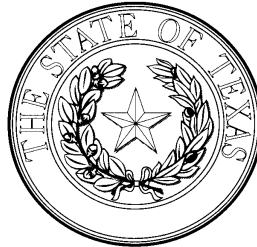


Opinion issued February 23, 2017



In The
Court of Appeals
For The
First District of Texas

NO. 01-16-00077-CR

WALTER EARL MCDONALD, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the 263rd District Court
Harris County, Texas
Trial Court Case No. 1449066

MEMORANDUM OPINION

A jury convicted appellant Walter Earl McDonald of aggravated assault enhanced by a previous conviction of possession of a controlled substance and sentenced him to 20 years' confinement in the Institutional Division of the Texas

Department of Criminal Justice. In his sole issue, McDonald argues that the evidence was legally insufficient to support his conviction. We affirm.

Background

Va-Shawn Cobbins and her sister Nina Robinson bake pastries out of their home. On the morning of November 2, 2014, they went to a corner store to deliver pastries to a customer. At trial, Cobbins and Robinson testified that, while at the corner store, they were joking with McDonald and two other men identified as Sonny and Wayne. According to Cobbins and Robinson, Wayne jokingly told McDonald that he was going to steal his woman, referring to Robinson. Both Cobbins and Robinson testified that, in response, McDonald reached in his pocket and pulled out a pocket knife in jest. Neither Cobbins nor Robinson could recall specific details about the pocket knife, other than the blade being silver. After that, McDonald left with Robinson.

Later that day, Cobbins and Robinson stopped at another gas station down the street where they again ran into McDonald. McDonald was with his daughter, Mary, and his daughter-in-law. McDonald approached Cobbins and Robinson's car to talk to them through the driver's side window, where Robinson was sitting. Mary approached the car and told McDonald "don't be giving these whores your money." Robinson asked McDonald to get his daughter away from them because she was not talking to her. In response, McDonald slapped Robinson in the head, knocking her

glasses off of her face. Robinson exited the car and she and Mary began to physically fight. Cobbins then exited the passenger side of the car and tried to break up the fight. Mary hit Robinson again and McDonald and his daughter-in-law approached the fight. In the commotion, Cobbins was stabbed and fell to the ground. Thereafter, McDonald, Mary, and McDonald's daughter-in-law backed away from the car and left the scene. Robinson called 911 and EMS transported Cobbins to the hospital. The police took a statement from Robinson at the scene in which she identified McDonald as the person who stabbed Cobbins. Cobbins also identified McDonald as the person who stabbed her.

At trial, the State presented the testimony of Officer T. Fay, Cobbins, Robinson, and Officer E. Cerpas. The State also presented footage from the gas station security camera that captured the incident. First, Officer Fay testified that when he arrived at the scene, he saw blood and an ambulance tending to Cobbins. McDonald was not at the scene. He stated that Robinson told him that she and Mary had gotten into a fight after Mary told McDonald not to give her and Cobbins money. Robinson explained that Cobbins was trying to break up the fight when she got stabbed. According to Officer Fay, Robinson identified McDonald as the suspect. Officer Fay testified that Cobbins "gave pretty much the same statement" and that he found Cobbins's and Robinson's statements credible.

Cobbins testified next and narrated the events as the jury watched the video recording of the incident. According to Cobbins, the video shows McDonald approach her by the door of the driver's side of the car and stab her, after which she falls to the ground. She stated that she "hit the ground" and "felt this sting, a pinch." She did not immediately know she had been stabbed but realized it once she hit the ground. Cobbins testified that she next heard Mary say "You stabbed her, Daddy. Let's go." She said that, at that point, she looked down and saw blood and started yelling at McDonald that he stabbed her. According to Cobbins, she immediately got up and paced around, then went after McDonald and maced him in his car. She stated she was in shock and initially did not realize the extent of her injury but eventually started feeling dizzy. She testified that her sister called 911 and an ambulance transported her to the hospital. Cobbins testified that she immediately had surgery to repair a punctured liver. The State introduced Cobbins's medical records which state that Cobbins had "a high probability for imminent life or organ-threatening emergency medical condition" and that she suffered from a "liver laceration, moderate, with open wound assault by cutting piercing instrument."

Robinson testified to the same version of events. According to Robinson, she did not know Cobbins had been stabbed until she heard Cobbins say "You stabbed me." Robinson testified that she heard Mary say "Come on, Daddy. Let's go. Let's go. You stabbed her." She stated that Mary rushed McDonald away from the scene.

