Affirmed and Memorandum Opinion filed February 18, 2010.

In The

Fourteenth Court of Appeals

NO. 14-09-00130-CR

BRIAN ROGERS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 232nd District Court
Harris County, Texas
Trial Court Cause No. 1127881

MEMORANDUM OPINION

A jury convicted appellant Brian Rogers of aggravated assault, and the trial court sentenced him to twenty years' confinement. He challenges his conviction on the grounds that (1) the prosecutor gave an unconstitutional explanation of proof beyond a reasonable doubt during voir dire, (2) the evidence is factually insufficient to show that he used or exhibited a firearm in the commission of the assault, and (3) he was denied the effective assistance of counsel. We affirm.

I. **Background**

The State indicted appellant with the felony offense of aggravated assault of a family member, his eight-year-old daughter Brenda.[1] The assault was not disputed at trial, only whether or not a firearm was used as alleged in the indictment. At his trial, the following evidence was presented.

In March 2007, appellant became angry about an incident involving Brenda and her stepbrother, Zack, which had occurred two days earlier. Appellant took Brenda into a bedroom and interrogated her about the incident. Brenda claimed that appellant put a real gun to her head and told her not to lie to him. Appellant was visibly angry and yelled at Brenda during the encounter, which frightened her and made her cry. After threatening her with the gun, appellant took Brenda to the kitchen, where he pushed her to the floor, kicked her in the back and stomach, and lifted her by the shirt and shoved her against the wall, telling her again not to lie to him. Brenda's stepmother, Brandy, and Zack saw appellant kick and grab her. After the altercation, appellant took Brenda to his mother's home.

At some point during the evening of the altercation, appellant called Brenda's mother, Yolanda, and told her he was going to kill Brenda. Yolanda then called Brandy, who told her more about the incident. Brandy also contacted the police and told them to go to appellant's mother's home. Yolanda drove to appellant's mother's home to pick up Brenda. Police at the scene questioned Brenda, but she claimed "nothing happened." She later told Yolanda that appellant told her to say that. Because she wanted Brenda to tell the police what happened, Yolanda, Brandy, Brenda, and Zack went to a nearby Houston Police Department ("HPD") station to file a report. An officer in the HPD juvenile division, James Arnold, took statements from all four of them; Officer Arnold testified that their statements were all consistent. He further stated that the witnesses

[1] We have employed pseudonyms to protect the privacy of the minor children who were involved in this incident.

appeared shaken and nervous, and Brenda appeared afraid. Brenda reported to Arnold that her father had hit her, kicked her, and put a "pistol" to her head. Officer Arnold completed an offense report and submitted it to the child abuse unit.

After hearing the evidence and argument of counsel, the jury found appellant guilty of aggravated assault with a deadly weapon as charged in the indictment. Appellant elected to have the trial court determine his punishment, and the trial court sentenced him to twenty years' incarceration in the Institutional Division of the Texas Department of Criminal Justice. Appellant did not file a motion for new trial, and this appeal timely ensued.

II. Issues Presented

In his first issue, appellant asserts that the State provided an unconstitutional definition of "proof beyond a reasonable doubt" during voir dire. In issue two, appellant contends that, if we determine that his trial counsel failed to preserve his first complaint, his trial counsel was ineffective. Appellant challenges the factual sufficiency of the evidence to show that a firearm was used in the commission of the offense in issue three. Finally, in his fourth issue, appellant argues that his trial counsel was ineffective because he failed to object to improper closing argument by the State. For ease of reading and to simplify the issues, we address appellant's factual sufficiency challenge first, his issue concerning the State's alleged improper definition of "reasonable doubt" second, and consolidate the discussion of his ineffective assistance of counsel complaints in the third section of our analysis.

