Affirmed and Opinion filed March 23, 2000.

In The

Fourteenth Court of Appeals

NO. 14-98-00631-CR

WARREN BRAXTON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 351st District Court
Harris County, Texas
Trial Court Cause No. 769,063

O P I N I O N

Warren Braxton appeals his conviction by a jury for aggravated robbery. The trial court assessed his punishment at 25 years imprisonment, enhanced by two prior felony convictions. In four points of error, appellant contends the evidence is legally and factually insufficient to sustain his conviction, and his 25-year sentence constitutes cruel and unusual punishment in violation of the federal and state constitutions. We affirm.

On November 14, 1997, the complainant, Robert Glee, was in his father's car on the way home when he saw appellant standing at a bus stop. Glee knew appellant from junior high school days, and nodded his head at appellant when they drove by. Appellant walked over to Glee's house, and Glee and

appellant talked on the front porch. Appellant asked Glee how his love life was going, and Glee told appellant he was gay. Appellant told Glee he knew that, and they talked about sex. After Glee told appellant that he had not been with a man in two years, appellant asked Glee if Glee would have sex with him. Glee agreed and suggested they go somewhere, and appellant then asked Glee for a ten-dollar loan. Glee took ten dollars from his wallet and handed it to appellant. Appellant told Glee he needed the money to eat, and there was no discussion about Glee paying appellant for sex.

Appellant and Glee walked down a trail in the back of Glee's house, and appellant asked Glee for oral sex. Glee agreed and performed oral sex on appellant for a few seconds, then became nervous, embarrassed, and afraid someone would see them. Glee got up and tried to leave, but appellant stopped him and put his foot on Glee's foot. Appellant put one hand on Glee's side, then pulled out an open knife, pointed it at Glee, and told Glee to give him the rest of the money. Glee stated he thought appellant was going to kill him, and identified State's Exhibit 5 as the knife appellant used. Appellant then pulled the wallet out of Glee's pocket and threw it on the ground. With the knife still pointed at Glee, appellant bent over and took the rest of Glee's money, about $100.00, out of the wallet. Glee said he couldn't get away from appellant because appellant kept his foot on Glee's foot while he was taking Glee's money. Appellant then told Glee if he "called the cops he was going to come right back and get" him. Glee then told appellant that somebody was looking at them. Appellant turned to see if there was anybody looking, and took his foot off Glee's foot. Glee then ran into his house and called the police.

Glee told the police that he and appellant went back in the woods to drink alcohol, and appellant pulled a knife and robbed him. Glee did not tell the police that he and appellant had sex in the woods because he was too embarrassed.

Appellant gave the police a written statement indicating that Glee asked him for sex. Officer Sherri Anderson read appellant's written statement to the jury. In his statement, appellant stated he told Glee he charged "50 and a hundred" for sex. Appellant stated that Glee suggested they go behind the house in the bushes and do it. Once in the woods, Glee started to perform oral sex on appellant, but stopped and told appellant he wanted anal sex. Appellant stated he had his knife out and told Glee he charged $150.00 for that. Glee got scared and said he couldn't give appellant any money, and asked appellant to wait.

Appellant stated that he then took Glee's wallet out, got the $150.00 out of it, and threw the wallet on the ground.

At the trial, appellant testified that Glee agreed to pay him $150.00 in exchange for oral sex, and that Glee asked appellant if he could pay him later. After the oral sex, appellant testified that Glee gave him $50.00, and appellant asked him for the rest. Glee said he would give it to appellant when appellant came back later. Appellant said Glee took the money out of his wallet and gave it to him. Appellant stated he had his knife out, but he never threatened Glee with the knife. Appellant stated he had told the officers that he had read the written statement, but then told them he could not read. Appellant's mother testified that appellant cannot read.

In point of error one, appellant challenges the legal sufficiency of the evidence to sustain his conviction. He argues the record fails to show that the knife used or exhibited was a deadly weapon as defined by law. In point two, appellant contends the same evidence is factually insufficient to sustain his conviction.

In reviewing the legal sufficiency of the evidence, we consider all the evidence, both State and defense, in the light most favorable to the verdict. *Houston v. State*, 663 S.W.2d 455, 456 (Tex. Crim. App. 1984); *Garrett v. State*, 851 S.W.2d 853, 857 (Tex. Crim. App. 1993). In reviewing the sufficiency of the evidence in the light most favorable to the verdict or judgment, the appellate court is to determine whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *Ransom v. State*, 789 S.W.2d 572, 577 (Tex. Crim. App. 1989), *cert. denied*, 110 S.Ct. 3255 (1990). This standard is applied to both direct and circumstantial evidence cases. *Chambers v. State*, 711 S.W.2d 240, 245 (Tex. Crim. App. 1986). The jury is the exclusive judge of the facts, credibility of the witnesses, and the weight to be given to the evidence. *Chambers v. State*, 805 S.W.2d 459, 462 (Tex. Crim. App. 1991). In conducting this review, the appellate court is not to re-evaluate the weight and credibility of the evidence, but acts only to ensure the jury reached a rational decision. *Muniz v. State*, 851 S.W.2d 238, 246 (Tex. Crim. App. 1993); *Moreno v. State*, 755 S.W.2d 866, 867 (Tex. Crim. App. 1988). In making this

determination, the jury can infer knowledge and intent from the acts, words, and conduct of the accused. *Dues v. State*, 634 S.W.2d 304, 305 (Tex. Crim. App. 1982).

