**Affirmed and Opinion filed November 8, 2001.**

**In The**

# Fourteenth Court of Appeals

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**NO. 14-00-00929-CR**

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**STEVEN LEON YARBOROUGH, Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

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**On Appeal from the 180th District Court**
**Harris County, Texas**
**Trial Court Cause No. 844,088**

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## O P I N I O N

Appellant, Steven Leon Yarborough challenges the legal and factual sufficiency of the evidence supporting his conviction for aggravated robbery.

### I. FACTUAL BACKGROUND

The State and appellant presented different versions of the events surrounding the offense.

#### State's Version of Events

On the day of the offense, the complainant, 86-year old Basilia Longoria, pulled her

car into a Chevron station parking lot. Soon thereafter, appellant approached Longoria's car, sat down in the driver's seat, and stated that he wanted to "fix her car." Longoria replied that there was nothing wrong with her car. Appellant, holding a screwdriver, then stated his intention to steal her car. Appellant told her that if she refused to allow him to do so, he would kill her. A struggle ensued when Longoria tried to get the keys out of the car's ignition. Longoria slapped appellant in the face twice. Apparently unprepared for this feisty response from his elderly victim, appellant "hung his head." Longoria began to scream for help.

Marlon Merino, who was working in a nearby shopping center, heard Longoria scream and saw her struggling with appellant. Merino immediately called 911 and then ran to assist Longoria. According to Merino, Longoria was crying as if she were scared, but still was insistent on protecting her property. Appellant told Merino to step away or he would be hurt. Seeing that appellant had a screwdriver in his hand, Merino advised Longoria, for her own safety, to give appellant the keys to the car. Longoria complied. As appellant started to drive the car down the street, off-duty police officers, who had heard the commotion and cries for help, intervened. Appellant left Longoria's car in the middle of street and began to run, ignoring the officers' demands to stop. The off-duty officers eventually tackled appellant and handcuffed him. The uniformed police arrived almost immediately and arrested appellant.

**Appellant's Version of Events**

Appellant, who testified at trial, presented a different version of events. He claimed that he was having problems with his truck so he pulled into a Chevron gas station. Appellant explained that he had a screwdriver with him to use on his truck. Appellant stated that he walked over to Longoria and told her that people had tried to kill him when he was merely trying to fix his truck and that he needed her help to get to a hospital. Longoria refused. Appellant then stated that he planned to use her car to jump-start his truck, at which point appellant got into the driver's seat of the car and drove away until someone ran up to

the car and told him to stop. He claims he stopped the car and ran until he was tackled by the off-duty police.

Appellant was charged by indictment with the offense of aggravated robbery. He entered a plea of not guilty to the offense. After finding him guilty, the jury assessed punishment at forty years' confinement in the Texas Department of Criminal Justice Institutional Division.

## II. LEGAL AND FACTUAL SUFFICIENCY OF THE EVIDENCE

In two points of error, appellant challenges the legal and the factual sufficiency of the evidence to show that he intentionally or knowingly *threatened or placed* Longoria in fear of imminent bodily harm or death.

In evaluating a legal sufficiency challenge, we view the evidence in the light most favorable to the verdict. *Weightman v. State*, 975 S.W.2d 621, 624 (Tex. Crim. App. 1998); *see also Narvaiz v. State*, 840 S.W.2d 415, 423 (Tex. Crim. App. 1992). The issue on appeal is not whether we, as a court, believe the State's evidence or believe that the defense's evidence outweighs the State's evidence. *Wicker v. State*, 667 S.W.2d 137, 143 (Tex. Crim. App. 1994). Nor is it our duty to re-weigh the evidence based on a cold record; rather, it is our duty to act as a due process safeguard, ensuring only the rationality of the fact finder's decision. *Williams v. State*, 937 S.W.2d 479, 483 (Tex. Crim. App. 1996). The verdict may not be overturned unless it is irrational or unsupported by proof beyond a reasonable doubt. *Matson v. State*, 819 S.W.2d 839, 846 (Tex. Crim. App. 1991). The jury, as the trier of fact, "is the sole judge of the credibility of witnesses and of the strength of the evidence." *Fuentes v. State*, 991 S.W.2d 267, 271 (Tex. Crim. App. 1999). The jury may choose to believe or disbelieve any portion of the witnesses' testimony. *Sharp v. State*, 707 S.W.2d 611, 614 (Tex. Crim. App. 1986). When faced with conflicting evidence, we presume the trier of fact resolved conflicts in favor of the prevailing party. *Turro v. State*, 867 S.W.2d 43, 47 (Tex. Crim. App. 1993). Therefore, if *any* rational trier of fact could have found the essential

elements of the crime beyond a reasonable doubt, we must affirm. *McDuff v. State*, 939 S.W.2d 607, 614 (Tex. Crim. App. 1997).