Robinson testified that she then called 911. The State introduced the audio recording of Robinson's 911 call in which Robinson identified McDonald as the individual who stabbed Cobbins.

Officer E. Cerpas also testified at trial. He stated that he read Officer Fay's report and investigated the incident. As part of his investigation, Officer Cerpas spoke to Cobbins when she was in the hospital and observed her stab wound. He stated that the doctors informed him that Cobbins's wound was about four and a half centimeters deep and a few inches wide. Officer Cerpas testified that, based on his training and experience, he concluded that a knife was used in inflicting the wound. Officer Cerpas further testified that stabbing someone with a knife could cause death or serious bodily injury. Officer Cerpas testified that he spoke with medical personnel at the hospital who verified that the stab wound penetrated Cobbins's liver and that she had a laparoscopy. He testified that he also took statements from Cobbins and Robinson, both of whom identified McDonald as the individual who stabbed Cobbins.

According to Officer Cerpas, he conducted two interviews with McDonald in the days after the incident. Officer Cerpas stated that McDonald admitted to being at the scene and knew that a stabbing had taken place before Officer Cerpas told him. According to Officer Cerpas, McDonald denied stabbing Cobbins but at one point speculated that his daughter Mary "may have had a knife." Officer Cerpas

stated that McDonald's statements were inconsistent and that the surveillance video is consistent with Cobbins's statement but inconsistent with McDonald's.

The defense next presented the testimony of Lee Tollfree, who was also at the gas station when the stabbing took place. According to Tollfree, he drove McDonald to the gas station the day of the incident. Tollfree testified that someone maced McDonald and that he was stumbling towards the store so they fled the scene to rinse off McDonald's face. Tollfree testified that he did not see McDonald with a knife or hear him mention that he stabbed anyone.

McDonald testified and denied stabbing Cobbins. He stated that he does not carry a knife and did not pull one out when he first saw Cobbins and Robinson at a corner store earlier in the day. He admitted that he slapped Robinson because he did not like the way she spoke to his daughter. But he stated that he did not stab Cobbins and did not have a knife with which to stab her. According to McDonald, the day after the incident, his daughter-in-law told him that she had stabbed Cobbins. McDonald stated that he lied to the investigator for his daughter-in-law. McDonald also testified that he had a criminal history which included a charge for drugs and assault.

The jury found McDonald guilty of aggravated assault, enhanced by a prior felony conviction of possession of a controlled substance, and assessed punishment at 20 years' confinement. McDonald appealed.

Discussion

In his sole issue, McDonald contends that the evidence was legally insufficient to support his conviction because the State failed to prove two essential elements of the offense—(1) he caused bodily injury to Cobbins and (2) he “used or exhibited a deadly weapon, namely a knife” during the commission of the offense.

A. Standard of Review

We review the sufficiency of the evidence in the light most favorable to the verdict and then determine whether a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Acosta v. State*, 429 S.W.3d 621, 624–25 (Tex. Crim. App. 2014) (first citing *Brooks v. State*, 323 S.W.3d 893, 912 (Tex. Crim. App. 2010); then citing *Jackson v. Virginia*, 443 U.S. 307, 318–19, 99 S. Ct. 2781, 2789 (1979)). This standard of review allows a jury to resolve fact issues and to draw reasonable inferences from the evidence. *Thomas v. State*, 444 S.W.3d 4, 8 (Tex. Crim. App. 2014) (citing *Jackson*, 443 U.S. at 319, 99 S. Ct. at 2789). With respect to testimony of witnesses, the jury is the sole judge of the credibility and weight to be attached thereto, and when the record supports conflicting inferences, we presume that the jury resolved the conflicts in favor of the verdict, and we defer to that determination. *Id.* (citing *Jackson*, 443 U.S. at 319, 99 S. Ct. at 2789). In a sufficiency inquiry, direct evidence and circumstantial evidence are equally probative. *Tate v. State*, 500 S.W.3d 410, 413 (Tex. Crim. App. 2016)

(citing *Winfrey v. State*, 393 S.W.3d 763, 771 (Tex. Crim. App. 2013)). Every fact need not directly indicate the defendant’s guilt; the cumulative force of the evidence can be sufficient to support a finding of guilt. *Nowlin v. State*, 473 S.W.3d 312, 317 (Tex. Crim. App. 2015) (citing *Beardsley v. State*, 738 S.W.2d 681, 685 (Tex. Crim. App. 1987)).