III. Analysis

A. Factual Sufficiency of the Evidence In a factual-sufficiency review, we view the evidence in a neutral light to determine whether the evidence supporting the conviction, although legally sufficient,[2] is nevertheless so weak or so against the great weight and

[2] Because appellant has challenged only the factual sufficiency of the evidence, he has effectively conceded that the evidence is legally sufficient to support his conviction.

preponderance of conflicting evidence as to render the jury's verdict clearly wrong and manifestly unjust. *Gamboa v. State*, 296 S.W.3d 574, 579 (Tex. Crim. App. 2009). A conviction is not "clearly wrong" or "manifestly unjust" simply because, on the quantum of evidence admitted, we would have voted to acquit had we been on the jury. *Watson v. State*, 204 S.W.3d 404, 417 (Tex. Crim. App. 2006). Nor can we declare that a conflict in the evidence justifies a new trial simply because we disagree with the jury's resolution of that conflict. *Id.* Instead, we must give due deference to the jury's determinations, particularly those concerning the weight of the evidence and the credibility of witness testimony. *See Johnson v. State*, 23 S.W.3d 1, 8–9 (Tex. Crim. App. 2000).

Appellant asserts, "The State's evidence as to the actual nature of the weapon was weak, being dependent on the observation and knowledge of a frightened eight-year-old child. . . . [and] countervailing evidence, indicating that a BB gun might have been used, was not contradicted." Appellant's factual sufficiency challenge is essentially an attack on the credibility of the only eyewitness to the offense, Brenda. But we must defer to the jury's determination of the weight and credibility of Brenda's testimony. *Id.* Further, the testimony of a single eyewitness, if it establishes the elements of the offense and the jury believes it beyond a reasonable doubt, provides a sufficient basis for a guilty verdict. *See Roy v. State*, 76 S.W.3d 87, 102–03 (Tex. App.—Houston [14th Dist.] 2002, no pet.) (rejecting factual sufficiency complaint when eyewitness testified he saw defendant commit crime and defendant did not testify or present any contrary evidence).

Brenda testified that appellant, her father, threatened her with a real gun. Brenda stated that she knows the difference between real guns and toy guns, and that the gun appellant used was a real gun. She described the gun as black, metal, six- to seven-inches long, and later described it to her mother as a "cowboy-style" gun. Brenda also compared the gun appellant used to one shown to her by a police officer and found them similar, although she stated the gun appellant used was smaller. Brenda stated that she had seen the gun before in the air conditioner of the appellant's car. Yolanda stated that

she had seen appellant with real guns in the past, and Officer Andrews testified that Brenda "had stated that her dad [appellant] had hit her and kicked her and pulled a pistol and pointed it at her." Officer Andrews believed Brenda and found the witnesses' stories consistent. Even Brandy said she initially believed Brenda when she told her that appellant used a real gun. This testimony lends further credence to the jury's conclusion that the gun appellant used was a "firearm." *Cf. Williams v. State*, 980 S.W.2d 222, 225 (Tex. App.—Houston [14th Dist.] 1998, pet. ref'd) (legally and factually sufficient evidence established firearm was used where witness described gun as black and metal like, without a chamber like a revolver, square in front, and similar to a demonstrative exhibit shown at trial). Brenda's testimony establishes the elements of aggravated assault with a firearm. *See id.*

Finally, contrary to appellant's allegation in his briefing, our review of the record reveals no evidence that a BB gun might have been used in the commission of this offense. Brandy testified that she was unaware of any real guns in the house. She testified that her son had black toy plastic guns and that there may have been a metal BB gun in the house when the assault occurred. She gave no description of the color or style of the BB gun-whether it was a rifle or pistol or handgun. Although appellant's trial counsel suggested through his questioning and argument that Brenda may have mistaken a toy gun for a real gun,[3] it was for the jury to determine the weight and credibility of Brenda's testimony. *See Johnson*, 23 S.W.3d at 8–9.

[3] Our review of the record reveals no instance in which appellant's trial counsel suggested that the gun appellant threatened Brenda with was a BB gun. This argument arises for the first time in his appellate brief, apparently based on the following questions posed by the jury during deliberations:

> If [appellant] put a toy gun to [Brenda's] head would this still be considered a deadly weapon if she didn't know the difference?
>
> Is a "BB" gun considered a firearm/deadly weapon?

The trial court responded that the jury had received all the applicable instructions and should continue to deliberate. Later, the jury asked for a definition of the term "firearm," and the court supplied the correct statutory definition.