In contrast, when evaluating a challenge to the factual sufficiency of the evidence, we view all the evidence without the prism of "in the light most favorable to the prosecution" and set aside the verdict only if it is "so contrary to the overwhelming weight of the evidence to be clearly wrong and unjust." *Johnson v. State*, 23 S.W.3d 1, 6–7 (Tex. Crim. App. 2000) (citing *Clewis v. State*, 922 S.W.2d 126, 129 (Tex. Crim. App. 1996)). This concept embraces both "formulations utilized in civil jurisprudence, i.e., that evidence can be factually insufficient if (1) it is so weak as to be clearly wrong and manifestly unjust or (2) the adverse finding is against the great weight and preponderance of the available evidence." *Id.* at 11. Under this second formulation, we essentially compare the evidence which tends to prove the existence of a fact with the evidence that tends to disprove that fact. *Jones v. State*, 944 S.W.2d 642, 647 (Tex. Crim. App. 1996). "In conducting the factual sufficiency review, we consider the fact finder's weighing of evidence and can disagree with the fact finder's determination." *Clewis*, 922 S.W.2d at 133. However, we must employ appropriate deference so that we do not substitute our judgment for that of the fact finder. *See Jones*, 944 S.W.2d at 648. Our evaluation should not intrude upon the fact finder's role as the sole judge of the weight and credibility given to any witness's testimony. *See Cain v. State*, 958 S.W.2d 404 (Tex. Crim. App. 1997).

In order to prove the offense of robbery, the State must prove that, while in the course of committing theft and with the intent to obtain and maintain control of the property, the

defendant: (1) intentionally[1], knowingly[2], or recklessly[3] caused bodily injury[4] to another; or (2) intentionally or knowingly threatened or placed another in fear of imminent bodily injury or death. TEX. PEN. CODE ANN. § 29.02 (Vernon 1994). To elevate this offense to aggravated robbery, the State must prove the robbery and also that during the course of the robbery the defendant either (1) caused serious bodily injury[5] to another; (2) used or exhibited a deadly weapon; *or* (3) caused bodily injury to another person *or* threatened *or* placed another person in fear of imminent bodily injury or death, *if* the other person is over 65 years old or disabled. *Id.* at § 29.03.

The jury charge properly instructed the jury as follows:

> Now, if you find from the evidence beyond a reasonable doubt that on or about the 20th day of May, 1999, in Harris County, Texas, the defendant, Steven Leon Yarborough, did then and there unlawfully, while in the course of committing theft of property owned by Basilia Longoria and with intent to obtain or maintain control of the property, intentionally or knowingly threaten *or* place in fear of imminent bodily injury or death, a person at least sixty-five years of age, namely Basilia

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[1] Texas Penal Code, section 6.03(a) provides that "a person acts intentionally, or with intent, with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result."

[2] Texas Penal Code, section 6.03(b) provides that "[a] person acts knowingly, or with knowledge, with respect to the nature of his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or that the circumstances exist. A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result."

[3] Texas Penal Code, section 6.03(c) provides that "[a] person acts recklessly, or is reckless, with respect to circumstances surrounding his conduct or the result of his conduct when he is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint."

[4] Texas Penal Code, section 1.07(8) defines "Bodily Injury" as "physical pain, illness, or any impairment of physical condition."

[5] Texas Penal Code, section 1.07 (46) defines "Serious Bodily Injury"as "bodily injury that creates a substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ."

> Longoria by telling her that he would kill her if she did not let him fix her car; or . . . by telling her that he would kill her if she did not let him take or steal her car, then you will find the defendant guilty of aggravated robbery, as charged in the indictment.

The indictment properly alleged the offense and the jury needed only to find that appellant either "threatened *or* placed" Longoria in fear of imminent bodily injury or death. *See e.g., Hunter v. State,* 576 S.W.2d 395 (Tex. Crim. App. 1979). Thus, the evidence is sufficient if it shows appellant either (1) had the conscious objective or desire to place Longoria in fear of imminent bodily harm or death or (2) was aware that it was reasonably certain that his robbery attempt would place her in fear of imminent bodily injury or death.

The element "*places* another in fear of imminent bodily injury," differs from the element "*threatens* another with imminent bodily injury." *Williams v. State,* 827 S.W.2d 614, 616 (Tex. App.–Houston [1st Dist.] 1992). "The general, passive requirement that another be 'placed in fear' cannot be equated with the specific, active requirement that the actor 'threaten another with imminent bodily injury.'" *Id.* Under the "placed in fear" language, the fact finder may find that an individual perceived fear in a situation where the accused made no actual threats. *Wilmeth v. State,* 808 S.W.2d 703, 706 (Tex. App.–Tyler 1991, no pet.) (jury may find requisite fear from menacing glance and a hand gesture).

When a robbery is effected by threats of bodily injury or placing another in fear, that fear must be of such nature as in reason and common experience is likely to induce a person to part with his property against his will. *Green v. State,* 567 S.W.2d 211, 213 (Tex. Crim. App. 1978). The victim's fear may not arise merely from some temperamental timidity, but must result from some conduct of the perpetrator. *Devine v. State,* 786 S.W.2d 268 (Tex. Crim. App. 1989). Fear-causing conduct can take many forms. Threats can be communicated by action or words. *McGowan v. State,* 664 S.W.2d 355, 357 (Tex. Crim. App. 1984). The inquiry on appeal is whether the words and conduct of the accused were sufficient to place a reasonable person in the victim's situation in fear of imminent bodily injury or death. *See Welch v. State,* 880 S.W.2d 225, 227 (Tex. App.–Austin 1994, no pet.).

