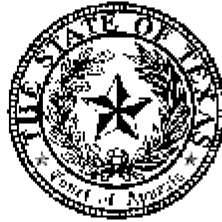
Affirmed and Opinion filed July 27, 2000.



In The

Fourteenth Court of Appeals

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NO. 14-99-00865-CR

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ELWIN MCKINLEY SMITHERS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 182nd District Court
Harris County, Texas
Trial Court Cause No. 798,036

O P I N I O N

A jury convicted appellant, Elwin McKinley Smithers, of robbery. Following his conviction, the trial court sentenced him to fourteen years in prison. On appeal, he challenges the legal and factual sufficiency of the evidence supporting his conviction. Finding the evidence legally and factually sufficient, we affirm his conviction and overrule his points of error

Early one Sunday morning in November of 1998, Warren Johnson, the complainant, left a friend's apartment and decided to try to find a church where he was to meet his family members later in the day. The church was located near Martin Luther King Boulevard and the

complainant proceeded to that area. Because of his lack of familiarity with that part of Houston, the complainant soon became lost and stopped at a convenience store to call his cousin from a pay phone for directions.

The complainant first noticed appellant while he was on the phone. During the conversation with his cousin, the complainant saw appellant walking toward him. The complainant ended the conversation and began moving toward his car when the appellant approached him, produced a gun, held it to the complainant's side, and ordered him to get into the vehicle. The complainant complied and, once he was in the driver's seat, appellant sat in the passenger's seat.

Inside the vehicle, appellant confronted the complainant. The complainant repeatedly told appellant that he did not want to die, and after reassuring the complainant that he was not going to kill him, appellant eventually ordered him to stop talking. He also ordered the complainant to drive him to several locations, the final destination being an apartment complex near the convenience store.

Once they arrived at the desired destination, appellant took several items from the complainant. Though the complainant pleaded with appellant not to take them, appellant took the complainant's pager and watch. Appellant also rifled through the complainant's day planner, from which he took $25 in cash. When the appellant again pleaded for the return of his watch and pager, appellant responded to these pleas by telling the complainant that he would return the two items in exchange for cash. Appellant told the complainant if he would withdraw the money, page appellant on the complaint's pager, and enter a "911" page, they would meet at the apartment complex and exchange the money for the watch and pager.

After appellant exited the vehicle, the complainant drove for several miles before deciding to contact the police. He contacted the Houston Police Department from a gas station several miles from the apartment complex and met with Officers Garcia and Satterwhite, who responded to the call.

Based on the information provided to them by the complainant, the officers and the complainant returned to the apartment complex. Officer Garcia, using his cellular phone, called the complainant's pager number and entered "911." Appellant soon emerged from the front of the apartment complex and looked around as if expecting someone. The officers approached appellant, but he fled into the complex and could not be found. After their search, the officers drove to the rear of the apartment complex, and while they were filling out paperwork, spotted appellant again.

They promptly arrested appellant, who admitted that he had used a BB gun during the robbery and had thrown it away. The complainant positively identified appellant as the person who had robbed him and the officers recovered the complainant's pager, watch, and $25 from appellant.

Though the State indicted appellant for aggravated robbery, the jury found appellant guilty of the lesser-included offense of robbery. Inherent in this finding is that appellant did not use a deadly weapon during the commission of the robbery.

Appellant first complains about the legal sufficiency of the evidence supporting his conviction. His main argument is that because the jury did not believe the complainant's testimony that appellant used a deadly weapon during the robbery, the remainder of his testimony is too incredible to support the jury's verdict. It appears that the remainder of appellant's legal sufficiency argument is based on what he terms "more likely" explanations of what occurred. As such, appellant's argument is in effect an "outstanding reasonable hypothesis of innocence" argument which the Court of Criminal Appeals forbade in *Geesa v. State*, 820 S.W.2d 154, 160-61 (Tex. Crim. App. 1991). Rather than use this method of analysis, we are directed by the Court of Criminal Appeals to apply the standard of review announced in *Santellan v. State* to legal sufficiency questions. *See* 939 S.W.2d 155 (Tex. Crim. App. 1997).

In reviewing legal sufficiency challenges, we view the evidence in the light most favorable to the prosecution and overturn the lower court's verdict only if a rational trier of

fact could not have found all of the elements of the offense beyond a reasonable doubt. *See Santellan*, 939 S.W.2d at 160. Determining the credibility of a particular witness's testimony is within the sole province of the jury and we must show deference to its determinations. *See Cain v. State*, 958 S.W.2d 404, 408-9 (Tex. Crim. App. 1997). In this determination, the jury is free to believe a portion of a witness's testimony while disbelieving another portion of that witness's testimony. *See Sharp v. State*, 707 S.W.2d 611, 614 (Tex. Crim. App. 1986).

Here, the complainant's testimony satisfied all of the elements of robbery. The complainant testified that the appellant took several items from him without his permission and, during the course of the taking, placed him in fear of his life. Accordingly, we find the evidence legally sufficient to support appellant's conviction and overrule his first point of error.

In reviewing factual sufficiency challenges, we must view all of the evidence without the prism of "in the light most favorable to the prosecution." *See Clewis v. State*, 922 S.W.2d 126, 129 (Tex. Crim. App. 1996). We accomplish this by examining all of the evidence presented at trial and applying just enough deference so that we do not substitute our own judgment for that of the trial court. *See id.* at 133. Under this standard of review, evidence is factually insufficient if it is so weak as to be clearly wrong or unjust or the finding is against the great weight or preponderance of the evidence. *See Johnson v. State*, No. 1915-98, 2000 WL 140257, *8 (Tex. Crim. App. February 9, 2000).

Our review of the record indicates that appellant's conviction was not based on evidence so weak that his conviction was clearly wrong or unjust. Though the complainant's testimony has a few inconsistencies, appellant was caught with the complainant's property and admitted to robbing appellant after his arrest. On this record, we cannot find that appellant's conviction was based on factually insufficient evidence. Appellant's second point of error is overruled.

Accordingly, we affirm the appellant's conviction.

/s/ Paul C. Murphy
Chief Justice

Judgment rendered and Opinion filed July 27, 2000.

Panel consists of Chief Justice Murphy and Justices Hudson and Wittig.

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