent with the design in Exhibit 13.

After reviewing the testimony heard by the trial court, the photographs of appellant’s clothing, and the surveillance video, we conclude that a rational fact finder could have found guilt beyond a reasonable doubt. In fact, the evidence in this case preponderates in favor of the State, and we may not overturn a conviction under these circumstances. *See Steadman v. State*, 280 S.W.3d 242, 247 (Tex. Crim. App. 2009). Reasonable inferences of identity could be made, and the fact finder was able to compare the clothing worn by appellant to the clothing worn by one of the suspects in the surveillance video. Finally, we note that appellant’s contention regarding forensic evidence is unpersuasive. Having decided that the testimonial evidence and video

identification evidence were sufficient when considered together, the lack of any additional forensic evidence does not justify a reversal. *See, e.g., Johnson v. State*, 176 S.W.3d 74, 78 (Tex. App.—Houston [1st Dist.] 2004, pet. ref'd) (rejecting a sufficiency challenge despite the lack of physical or forensic evidence because the evidence was otherwise sufficient).

Appellant's issue is overruled, and we affirm the trial court's judgment.

/s/ Leslie B. Yates
Justice

Panel consists of Chief Justice Hedges and Justices Yates and Mirabal.*

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* Senior Justice Margaret Garner Mirabal sitting by assignment.