B. Applicable Law

A person commits aggravated assault if he intentionally or knowingly causes bodily injury and uses or exhibits a deadly weapon during the commission of the assault. TEX. PENAL CODE § 22.01(a)(2), 22.02(a)(2). “Bodily injury” means physical pain, illness, or any impairment of physical condition. TEX. PENAL CODE § 1.07(a)(8).

C. Analysis

McDonald contends that the State (1) failed to establish that he was the person who caused Cobbins bodily injury or that (2) he “used or exhibited” a deadly weapon. In particular, he argues that the State could not prove that the knife was capable of causing death or serious bodily injury because no knife was entered into evidence and there was insufficient evidence regarding the knife’s “size, shape, and sharpness.” In response, the State argues that the evidence, including the surveillance video and testimony of multiple witnesses, supports the jury’s conclusion that McDonald stabbed Cobbins and that, although no knife was

recovered or entered into evidence, the nature of Cobbins's injury establishes that the object used to inflict her wounds was capable of causing serious bodily injury.

1. Identity of Assailant

McDonald argues that the only evidence that he caused Cobbins's injury is (1) "the unobjected to hearsay within hearsay from Officer Fay that Robinson told him at the scene that Robinson heard 'the daughter yelling, Daddy, you stabbed her. . . . You need to get out of here'" (2) "the unobjected to testimony of [Cobbins] herself claiming that she had [sic] heard Mary say that;" and (3) "Robinson's testimony saying Mary uttered words to that effect."

We conclude that sufficient evidence supports the jury's finding beyond a reasonable doubt that McDonald stabbed Cobbins. The State presented a video recording of the incident. Cobbins narrated the video, pointing out to the jury the moment in which she claims McDonald stabbed her. The video depicts McDonald standing next to Cobbins before she fell to the ground. Cobbins further testified that she heard Mary telling McDonald that they had to go because he had stabbed Cobbins. Robinson corroborated this statement. And Officers Fay and Cerpas testified that both Cobbins and Robinson told consistent versions of the events immediately following the incident. The undisputed video evidence also shows McDonald, Mary, and his daughter-in-law leaving the scene after Cobbins fell, and Officer Fay testified that McDonald was not at the scene when he arrived.

The State could prove the identity of the attacker through circumstantial evidence, including the testimony of its witnesses and the video evidence. The jury was entitled to judge the credibility of the witnesses and weigh the evidence presented. *See Chambers v. State*, 805 S.W.2d 459, 461 (Tex. Crim. App. 1991). Here, we presume that the jury resolved the conflicting testimony and evidence in favor of McDonald’s conviction and defer to its finding. *Merritt v. State*, 368 S.W.3d 516, 526–27 (Tex. Crim. App. 2012) (appellate court presumes jury resolved conflicting evidence in favor of verdict and defer to that determination); *Henson v. State*, 388 S.W.3d 762, 773 (Tex. App.—Houston [1st Dist.] 2012 (“verdict of guilty is an implicit finding rejecting the defendant’s [defensive] theory”), *aff’d*, 407 S.W.3d 764 (Tex. Crim. App. 2013). Based on the evidence presented, the jury was entitled to infer beyond a reasonable doubt that McDonald stabbed Cobbins. Thus, we conclude that the evidence was sufficient to support the jury’s finding that McDonald committed the stabbing. *See Jenkins v. State*, 493 S.W.3d 583, 599 (Tex. Crim. App. 2016) (noting that identity may be proven by direct or circumstantial evidence, coupled with all reasonable inferences from that evidence); *Greene v. State*, 124 S.W.3d 789, 792 (Tex. App.—Houston [1st Dist.] 2003, *pet. ref’d*) (noting defendant’s identity can be proven by direct or circumstantial evidence and that eyewitness identification is not necessary).

2. Exhibited or Used a Deadly Weapon, Namely, a Knife

McDonald contends that the evidence was insufficient to establish that he “exhibited or used” a deadly weapon, namely a knife. He argues that that his alleged exhibition of a knife jokingly and on the morning of but hours before Cobbins was stabbed does not suffice as proof of exhibition of a deadly weapon during the assault. Additionally, McDonald argues that “[n]o one testified to having seen the knife appellant allegedly used to stab [Cobbins] ‘during the commission of the offense’” and no knife was entered into evidence. McDonald further challenges the jury’s finding that the knife used or exhibited in the offense was a “deadly weapon.” The State responds that the evidence establishes that the object used to inflict Cobbins’s wounds was a deadly weapon because it was capable of causing serious bodily injury or even death.