Under *Clewis v. State*, 922 S.W.2d 126, 133 (Tex. Crim. App. 1996), a court of appeals reviews the factual sufficiency of the evidence when properly raised after a determination that the evidence is legally sufficient. *Id*. In conducting a factual sufficiency review, the court of appeals views all the evidence without the prism of "in the light most favorable to the prosecution" 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*. In conducting a factual sufficiency review, the court of appeals reviews the fact finder's weighing of the evidence and is authorized to disagree with the fact finder's determination. *Id*. This review, however, must be appropriately deferential so as to avoid an appellate court's substituting its judgment for that of the jury. *Id*. If the court of appeals reverses on factual sufficiency grounds, it must detail the evidence relevant to the issue in consideration and clearly state why the jury's finding is factually insufficient. *Id*. The appropriate remedy on reversal is a remand for a new trial. *Id*.

Appellant argues there is no evidence that appellant used his knife in such a manner that it was capable of causing death or serious bodily injury under the definition of a "deadly weapon." TEX. PEN. CODE ANN. § 1.07(a)(17)(B) (Vernon 1994 & Supp. 2000). Appellant asserts that Glee did not identify the knife used by appellant. We disagree.

The record clearly shows that Glee identified appellant's knife as State's Exhibit 5, and that he was shown the knife by the prosecutor. The prosecutor showed Glee appellant's knife and asked Glee if it looked like what appellant had. Glee replied: "That's exactly what he had." The prosecutor again asked Glee at the conclusion of his direct examination: "Mr. Glee, State's No. 5 is the knife that he pointed at you?" Glee answered: "Yes, sir."

Glee testified that appellant put one hand on Glee's side, reached into his (appellant's) pocket, and then pulled out an open knife, pointed it at Glee and told Glee to give him the rest of the money. Glee stated he thought appellant was going to kill him, and identified State's Exhibit 5 as the knife appellant used. Appellant then pulled the wallet out of Glee's pocket and threw it on the ground. With the knife still pointed at Glee, appellant bent over and took the rest of Glee's money, about $100.00, out of the wallet. Glee said

he couldn't get away from appellant because appellant kept his foot on Glee's foot while he was taking Glee's money. Appellant then told Glee if he "called the cops he was going to come right back and get" him. Officer Anderson testified that appellant's knife was capable of causing death or injury, and it was a deadly weapon.

A person commits robbery if, in the course of committing theft as defined by Chapter 31 of the Texas Penal Code and with the intent to obtain or maintain control of the property, he (1) intentionally, knowingly, or recklessly causes bodily injury to another; or (2) intentionally or knowingly threatens or places another in fear of imminent bodily injury or death. TEX. PEN. CODE ANN. § 29.02(a) (Vernon 1994 & Supp. 2000). This offense becomes aggravated robbery when a person uses or exhibits a deadly weapon. TEX. PEN. CODE ANN. § 29.03(a)(2) (Vernon 1994 & Supp. 2000). In the present case, the indictment alleged that appellant used and exhibited a knife.

The Texas Penal Code defines a deadly weapon as "anything manifestly designed . . . 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." TEX. PEN. CODE ANN. § 1.07(a)(17) (Vernon 1994 & Supp. 1994). Texas courts have held that a knife is not per se a deadly weapon under this statute. *Thomas v. State*, 821 S.W.2d 616, 619 (Tex.Crim.App.1991); *Blain v. State*, 647 S.W.2d 293, 294 (Tex.Crim.App.1983); *Birl v. State*, 763 S.W.2d 860, 863 (Tex.App.--Texarkana 1988, no pet.). The State must therefore prove that the knife in this offense was, in the manner of its use or intended use, capable of causing death or serious bodily injury. *Victor v. State*, 874 S.W.2d 748, 751 (Tex.App.--Houston [1st Dist.] 1994, pet. ref'd), citing *Thomas*, 821 S.W.2d at 620; Birl, 763 S.W.2d at 863.

The Texas Court of Criminal Appeals has listed the following factors that the State may use to prove that a knife was used as a deadly weapon in a given case: the size of the knife; the shape and sharpness of the knife; the manner in which the defendant used the knife; the intended use of the knife; and the knife's capacity to produce death or serious bodily injury. *Blain*, 647 S.W.2d at 294. The State does not have to introduce the knife into evidence to meet this burden. *Victor*, 874 S.W.2d at 751, citing *Morales v. State*, 633 S.W.2d 866, 868 (Tex.Crim.App. [Panel Op.] 1982). Nor is it necessary that the knife be

used to inflict wounds. *Birl*, 763 S.W.2d at 863; *see Brown v. State*, 716 S.W.2d 939, 946 (Tex.Crim.App.1986). It is also not necessary for an express or implied threat to accompany the use of a knife for it to be deemed a deadly weapon. *Tisdale v. State*, 686 S.W.2d 110, 111-12 (Tex.Crim.App.1984); *Vaughn v. State*, 634 S.W.2d 310, 311-12 (Tex.Crim.App.1982). The jury may consider all of the facts of the case, including the words of the defendant, when making this determination. *See Thomas*, 821 S.W.2d at 619; *Blain*, 647 S.W.2d at 294.

