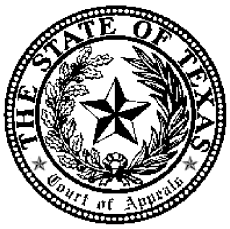
Affirmed and Opinion filed October 18, 2001.



In The

Fourteenth Court of Appeals

NO. 14-00-00632-CR

MICHAEL DEAN MUIRHEID, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 240th District Court
Fort Bend County, Texas
Trial Court Cause No. 31,669 A

O P I N I O N

Appellant, Michael Dean Muirheid, was convicted by a jury of the offense of aggravated robbery and sentenced to twenty-eight years imprisonment. In four issues, appellant contends: (1) the trial court erred in denying his motion for directed verdict; (2) the evidence was legally insufficient to show that his attack on another was undertaken while in the course of committing theft with intent to obtain control of property; (3) the evidence was factually insufficient to support a conviction for aggravated robbery; and (4) that the

evidence was legally and factually insufficient to show that appellant caused serious bodily injury. We affirm.

On April 10, 1999, as Porfirio Guillen walked home, he was set upon and beaten by appellant and two associates. During this attack, Mr. Guillen was held to the ground and battered with fists and feet while one of the attackers attempted to go through his pockets. The intercession of several bystanders cut short the assault, but Mr. Guillen suffered sundry injuries, including various abrasions, contusions, and a fractured orbit and nasal bone. Appellant and his companions fled, but all were rapidly apprehended.

In his first point of error, appellant alleges the evidence is legally insufficient to prove he intended to deprive Mr. Guillen of his property. In his third point of error, appellant complains that the trial court committed reversible error by denying his motion for directed verdict. A challenge to the denial of a motion for an instructed verdict is actually a challenge to the legal sufficiency of the evidence. *Cook v. State*, 858 S.W.2d 467, 470 (Tex. Crim. App. 1993); *Johnson v. State*, 32 S.W.3d 388, 392 (Tex. App.—Houston [14th Dist.] 2000, no pet). Appellant's third issue therefore merely reiterates elements of his first, and we consider them together to determine if the evidence is legally sufficient to show that appellant's attack occurred in the course of committing theft with the intent to obtain control of property, and that appellant's hands or feet constitute a deadly weapon.

When reviewing legal sufficiency, we view the evidence in the light most favorable to the verdict and determine whether a rational trier of fact could have found the elements of the offense beyond a reasonable doubt. *Curry v. State*, 30 S.W.3d 394, 406 (Tex. Crim. App. 2000). We consider all of the evidence whether properly or improperly admitted. *Green v. State*, 893 S.W.2d 536, 540 (Tex. Crim. App. 1995); *Chambers v. State*, 805 S.W.2d 459, 460 (Tex. Crim. App. 1991). Moreover, in determining legal sufficiency, we do not examine the fact finder's weighing of the evidence, but merely determine whether there is evidence supporting the verdict. *Clewis v. State*, 922 S.W.2d 126, 132 n. 10 (Tex. Crim. App. 1996).

Appellant was indicted for aggravated robbery. A person commits robbery if, in the course of committing theft and with the intent to obtain or maintain control of property, he intentionally, knowingly, or recklessly causes bodily injury to another, or intentionally or knowingly threatens or places another in fear of imminent bodily injury or death. TEX. PENAL CODE ANN. § 29.02(a) (Vernon 1994). A person commits aggravated robbery if he uses or exhibits a deadly weapon during a robbery. *Id.* § 29.03(a)(2).

Appellant contends that the State failed to prove his attack occurred in the course of committing theft with the intent to obtain control of property. Although an intent to steal must be shown in order to prove an attempted theft, this intent may be inferred from circumstantial evidence. *Caldwell v. State*, 943 S.W.2d 551, 552 (Tex. App.—Waco 1997, no pet.); *Wolfe v. State*, 917 S.W.2d 270, 275 (Tex. Crim. App. 1996). "The gravamen of robbery, therefore, is its assaultive conduct and not the underlying theft." *Matlock v. State*, 20 S.W.3d 57, 63 (Tex. App.—Texarkana 2000, pet. ref'd.). Thus, in order to sustain a robbery verdict, the evidence must show only that the accused assaulted the victim in an attempt to commit theft. TEX. PENAL CODE ANN. § 29.01(1). Proof of a completed theft is not required to establish a robbery. *Caldwell*, 943 S.W.2d at 552; *Wolfe*, 917 S.W.2d at 275; *Dillard v. State*, 931 S.W.2d 689, 696 (Tex. App.—Dallas 1996, pet. ref'd, untimely filed); *Finley v. State*, 917 S.W.2d 122, 125 (Tex. App.—Austin 1996, pet. ref'd).

The State had the testimony of an eyewitness that, as the beating proceeded, one of the assailants went through Mr. Guillen's pockets. Moreover, Mr. Guillen himself testified that appellant or his associates tried to steal his wallet. That these efforts were unsuccessful is immaterial. The jury was entitled to conclude that the search of the victim's person was undertaken with an intent to steal anything of value discovered. This is sufficient for a rational trier of fact to find appellant intended and attempted to deprive his victim of property.

