NO. 12-11-00175-CR

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

JERRY DON THORN, APPELLANT	***§***	***APPEAL FROM THE 420TH***
V.	***§***	***JUDICIAL DISTRICT COURT***
THE STATE OF TEXAS, APPELLEE	***§***	***NACOGDOCHES COUNTY, TEXAS***

MEMORANDUM OPINION

Jerry Don Thorn appeals his conviction for aggravated robbery. In one issue, Appellant argues that the evidence is insufficient to support the verdict. We affirm.

BACKGROUND

In January 2011, Manuela Villanueva was walking through the campus of Stephen F. Austin State University when the driver of a car pulled up and asked him for change. Villanueva did not have change. The driver, who was Appellant, turned the car around and the passenger got out of the car. The passenger pulled out a gun and asked Villanueva for his money. Villanueva gave the man his wallet, and the men left.

Appellant was identified as the driver of the car, and a Nacogdoches County grand jury indicted him for the felony offense of aggravated robbery. Appellant pleaded not guilty and a trial was held. The jury found Appellant guilty. Following a sentencing hearing, the jury assessed a sentence of imprisonment for thirty-five years. This appeal followed.

SUFFICIENCY OF THE EVIDENCE

In his sole issue, Appellant argues that the evidence is insufficient to support the verdict.

Specifically, Appellant asserts that there is insufficient evidence that a deadly weapon was used in the commission of the robbery.

Applicable Law

The due process guarantee of the Fourteenth Amendment requires that a conviction be supported by legally sufficient evidence. *See* ***Jackson v. Virginia***, 443 U.S. 307, 315–16, 99 S. Ct. 2781, 2786–87, 61 L. Ed. 2d 560 (1979); ***Brooks v. State***, 323 S.W.3d 893, 917 (Tex. Crim. App. 2010) (plurality opinion). Evidence is not legally sufficient if, when viewing the evidence in a light most favorable to the verdict, no rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *See* ***Jackson***, 443 U.S. at 319, 99 S. Ct. at 2789; *see also* ***Rollerson v. State***, 227 S.W.3d 718, 724 (Tex. Crim. App. 2007). Under this standard, a reviewing court does not sit as a thirteenth juror and may not substitute its judgment for that of the fact finder by reevaluating the weight and credibility of the evidence. *See* ***Brooks***, 323 S.W.3d at 899; ***Dewberry v. State***, 4 S.W.3d 735, 740 (Tex. Crim. App. 1999). Instead, a reviewing court defers to the fact finder's resolution of conflicting evidence unless that resolution is not rational in light of the burden of proof. *See* ***Brooks***, 323 S.W.3d at 899–900. The duty of a reviewing court is to ensure that the evidence presented actually supports a conclusion that the defendant committed the crime. *See* ***Williams v. State***, 235 S.W.3d 742, 750 (Tex. Crim. App. 2007).

The sufficiency of the evidence is measured against the offense as defined by a hypothetically correct jury charge. *See* ***Malik***, 953 at 240. A hypothetically correct jury charge "accurately sets out the law, is authorized by the indictment, does not unnecessarily increase the State's burden of proof or unnecessarily restrict the State's theories of liability, and adequately describes the particular offense for which the defendant is tried." ***Id***.

As charged in the indictment, the State had to show that Appellant did, in the course of committing a theft of property, and with the intent to obtain or maintain control of the property, knowingly or intentionally threaten or place Manuel Villanueva in fear of imminent bodily injury or death, and that Appellant used or exhibited a deadly weapon in the commission of the crime. *See* TEX. PENAL CODE ANN. § 29.03(a)(2) (West 2011). The jury was also instructed that it could find Appellant guilty if it found that he was criminally responsible for the offense as a party. *See* TEX. PENAL CODE ANN. § 7.02 (West 2011).

Analysis

Citing ***In re J.A.W.***, 108 S.W.3d 573 (Tex. App–Amarillo 2003, no pet.), Appellant argues that there is insufficient evidence that a deadly weapon was used. Specifically, he points out that the gun was never recovered and that Villanueva did not give a detailed description of the gun. Accordingly, he argues that the evidence is insufficient to show that a deadly weapon was used in the commission of the offense. He also asserts that Villanueva could have been mistaken about a gun being present because it was dark when he was confronted and because he was stressed.

