

Affirmed and Opinion filed September 14, 2000.



In The

Fourteenth Court of Appeals

NO. 14-96-01005-CR

TYWOO KEYONDI MCCAIN, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the 268th District Court
Fort Bend County, Texas
Trial Court Cause No. 26,926**

OPINION ON REMAND

Appellant challenges the factual sufficiency of the evidence to support his conviction for aggravated robbery. We affirm.

Background

Appellant's conviction was based on a kick-in robbery during which he assaulted the complainant in her home. On appeal to this court, appellant's two points of error challenged the legal and factual sufficiency of the evidence to support the jury's finding that he used or exhibited a deadly weapon during the robbery.

We found that no evidence supported the deadly-weapon finding, modified the trial court's judgment to reflect a conviction for robbery, affirmed the judgment as modified, reversed the imposition of punishment, and remanded the case for a new trial on punishment. *See McCain v. State*, 987 S.W.2d 134, 137-38 (Tex. App.—Houston [14th Dist.] 1998), *rev'd*, 22 S.W.3d 497 (Tex. Crim. App. 2000). Upon the State's petition for discretionary review, the Court of Criminal Appeals concluded that legally sufficient evidence supported the jury's finding, reversed this court's judgment, and remanded the case to this court for further proceedings. *See McCain*, 22 S.W. 3d at 503-04.

Factual Sufficiency Review

The legal sufficiency challenge in appellant's first point of error having been overruled by the Court of Criminal Appeals, the only remaining issue in this remand is his second point of error challenging the factual sufficiency of the evidence to support the jury's finding that he used or exhibited a deadly weapon, namely, a knife, during the robbery.

As it has been recently reformulated by the Court of Criminal Appeals, a factual sufficiency review asks whether a neutral review of all the evidence, both for and against the finding, demonstrates that the proof of guilt is so obviously weak as to undermine confidence in the jury's determination, or that the proof of guilt, although adequate if taken alone, is greatly outweighed by contrary proof. *See Johnson v. State*, No. 1915-98, slip op. at 18, 2000 WL 140257, at *8 (Tex. Crim. App. Feb. 9, 2000).

In this case, the indictment alleged, in part, that appellant did "use and exhibit a deadly weapon, to wit: a knife, which in the manner of its use and intended use was capable of causing death or serious bodily injury."¹ The evidence at trial showed that appellant kicked in the door

¹ A robbery is aggravated if the actor uses or exhibits a deadly weapon. *See* TEX. PEN. CODE ANN. § 29.03(a)(2) (Vernon 1994). An object, such as a knife, is a deadly weapon if: (a) it is made for the purpose of inflicting death or serious bodily injury; or (b) in the manner of its use or intended use, it is capable of causing death or serious bodily injury. *See* TEX. PEN. CODE ANN. § 1.07 (17) (Vernon 1994); *Thomas v. State*, 821 S.W.2d 616, 620 (Tex. Crim. App. 1991). For this purpose, a person uses or exhibits a deadly weapon if he employs it in any manner that facilitates the underlying offense. *See McCain*, 22 S.W.3d at 502, 503.

of the complainant's kitchen and hit her numerous times with his fist. During the attack, the complainant saw a long, dark object partly sticking out of appellant's back pocket. She believed that the object was a knife and was worried that appellant would cut her with it. There was no evidence that appellant touched, brandished, referred to, or overtly displayed the knife in any way other than having it partly sticking out of his pocket. Eventually the complainant escaped appellant's attack and later returned to her house with the police. Upon her return, she discovered that her car and pager were missing. When appellant was later arrested, the police found on his person a butcher knife with a nine-inch blade. Police officers testified that the knife was sharp enough to cause death or seriously bodily injury.

The evidence was legally sufficient to show that the butcher's knife was a deadly weapon because appellant's carrying it during such a violent attack showed that its intended use was to be capable of causing death or serious injury. *See McCain*, 22 S.W.3d at 503. The evidence was legally sufficient to show that the knife was used or exhibited in the robbery because it was partially exposed to view and, from that exposure, a rational factfinder could conclude that its presence was intended by appellant to instill apprehension in the complainant so as to reduce the likelihood of her resistance. *See id.*

In support of his factual sufficiency challenge, apart from his legal sufficiency challenge, appellant states only: "There is no evidence to support the finding that Appellant used and exhibited of [sic] a deadly [weapon] in this case. Such a finding is so contrary to the overwhelming weight of the evidence so as to be clearly wrong and unjust." Because this fails to establish the factual insufficiency of the evidence to show that the knife was a deadly weapon or that it was used or exhibited during the robbery, we overrule appellant's second

point of error and affirm the judgment of the trial court.

/s/ Richard H. Edelman
Justice

Judgment rendered and Opinion filed September 14, 2000.

Panel consists of Chief Justice Murphy and Justices Yates and Edelman.

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