Viewing all the evidence in a neutral light, we cannot say that the jury's verdict is so contrary to the overwhelming weight of the evidence as to be clearly wrong and manifestly unjust, nor is the verdict against the great weight and preponderance of the evidence. *Gamboa*, 296 S.W.3d at 579. We therefore overrule appellant's challenge to the factual sufficiency of the evidence.

B. Definition of "Reasonable Doubt"

At the close of the State's portion of voir dire, the prosecutor discussed the burden of proof as follows:

> Beyond a reasonable doubt. The Judge talked to you and I want to say that it is the highest burden that there is and I gladly accept that burden. This is a felony case and very serious and I take that burden very seriously but I want to tell you there is no Texas definition. The Judge is not going to give you a definition. It's up to you to decide what beyond a reasonable doubt is.
>
> *Some people call it the smell test, gut feeling, some common sense.* It's up to you to decide that. But I want you to know that it's the same burden for a speeding ticket same as it is for a capital murder. That's what the standard is in the United States and I want you to know it's met every single day in every one of the courtrooms in courts like this. So it's not an impossible standard and I want you to keep that in mind and keep in mind what it means to you as you go through this.

(emphasis added).

In his first issue, appellant complains that the italicized portion of the prosecutor's statement constituted an unconstitutional explanation of the burden of proof. However, appellant made no objection to this statement by the prosecutor, so he has failed to preserve this issue for our review. *See* TEX. R. APP. P. 33.1(a); *Saldano v. State*, 70 S.W.3d 873, 886–87 (Tex. Crim. App. 2002); *Beltran v. State*, 99 S.W.3d 807, 811–812

Further, appellant has seemingly abandoned his trial-court argument that Brenda may have mistaken the gun for a toy gun: "Since Brandy Rogers said the toy guns she had bought were plastic, [Brenda]'s testimony that the gun barrel was metal would seem to rule out the use of one of those toy guns."

(Tex. App.—Houston [14th Dist.] 2003, pet. ref'd); *Murchison v. State*, 93 S.W.3d 239, 261 (Tex. App.—Houston [14th Dist.] 2002, pet. ref'd). We overrule appellant's first issue.

C. Ineffective Assistance of Counsel

When reviewing claims of ineffective assistance of counsel, we apply the standard of review set forth in *Strickland v. Washington*, considering whether the defendant's trial counsel's performance was deficient and whether this deficient performance deprived the defendant of his right to a fair trial. 466 U.S. 668, 687 (1984). The *Strickland* standard requires that an appellant prove by a preponderance of the evidence both that (a) his trial counsel's representation fell below an objective standard of prevailing professional norms and (b) there is a reasonable probability that, but for counsel's deficiency, the result of the proceeding would have been different. *Id.* at 690–94. An appellant's failure to satisfy one prong makes it unnecessary for a court to consider the other prong. *Id*. at 697.

1. Reasonable Doubt Comment

In his second issue, appellant contends that his trial counsel was ineffective for failing to object to the prosecutor's comment regarding reasonable doubt made during voir dire. Appellant asserts that the italicized comment reduced the State's burden of proof. We disagree.

The prosecutor's comment was made after the trial judge gave a thorough explanation of the burden of proof. The trial judge contrasted the burden of proof in a criminal court to that in a civil or family court to highlight that the criminal standard of "beyond a reasonable doubt" was higher than any other standard. She explained that the jury would not receive an explicit definition, but stated, "To a certain extent, it's a subjective standard. It's up to you [the jurors] to give it meaning when you're in the jury box." The trial judge admonished the venire panel that everyone must agree that it is higher than the "preponderance" or "clear and convincing" standards, yet the burden is not proof beyond any doubt. She explained,

> So you might think of it as the greatest humanly achievable standard of proof or some people say well it's proof to a moral certainty. However you want to formulate the definition in your mind that's fine as long as you agree that it's greater than clear and convincing but not an impossible standard.

The trial judge then sought a commitment from each potential juror to hold the State to that burden. She also admonished the panel members that the defense had no burden of proof.