In this case, the State proved appellant pointed his knife at Glee, with the blade open, while preventing Glee from running by keeping his foot on Glee's foot. While holding the knife on appellant, appellant pulled the wallet from Glee's pocket, threw the wallet on the ground, and took the money from the wallet. Glee stated he thought he was going to be killed. Appellant admitted he had the knife in his hand while taking the wallet from Glee to retrieve his "payment" for sex, but asserts he did not threaten Glee with the knife.

To this end, evidence is sufficient if a knife is capable of causing death or serious bodily injury or if it is displayed in a manner conveying an express or implied threat that serious bodily injury or death will be inflicted if the desire of the person displaying the knife is not satisfied. *Billey v. State*, 895 S.W.2d 417, 422 (Tex.App.-Amarillo 1995, pet. ref'd). Where the victim testifies that he or she was in fear of serious bodily injury or death, a verbal threat by the accused is not required for the fact finder to conclude that threats were actually made. *Id.*

In the instant case, direct evidence established that appellant exposed his concealed knife to Glee while he was taking Glee's money. These gestures carried an implied, if not an express, threat that if Glee did not give appellant the money, or resisted his taking Glee's wallet, that he would use the knife to inflict serious bodily injury or death upon him. Appellant was clearly in close enough proximity to use the knife on Glee if he resisted appellant. Furthermore, Glee testified he thought appellant was going to kill him, and a verbal threat by appellant was unnecessary. *Billey*, 895 S.W.2d 422.

From all of the circumstances, a rational trier of fact could find appellant intended to use his knife in a manner capable of causing death or serious bodily injury if his plans were to go awry. There is no other

logical intended purpose for such a knife displayed in order to facilitate a commission of a robbery or other offense. We overrule appellant's point of error one.

Appellant further contends the same evidence is factually insufficient to sustain his conviction. He asserts that the greater weight and preponderance of the evidence fails to show the knife was a deadly weapon in the manner appellant used the knife or intended to use it. Glee's version of the robbery conflicts with appellant's version. Glee said he was robbed at knife point and thought appellant was going to kill him. Appellant asserts he was only collecting his fee for sexual services, and made no threats with the knife. What weight to give contradictory testimonial evidence is within the sole province of the trier of the fact, because it turns on an evaluation of credibility and demeanor. *Cain v. State*, 958 S.W.2d 404, 408-09 (Tex.Crim.App.1997). Accordingly, we must show deference to the jury's findings. *Id*. at 409. A decision is not manifestly unjust merely because the jury resolved conflicting views of the evidence in favor of the State. *Id*. at 410. In performing a factual sufficiency review, the courts of appeals are required to give deference to the jury verdict, examine *all* of the evidence impartially, and set aside the jury verdict "only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust." *Cain*, 958 S.W.2d at 410; *Clewis*, 922 S.W.2d at 129. After reviewing the record, we conclude the jury's finding that appellant knowingly committed aggravated robbery with a deadly weapon is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. We find the evidence is factually sufficient to sustain appellant's conviction, and we overrule his point of error two.

In his third and fourth points of error, appellant asserts his sentence of twenty-five years imprisonment by the trial court was unconstitutional under the state and federal constitutions. He contends that the sentence was not proportional to the offense committed, and violated both constitutions prohibiting cruel and unusual punishment. Appellant argues that Glee was not harmed, and the offense arose out of a consensual sexual encounter. Therefore, appellant contends the punishment was unconstitutional under the "unique facts of this case."

Appellant admits the sentence was within the range of punishment provided for by statute. Aggravated robbery is a first degree felony punishable by 5 to 99 years, or life imprisonment, and up to a $10,000.00 fine. TEX. PEN. CODE ANN. § 12.32 (Vernon 1994 & Supp. 2000). Appellant was a

habitual offender with two prior felony convictions, and the minimum punishment is 25 years imprisonment. TEX. PEN. CODE ANN. § 12.42(d) (Vernon 1994 & Supp. 2000). The trial court assessed the minimum punishment under the law applicable to this case which was within the range of punishment provided by law.

Appellant cites no authority for his contention that the "unique facts of this case" make the sentence unconstitutional under the state and federal constitutions. Appellant has waived these contentions by failure to adequately brief these points. *McFarland v. State*, 928 S.W.2d 482, 521 (Tex.Crim.App. 1996), *cert. denied*,117 S.Ct. 966 (1997). Points of error three and four are overruled.

We affirm the judgment of the trial court.

/s/ Sam Robertson
Justice

Judgment rendered and Opinion filed March 23, 2000.
Panel consists of Justices Robertson, Sears, and Lee.*
Do Not Publish — TEX. R. APP. P. 47.3(b).

* Senior Justices Sam Robertson, Ross A. Sears, and Norman Lee sitting by assignment.