Appellant did more than merely *place* Longoria in fear, he made verbal threats to kill her while holding a screwdriver. Longoria testified that she believed appellant when he said he would hurt her if she did not surrender the keys to her car. Although at one point she testified she was not afraid that appellant would actually hurt her, she also stated that she was a bit afraid that he might, if she did not let him take her car.[6] When appellant threatened to kill Longoria, she believed that he was capable of doing it.[7] Other courts confronting similar scenarios have found this type of evidence legally sufficient. For example, in *Vaughn v. State*, a 67- year old complainant who had been held at knife-point denied that the accused had placed him in fear of imminent bodily injury. 634 S.W.2d 310 (Tex. Crim. App. 1982). However, he testified that he imagined that the accused would hurt him with the knife if he did not give him the money. *Id.* at 312. The *Vaughn* court held that this testimony was sufficient to show that the complainant felt threatened with bodily injury. *Id.*

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[6] Longoria testified:
Q: Miss Longoria, why did you let the man take your car?
A: Ma'am?
Q: Why did you let the man take your car?
A: How come I let him take it?
Q: M-h-m.
A: Because I couldn't take it away from him. . . .
Q: Did you think he would hurt you, even though you were not afraid, did you think he- - listen to my question.
A: I wasn't afraid of him.
Q: Listen to my question.
A: I wasn't afraid of him. I turned around and slapped him twice. . .

[7] Longoria testified:
Q: Even though you weren't afraid of him did you think - - and this is - - did you think that he would hurt you if you did not let him take the car?
A: Yeah, I kind of was afraid of that. But I was not afraid of him. . . .
Longoria further testified on re-direct examination as to the following:
Q: - - did you think that if you didn't let him take the car he might hurt you?
A. He might. But they won't let him do it because they catch him. They catch him before he got on the street. . . .
Q: Okay. But when you were standing there and he made those comments to you, did you believe that what he was telling you he was capable of doing if he wanted to?
A: Yes.

Marlon Merino testified that, when he arrived on the scene, Longoria appeared to be struggling with appellant and was crying as if she were both angry and scared. In addition, Deputy Willis testified that he noticed that Longoria was very upset. Longoria testified to her belief that, had she failed to comply with appellant's demand for the car keys, she was "kind of afraid" that he would hurt her. The evidence shows that Longoria did, in fact, relinquish control over her vehicle because she was threatened with imminent bodily harm. Viewing the facts in the light most favorable to the verdict, we find Longoria's statements, coupled with other testimony at trial, legally sufficient to support the jury's finding that appellant threatened Longoria or placed her in fear of imminent bodily injury or death. Any rational trier of fact could have found the essential elements of aggravated robbery beyond a reasonable doubt.

To support his contention that the evidence is factually insufficient to show that he either intentionally or knowingly threatened or placed Longoria in fear of imminent bodily harm, appellant points to testimony by Longoria that she was not afraid of him. Although Longoria did make this statement, other witnesses testified that Longoria was screaming, and crying, and appeared to be upset. Longoria herself admitted that, at least at one point, she was somewhat afraid that appellant would follow through with his threats if she did not comply with his demands. The credibility of the witnesses and the weight of the evidence was a question for the jury, not this court. *See Webster v. State*, 627 S.W.2d 818, 820 (Tex. App.–Fort Worth 1982, pet. ref'd.). The trier of fact has the opportunity to observe the demeanor of the witnesses on the stand and is able to better judge their credibility. *Jackson v. State*, 672 S.W.2d 801, 804 (Tex. Crim. App. 1984). The jury, as fact finder, was free to believe any, all, or part of the testimony, including whether Longoria was placed in fear by appellant's words and/or actions. *See e.g., Cain v. State,* 958 S.W.2d 404 (Tex. Crim. App. 1997). Moreover, the evidence is not insufficient merely because the appellant took the stand and offered a different version of the facts. *See Russell v. State,* 665 S.W.2d 771, 776 (Tex. Crim. App. 1983).

In considering all of the evidence, the jury resolved any conflicts to find that Longoria was either "placed in fear" or that she was threatened by appellant's words or conduct. The record contains ample evidence that appellant brandished a screwdriver and told the 86-year old Longoria that he would kill her. Thus, even if Longoria were not "placed in fear," the record contains sufficient evidence to support the jury's finding that appellant threatened a person over 65-years old with death or serious bodily injury. We find the jury's verdict is not clearly wrong or unjust or against the great weight and preponderance of the evidence. Accordingly, appellant's factual sufficiency challenge fails.

Having concluded that the evidence is both legally and factually sufficient to support appellant's conviction for the offense of aggravated robbery, we overrule appellant's points of error and affirm the judgment of the trial court.

/s/ Kem Thompson Frost
Justice

Judgment rendered and Opinion filed November 8, 2001.

Panel consists of Justices Anderson, Hudson, and Frost.

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