

Affirmed and Opinion filed July 19, 2001.



In The

Fourteenth Court of Appeals

NO. 14-99-01122-CR

MARCUS REDD, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the 351st District Court
Harris County, Texas
Trial Court Cause No. 803,061**

A jury found appellant, Marcus Redd, guilty of the felony offense of aggravated robbery. The trial court assessed punishment at twenty five years confinement in the Institutional Division of the Texas Department of Criminal Justice. In two points of error, appellant alleges that the evidence was legally and factually insufficient to support his conviction. More precisely, appellant maintains that the State failed to establish that he had the intent to commit theft. We affirm.

At 2:20 p.m., on August 22, 1998, appellant entered a convenience store wearing a stocking cap, leapt over the counter, and threatened the owner of the store, Ms. Thuy

Nguyen Pham, with a large kitchen knife. Ms. Pham reacted by drawing a firearm she kept behind the counter and shooting appellant. The shot went through appellant's right hand and struck him in the shoulder. Appellant responded by tackling Ms. Pham and forcibly wresting the revolver from her hand. Appellant then fled the store.

Appellant went directly to an emergency room where he was treated for his gunshot wounds. Appellant's disguise prevented Ms. Pham from giving the Houston Police Department a detailed description of her attacker. The police were able to recover DNA evidence, appellant's blood, from the crime scene. Police identified appellant after they discovered that he was the only gunshot victim treated on the afternoon of the incident in any of the area's hospitals. A police department chemist testified at trial that appellant's DNA matched the DNA evidence recovered at the crime scene.

In his two points of error, appellant contends that the evidence was legally and factually insufficient to support his conviction because the State failed to prove that appellant had the intent to commit theft or attempted theft as alleged in appellant's indictment. Essentially, appellant's argues that the State only established that he committed aggravated assault, not aggravated robbery, because the State failed to produce any evidence that he stole or attempted to steal any property. We disagree.

For the legal sufficiency challenge, we must view the evidence in the light most favorable to the verdict and determine whether any rational trier of fact could have found each element of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979). The fact finder is the exclusive judge of the credibility of the witnesses and the weight to be given their testimony. *Mosley v. State*, 983 S.W.2d 249, 254 (Tex. Crim. App. 1998). Thus, we must disregard evidence that is contrary to the verdict and assume as true the evidence in favor of the verdict. *Clewis v. State*, 922 S.W.2d 126, 132 n.10 (Tex. Crim. App. 1996). Ms. Pham testified that an armed, masked man entered her convenience store, jumped the counter, brandished a deadly weapon, and then *stole* her handgun after taking it from her by force. From this testimony, a rational trier of fact could

easily discern that appellant entered the victim's store with the intent to commit theft. We overrule appellant's first point of error.

For the factual sufficiency challenge, we must conduct a neutral review of the evidence. We may only set aside the verdict if (1) the evidence is so obviously weak that it undermines our confidence in the jury's determination, or (2) the evidence of guilt, although adequate if taken alone, is greatly outweighed by contrary proof. *Johnson v. State*, 23 S.W.3d 1, 10-11(Tex. Crim. App. 2000). When conducting a factual sufficiency review, we must be appropriately deferential to the fact finder's determinations of the credibility of the witnesses and the weight given their testimony. Therefore, we should only nullify a jury's factual finding when the finding is against the great weight and preponderance of the evidence. *Clewis*, 922 S.W.2d at 135.

After conducting the appropriate review of the evidence, we are convinced that the proof of appellant's guilt is factually sufficient to support his conviction. Appellant's argument is, simply put, that he cannot be convicted of aggravated robbery because he did not demand money before Ms. Pham shot him. This argument has no merit. Appellant entered a convenience store wearing a mask armed with a deadly weapon and leapt over the counter. The jury could reasonably infer from appellant's actions that his intention was to help himself to the money in the cash register. He was prevented from carrying out his intention when he was shot by Ms. Pham. We overrule appellant's second point of error.

Accordingly, we affirm the judgment of the court below.

/s/ J. Harvey Hudson
Justice

Judgment rendered and Opinion filed July 19, 2001.
Panel consists of Justices Anderson, Hudson, and Seymore.
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