In light of the trial judge's extensive comments regarding the burden of proof, we conclude that the isolated statement by the prosecutor regarding a "smell" or "gut" test did not reduce the State's burden of proof. *Cf. Marshall v. State*, —S.W.3d—, 2009 WL 3400977, at *2–3 (Tex. App.—Houston [1st Dist.] Oct. 22, 2009, no pet.) (stating that *trial judge's* comment that jurors would "know a reasonable doubt when they see it" amounted to a simple explanation of "the existing law with regard to reasonable doubt"). The prosecutor's comment indicated that jurors should determine the standard for themselves, which is the proper method for determining what "reasonable doubt" means in Texas. *Paulson v. State*, 28 S.W.3d 570, 577 (Tex. Crim. App. 2000). Further, we note that the jury charge provided, "The presumption of innocence alone is sufficient to acquit the defendant, unless jurors are satisfied beyond a reasonable doubt of the defendant's guilt after careful and impartial consideration of all the evidence in the case." It also stated that the prosecution must prove "each and every element of the offense charged beyond a reasonable doubt," and repeatedly emphasized that the burden of proof was "beyond a reasonable doubt." Considering the entirety of voir dire and the charge to the jury, we conclude that it was not reasonably likely that the jury understood this single statement by the prosecutor to lower the standard of proof constitutionally required.

Under these circumstances, we can neither conclude appellant has established, by a preponderance of the evidence, that his trial counsel's representation fell below an objective standard of prevailing professional norms nor that there is a reasonable probability that, but for counsel's deficiency, the result of the proceeding would have

been different. *Strickland*, 466 U.S. at 690–94. We thus overrule appellant's second issue.

2. State's Closing Argument

In his fourth issue, appellant claims he was denied the effective assistance of counsel when his trial counsel failed to object to an allegedly improper statement made by the prosecutor during closing argument that the jury should convict appellant "if the complainant 'believed that a gun was put to her head.'" Appellant argues that this comment misstated what the State had to prove to convict him. Again, we must disagree.

First, appellant parses out a portion of a single statement made during the State's closing argument. The entire statement about which appellant complains is: "And if *you believe* that [Brenda] believed that a gun was put to her head *and her description of it* then we've proven our case." (emphasis added). Contrary to appellant's position, we see nothing in this comment that lessened the State's burden of proof or misstated the elements of the offense.

Further, before making this particular statement, the prosecutor made other statements emphasizing that, to convict appellant, the jury had to believe that Brenda's testimony established *all* the elements of the offense:

> Well, we talked in voir dire about just what we could rely on as far as child testimony is concerned. And in fact each and every one of you did agree that if *you believed what that child said on the stand beyond a reasonable doubt and it met all the elements, every one of them that you could convict.*
>
> . . .
>
> *If you believe [Brenda] and you believe her testimony* then we've met the elements of deadly weapon.

Finally, permissible jury argument falls within one of the following four general areas: (1) summation of the evidence; (2) reasonable deductions from the evidence; (3) response to argument of opposing counsel; or (4) pleas for law enforcement. *Gallo v.*

State, 239 S.W.3d 757, 767 (Tex. Crim. App. 2007). The prosecutor's comments were made in response to appellant's trial counsel's argument that Brenda either mistakenly believed that appellant had put a real gun to her head or that she was making up the story about the gun to get out of trouble for some sort of bad behavior. The prosecutor responded to this argument by reminding jurors that if they believed Brenda's testimony that appellant threatened her with a real gun, then they had sufficient evidence to convict. Thus, the trial court would have properly overruled any objection to this argument.

Counsel is not ineffective for failing to make a meritless objection. *See Riles v. State*, 595 S.W.2d 858, 861 (Tex. Crim. App. 1980). Appellant has therefore not established that his trial counsel's performance was deficient and we need not consider the second prong of *Strickland*. *See Strickland*, 466 U.S. at 687. We overrule his fourth issue.

III. Conclusion

Having overruled each of appellant's issues, we affirm the trial court's judgment.

/s/ Tracy Christopher
Justice

Panel consists of Chief Justice Hedges and Justices Anderson and Christopher.
Do Not Publish — TEX. R. APP. P. 47.2(b).