

Affirmed and Opinion filed January 13, 2000.



In The

Fourteenth Court of Appeals

NO. 14-98-00961-CR

ANDRE LAMONT BEMBRY, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the 232nd District Court
Harris County, Texas
Trial Court Cause No. 778,505**

OPINION

After finding appellant guilty of aggravated robbery, a jury sentenced him to twenty years imprisonment. Appellant challenges this conviction, asserting in two points of error that the evidence presented at trial is factually and legally insufficient to support his conviction. We overrule these points of error and affirm the judgment of the trial court.

The robbery with which appellant was charged occurred in the parking lot of a grocery store owned by the complainant, Chol Sang Song. The morning of the robbery, the complainant left his store to make a trip to his bank. While at the bank, he received a box containing

\$500.00 in quarters which weighed approximately twenty-five pounds. Placing the box next to him, he returned to his store.

Upon his arrival, he noticed a suburban pull into the parking lot and park behind him. The complainant exited his vehicle, and went to the passenger side to remove the box of quarters. Before the complainant could remove the box, however, a man exited the suburban, approached the complainant, put a gun in the complainant's face, and told the complainant "Give me your money." The complainant told the man that he could take the box of quarters. The man reached into the complainant's vehicle, tried unsuccessfully to grab and lift the box while holding the gun on the complainant, and fled back into the suburban and drove immediately from the scene.

After conducting an investigation, the police put together a photographic lineup of suspects. When shown this lineup, the complainant identified appellant as the man who attempted to steal from him. Shortly after this identification, police officers arrested appellant.

Appellant complains on appeal that the evidence adduced at trial is factually and legally insufficient to support his conviction of aggravated robbery. Specifically, appellant complains that the complainant's description of him was insufficient to rebut his alibi and mistaken identity defenses.

In reviewing legal sufficiency challenges, appellate courts are to view the evidence in the light most favorable to the prosecution, overturning the lower court's verdict only if a rational trier of fact could not have found all of the elements of the offense beyond a reasonable doubt. *See Santellan v. State*, 939 S.W.2d 155, 160 (Tex. Crim. App. 1997) (citing *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct.2871, 2789, 61 L.Ed.2d 560 (1979)).

Here, the only element of aggravated robbery that was in dispute was the identity of the person committing the robbery. The complainant was the only witness who identified appellant as the person who robbed him. While the complainant's description of appellant was imperfect, the complainant easily identified him from the photographic lineup and at trial as the person

who robbed him. Further, though appellant testified that he was at home asleep when the robbery occurred, the jury was entitled to disbelieve this testimony and find that appellant committed the robbery. *See Sharp v. State*, 707 S.W.2d 611, 614 (Tex. Crim. App. 1986). Viewing the evidence in the light most favorable to the prosecution, we find the evidence legally sufficient to support appellant's conviction. We overrule appellant's first point of error.

In reviewing factual sufficiency questions, the court of appeals must 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 as to be clearly wrong or unjust. *See Clewis v. State*, 922 S.W.2d 126, 129 (Tex. Crim. App. 1996). The court accomplishes this objective by viewing all of the evidence adduced at trial, using enough deference to keep the appellate court from substituting its own judgment for that of the fact finder. *See Santellan*, 939 S.W.2d at 164. The appellate court will overrule the fact finder only when its finding is "manifestly unjust," "shocks the conscience," or "clearly demonstrates bias." *See id.* at 165 (citing *Clewis*, 922 S.W.2d at 135).

At trial, the testimony showed that the complainant described the person who robbed him as a light skinned, six-foot tall black male weighing between 160 and 190 pounds. Appellant was shown at trial to be dark-skinned, five feet, seven inches, weighing about 180 pounds. The complainant, when confronted with these apparent inconsistencies, pointed out that he knew that the robber was taller than he was and, to him, had somewhat lighter colored skin. Further, the officer conducting the lineup testified that the complainant had no problem identifying appellant from the lineup and expressed fear that he might return upon seeing his photograph.

Appellant presented two witnesses in support of his alibi defense. The appellant's sister-in-law, who lived with appellant, testified that she was at home all day on the date the robbery occurred and the appellant never left the house. On cross-examination, however, she was unable to remember clearly other, arguably more important dates during this time period,

such as the day appellant was arrested or the day appellant's mother died. Appellant also testified, stating that he was at home all day the day of the robbery, sleeping until late in the afternoon. Appellant, however, had the same problem remembering other days, exhibiting confusion about the date he was arrested and charged with the crime. Since the jury is sole judge of credibility, they could have chosen to disbelieve the testimony of appellant and his witness. *See Sharp*, 707 S.W.2d at 614.

Based on this evidence, we do not find appellant's conviction so against the weight of the evidence as to be shocking, unjust, or biased. Accordingly, we overrule appellant's second point of error and affirm the judgment of the trial court.

/s/ Paul C. Murphy
Chief Justice

Judgment rendered and Opinion filed January 13, 2000.

Panel consists of Chief Justice Murphy and Justices Anderson and Hudson.

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