The ***J.A.W.*** opinion is instructive to our analysis. An aggravated robbery can be accomplished without a deadly weapon if, for example, the actor causes serious bodily injury to another or in certain instances if the victim is elderly or disabled. *See* TEX. PENAL CODE ANN. § 29.03(a)(1), (3). However, the offense alleged here is aggravated robbery because it was alleged that a deadly weapon was used or exhibited. *See* ***id***. § 29.03(a)(2). At issue in ***J.A.W.*** was whether the knife that was used was a deadly weapon. There was little testimony about the knife, and the court held that there was "no evidence" to support the jury's determination that the knife was a deadly weapon. *See* ***J.A.W.*** at 576. This is so because a deadly weapon is defined as "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. *See* TEX. PENAL CODE ANN. § 1.07 (17)(A), (B) (West Supp. 2011). In the case of a knife, the court of criminal appeals has held that there must be some evidence describing the physical characteristics of a knife or other evidence to allow the conclusion that the knife is a deadly weapon. *See* ***Blain v. State***, 647 S.W.2d 293, 294 (Tex. Crim. App. 1983); *see also* ***Robertson v. State***, 163 S.W.3d 730, 732 (Tex. Crim. App. 2005) ("[D]escribing an object generically as a 'knife' does not by itself establish the object as a deadly weapon by 'design' because many types of knives have an obvious other purpose (e.g. butcher knives, kitchen knives, utility knives, straight razors, and eating utensils).").

Such evidence is not necessary with respect to a firearm because the statute specifically defines a firearm as a deadly weapon. *See* TEX. PENAL CODE ANN. § 1.07 (17)(A). Generally, the state is not required to produce a deadly weapon to prove that it was used in the commission of a robbery. *See, e.g.*, ***Victor v. State***, 874 S.W.2d 748, 751 (Tex. App.–Houston [1st Dist.] 1994, pet. ref'd). Furthermore, because a firearm is a deadly weapon per se, it is not necessary to prove that a firearm is capable of causing death, either in the manner of its actual use or in the manner of

its intended use. *See* ***Thomas v. State***, 821 S.W.2d 616, 620 (Tex. Crim. App. 1991). The state must simply prove the object was a firearm. ***Id***. Therefore, based on Villanueva's testimony that Appellant's co-actor brandished a gun during the robbery, the jury could have rationally concluded that a deadly weapon had been used or exhibited.

With respect to Appellant's argument that Villanueva was stressed or that it was too dark for him to observe a gun, we defer, generally, to the jury's resolution of fact issues. *See* ***Lancon v. State***, 253 S.W.3d 699, 705 (Tex. Crim. App. 2008) (jury is the sole judge of the credibility of the witnesses and the weight to be given their testimony). It is true that Villanueva said he was "stressed" upon seeing the gun. In fact, he testified that when he saw the gun, he felt like "everything was meaningless, everything [he worked] so hard for, it's all gone." He said he was "hoping he wouldn't pull the trigger," and that he "gave him everything," and "did what he asked." He also testified that it was nighttime when the robbery occurred. But Villanueva also said that he was no more than twelve feet from a light source and that he was able to see Appellant, the other man, and the gun. And while he was stressed by the encounter, there was no contradiction to his testimony that the other man was armed and that he brandished a gun.

Accordingly, after considering all of the evidence, we hold that the evidence is legally sufficient to support the jury's verdict that a deadly weapon was used or exhibited in the course of the robbery. We overrule Appellant's sole issue.

DISPOSITION

Having overruled Appellant's sole issue, we ***affirm*** the judgment of the trial court.

BRIAN HOYLE
Justice

Opinion delivered May 31, 2012.
Panel consisted of Worthen, C.J., Griffith, J., and Hoyle, J.

(DO NOT PUBLISH)

COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT OF TEXAS

JUDGMENT

MAY 31, 2012

NO. 12-11-00175-CR

JERRY DON THORN,
Appellant
V.
THE STATE OF TEXAS,
Appellee

Appeal from the 420th Judicial District Court
of Nacogdoches County, Texas. (Tr.Ct.No. F1118167)

THIS CAUSE came to be heard on the appellate record and briefs filed herein, and the same being considered, it is the opinion of this court that there was no error in the judgment.

It is therefore ORDERED, ADJUDGED and DECREED that the judgment of the court below **be in all things affirmed**, and that this decision be certified to the court below for observance.

Brian Hoyle, Justice.
Panel consisted of Worthen, C.J., Griffith, J., and Hoyle, J.