The indictment alleged that McDonald used and exhibited a “deadly weapon, namely a knife” in committing assault. Thus, the State had to prove beyond a reasonable doubt that (1) McDonald used a knife during the assault, and (2) that the knife qualified as a deadly weapon. Both Robinson and Cobbins testified that McDonald jokingly exhibited a pocket knife in front of them the morning of the day of the stabbing, and Cobbins testified that McDonald stabbed her with a knife. The EMS report also states that Cobbins reported that she had been stabbed by a knife. Similarly, Cobbins’s medical records state that her wounds were caused by a

“cutting piercing instrument” and list the “Mechanism of Injury” as a “Knife/Sharp Instrument.” Officer Cerpas testified that, based on his training and experience, he concluded that a knife was used in inflicting the injury.

Based on this evidence, the jury rationally could have concluded beyond a reasonable doubt that Cobbins was stabbed with a knife even if nobody saw the knife at the time of the assault. Viewing the evidence in the light most favorable to the verdict, we conclude that sufficient evidence supports the jury’s finding that McDonald used and exhibited a knife during the assault. *See Arceneaux v. State*, 177 S.W.3d 928, 931 (Tex. App.—Houston [1st Dist.] 2005, pet. ref’d) (holding circumstantial evidence was legally sufficient to establish defendant used or exhibited firearm during robbery though complainant did not see gun and police did not recover one); *Webber v. State*, 757 S.W.2d 51, 52–54 (Tex. App.—Houston [14th Dist.] 1988, pet. ref’d) (holding circumstantial evidence sufficient to establish defendant used or exhibited knife during robbery where cashier did not see knife but witnesses saw defendant with knife after the fact and police recovered knife in defendant’s car).

This same evidence is also sufficient to support the jury’s finding that the knife used by McDonald qualified as a deadly weapon. A knife is not a deadly weapon per se, but the State may “prove a particular knife to be a deadly weapon by showing its size, shape and sharpness, the manner of its use, or intended use and its

capacity to produce death or serious bodily injury.” *Blain v. State*, 647 S.W.2d 293, 294 (Tex. Crim. App. 1983). Expert testimony is not required. *Id.* A jury may consider all of the facts of the case in determining the deadliness of the weapon. *Id.* The jury is entitled to determine whether an individual used a knife as a deadly weapon by weighing the evidence before it on a case-by-case basis and using that evidence to draw reasonable inferences. *Clark v. State*, 444 S.W.3d 671, 678 (Tex. App.—Houston [14th Dist.] 2014, pet. ref’d).

The record establishes that Cobbins’s liver was punctured and that she had to undergo immediate surgery. Her medical records detail that she had a “high probability for imminent life or organ-threatening emergency medical condition.” The State also offered Officer Cerpas’s picture of Cobbins’s wound. Given the nature of Cobbins’s injury and viewing the evidence in the light most favorable to the verdict, we hold that there was sufficient evidence for a rational trier of fact to find that McDonald used or exhibited a knife as a deadly weapon. *See Tucker v. State*, 274 S.W.3d 688, 692 (Tex. Crim. App. 2008) (holding that jury rationally inferred deadly weapon was used based on extent of victim’s injuries despite knife not being introduced into evidence and lack of testimony regarding sharpness of knife); *see also Dana v. State*, 420 S.W.3d 158, 169 (Tex. App.—Beaumont 2012, pet. ref’d) (holding jury could rationally conclude that knife used was deadly weapon based on injuries inflicted and that defendant possessed knife where victims were

cut, someone yelled defendant had knife, and individual testified he wrestled knife away from defendant); *Baltazar v. State*, 331 S.W.3d 6, 8 (Tex. App.—Amarillo 2010, pet. ref'd) (“Injuries suffered by the victim can alone be a sufficient basis for inferring that a deadly weapon was used.”).

We overrule McDonald’s sole issue.

Conclusion

We affirm the trial court’s judgment.

Rebeca Huddle
Justice

Panel consists of Justices Massengale, Brown, and Huddle.

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