Affirmed and Opinion filed October 14, 1999.

In The

Fourteenth Court of Appeals

NO. 14-98-00133-CR

WENDELL JOE SYLVESTER, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 337th District Court
Harris County, Texas
Trial Court Cause No. 761,354

O P I N I O N

A jury found Wendell Joe Sylvester, appellant, guilty of robbery and sentenced him to 35 years' confinement. In two points of error, appellant raises legal and factual insufficiency of the evidence. We affirm.

During the morning hours of July 20, 1997, appellant walked into a Houston seafood restaurant wearing pantyhose over his face. He approached the manager and told her he had a gun and to give him all the money in the store safe and registers. Although the manager did not actually see a gun, appellant had his hands at his waist and she believed him. She gave him all the cash in the registers, but told him the time-

delayed safe could not be opened. After he told her to open the safe or he would shoot, the manager and another store employee opened the safe and put the money in a bag. Appellant took the bag and ran out.

While the manager called police, the other employee got in her car and chased after appellant in the parking lot. He had removed the pantyhose from his face, but she recognized him by his clothing and the money bag he was carrying. Before getting into his car, he turned to her and again put his hands to his waist, at which point the employee thought he was going to shoot her. Appellant drove off, but police were able to locate him by tracing the vehicle's registration. No actual gun was seen by either of the employees.

Under his two points of error, appellant claims that the evidence is legally and factually insufficient to sustain a conviction for robbery. He contends that because the jury did not find an aggravating element, we cannot consider the testimony that appellant said he had a gun and would shoot. Consequently, he argues, there was no basis for the employees' fear of imminent bodily injury or death, and no robbery was established.

The standard of review for a challenge to the legal sufficiency of the evidence is whether, viewing the evidence in the light most favorable to the verdict, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Garrett v. State*, 851 S.W.2d 853, 857 (Tex. Crim. App. 1993); *Thomas v. State*, 915 S.W.2d 597, 599 (Tex. App. – Houston [14th Dist.] 1996, pet. ref'd). In conducting this review, we will not re-evaluate the weight and credibility of the evidence; instead, we act only to ensure the jury reached a rational decision. *Muniz v. State*, 851 S.W.2d 238, 246 (Tex. Crim. App. 1993).

To conduct a factual sufficiency review, we do not view the evidence through the prism of "in the light most favorable to the prosecution." *Cain v. State*, 958 S.W.2d 404, 407 (Tex. Crim. App. 1997); *Clewis v. State*, 922 S.W.2d 126, 129 (Tex. Crim. App. 1996). The jury is the judge of the facts. TEX. CODE CRIM. PROC. ANN. Art. 36.13; *Cain*, 958 S.W.2d at 407. We will set aside the verdict only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *Clewis*, 922 S.W.2d at 133. Under the Texas Penal Code, a person commits an offense of robbery if, in the course of committing theft, he intentionally or knowingly threatens or places another in fear of imminent bodily injury or death. TEX. PEN. CODE ANN. § 29.02 (Vernon 1994). It is not necessary that the robber

display an actual weapon in order to find that the complainant was threatened or placed in fear. *Welch v. State*, 880 S.W.2d 225, 227 (Tex. App. – Austin 1994, no pet.). A victim can be placed in fear of bodily injury or death if a defendant leads the complainant to believe he has a gun by placing his hands in his pockets during the offense. *Emerson v. State*, 476 S.W.2d 686, 687 (Tex. Crim. App. 1972).

We review the entire record in the light most favorable to the verdict, which includes the complainant's testimony concerning appellant's threats to use a handgun, and find that appellant's words and conduct were legally sufficient to constitute robbery by threat when he demanded money from the employees and said he had a gun, and that he would shoot if they did not open the store's safe. Both employees testified that when appellant placed his hands on his waist, they believed he had a gun, and that they were afraid and believed he would shoot them. *See Knight v. State*, 868 S.W.2d 21, 25 (Tex. App. – Houston [1st Dist.] 1993, pet. ref'd)(stating that although the jury did not find an aggravating element, there was legally sufficient evidence where the complainant testified that appellant pushed her hands away from the cash register while having what appeared to be a gun tucked in his waistband).

Appellant's first point of error is overruled.

In his second point of error, appellant argues that the evidence is factually insufficient to support the conviction. After examining all of the evidence, we find that the jury's verdict is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust.

Appellant's second point of error is overruled.

The judgment of the trial court is affirmed.

/s/ D. Camille Hutson-Dunn
Justice

Judgment rendered and Opinion filed October 14, 1999.

Panel consists of Justices Draughn, Lee and Hutson-Dunn.[*]

Do Not Publish — TEX. R. APP. P. 47.3(b).

[*] Senior Justices Joe Draughn, Norman Lee and D. Camille Hutson-Dunn sitting by assignment.