Appellant further contends that the State failed to prove he used a deadly weapon during his pummeling of Mr. Guillen. The offense of robbery is aggravated if, in committing

it, the actor "uses or exhibits a deadly weapon." TEX. PENAL CODE ANN. § 29.03(a)(2) (Vernon 1994). The definition of a "deadly weapon" includes: "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." *Id.* § 1.07(a)(17) (Vernon 1994). "Hands and feet are not deadly weapons per se," and thus the State bore the burden of proving appellant's hands and feet were capable of causing death or serious bodily injury in the manner of their use or intended use. *Hilla v. State*, 832 S.W.2d 773, 778 (Tex. App.—Houston [1st Dist.] 1992, pet. ref'd) (citing *Ray v. State*, 160 Tex. Crim. 12, 266 S.W.2d 124, 128 (App.1954)).

Five eyewitnesses testified that appellant and his companions hit and kicked Mr. Guillen's face and body repeatedly. Bones of the nose and face were fractured during the assault. Any injury which would, without medical aid, result in serious permanent disfigurement satisfies the definition of "serious bodily injury"; thus, a broken nose may constitute serious bodily injury. *Brown v. State*, 605 S.W.2d 572, 574-75 (Tex. Crim. App. 1980). However, where no evidence is offered to show that the complainant's injury, without medical attention, would have caused permanent disfigurement, no serious bodily injury is proven. *Webb v. State*, 801 S.W.2d 529, 532 (Tex. Crim. App. 1990). Here, the State concedes in its brief that it offered no evidence to show Mr. Guillen sustained serious bodily injury.

It is well established, however, that an indictment may contain as many paragraphs as necessary to allege the various manner and means of committing an offense. *Cover v. State*, 913 S.W.2d 611, 617 (Tex. App.—Tyler 1995, pet. ref'd). When such methods of committing the offense are alleged conjunctively, proof of any of the ways charged in the indictment will support a conviction. *Sidney v. State*, 560 S.W.2d 679, 681 (Tex. Crim. App. 1978). Thus, when a general verdict is returned, and the evidence is sufficient to support a finding of guilt under any of the paragraph allegations submitted, the verdict will be upheld. *Fuller v. State*, 827 S.W.2d 919, 931 (Tex.Crim.App.1992).

Here, the physicians who treated Mr. Guillen after the attack testified that, given sufficient force, the type of blows administered were capable of causing death or serious bodily injury. Moreover, Mr. Guillen testified that he was in fear of imminent bodily injury or death. Thus, the State presented sufficient evidence to prove up two of the three alternative manner and means presented to the jury. "[W]hen a general verdict is returned and the evidence is sufficient to support a finding under any of the paragraphs submitted, the verdict will be applied to the paragraph finding support in the facts." *Manrique v. State*, 994 S.W.2d 640, 642 (Tex. Crim. App. 1999). We find, therefore, the evidence is legally sufficient to support the jury's verdict.

Accordingly, we overrule appellant's first and third issues.

In his second issue, appellant contends the evidence was factually insufficient to support a conviction for aggravated robbery. Specifically, appellant argues that the State's evidence does not exclude the possibility that appellant and his confederates attacked Mr. Guillen without any intent to take his property, and thus the verdict was contrary to the weight of evidence and clearly unjust.

When reviewing claims of factual insufficiency, it is our duty to examine the jury's weighing of the evidence. *Johnson v. State*, 23 S.W.3d 1, 6 (Tex. Crim. App. 2000). In other words, we must view all the evidence "without the prism of 'in the light most favorable to the prosecution,' [i.e., views the evidence in a neutral light,] and sets aside the verdict only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust." *Id.* at 7 (quoting *Clewis v. State*, 922 S.W.2d at 129). Thus, when reviewing factual sufficiency challenges, appellate courts must determine "whether a neutral review of all of the evidence, both for and against the finding, demonstrates that the proof of guilt, although adequate if taken alone, is greatly outweighed by contrary proof." *Id.* at 11.

Appellant's factual sufficiency challenge relies upon the testimony of an eyewitness to the attempted theft, Mr. Francisco Reyes, that appellant or one of his accomplices was

"searching on" Mr. Guillen. Appellant argues that this phrase describes nothing more than a "patting down," from which no intent to steal can be inferred. In subsequent testimony, however, Mr. Reyes confirmed that an assailant went through the victim's pockets during the attack. The jury, as the trier of fact, resolves any conflicts in the evidence, evaluates the credibility of the witnesses, and determines the weight to be given to any particular evidence. *Edwards v. State*, 10 S.W.3d 699, 702 (Tex. App.—Houston [14th Dist.] 1999, writ granted); *Ruiz v. State*, 891 S.W.2d 302, 304 (Tex. App.—San Antonio 1994, pet. ref'd). Viewing all of the evidence, we cannot say the jury's finding that appellant's attack was undertaken while in the course of committing theft with intent to obtain control of property is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *See Clewis*, 922 S.W.2d at 129. We overrule appellant's third issue.

The judgment of the trial court is affirmed.

/s/ J. Harvey Hudson
Justice

Judgment rendered and Opinion filed October 18, 2001.
Panel consists of Justices Anderson, Hudson, and Frost.
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