Affirmed and Memorandum Opinion filed May 20, 2010.

In The

Fourteenth Court of Appeals

NO. 14-09-00574-CR

TOMMY ALEXANDER, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 184th District Court
Harris County, Texas
Trial Court Cause No. 1153276

MEMORANDUM OPINION

Appellant, Tommy Alexander, appeals from his conviction for aggravated assault. At trial, the State presented evidence that appellant possessed a firearm and confronted and physically struck Marcus Peck. After a bench trial, the judge found appellant guilty and assessed punishment at ten years' imprisonment. On appeal, appellant asserts that

the evidence at trial is legally and factually insufficient to support the trial court's judgment. We affirm.

I. Background

Marcus Peck testified that in the late morning of February 4, 2008, he entered a store across the street from his residence. Peck selected several items and approached the front counter in order to pay. Appellant, Peck's neighbor, then walked into the store with a black pistol in his right hand held at his side, confronted Peck at a distance of about two feet, and accused Peck, in a "[d]ense" tone, of having said that he was glad appellant had been "locked up." Peck testified that he felt "[t]hreatened" by the confrontation and that he could only "think about . . . my boys [his children] because I'm all they got." After Peck denied the accusation, appellant departed the store. Peck then walked to the cooler to retrieve two more items and returned to the front counter to pay. However, before Peck could pay, appellant reentered the store with the same pistol in his right hand with his finger in the trigger guard, approached Peck to within "[a]rm reach," and struck Peck on the left side of his face, rendering him unconscious.[1] Peck testified that, immediately prior to being struck, he sensed something was "fixing to happen," and he was afraid of "[l]osing [his] life." When later asked whether he was afraid of imminent bodily injury during the second confrontation, Peck responded: "Yes."

In a bench trial, appellant was convicted of aggravated assault by threat under Texas Penal Code sections 22.01(a)(2) and 22.02(a)(2) and sentenced to ten years' imprisonment. This appeal followed.

[1] Peck testified that although he did not see appellant strike him, he was certain that appellant struck him *with the pistol*. In his testimony, appellant denied possessing or hitting Peck with a firearm; rather, he testified that he struck Peck with a closed fist. However, we need not resolve whether Peck's testimony and his medical records were legally and factually sufficient to prove that the appellant struck Peck *with the pistol* because as discussed below, appellant was convicted of aggravated assault by threat with a deadly weapon rather than aggravated assault by causing bodily injury with a deadly weapon.

II. Legal Sufficiency

In his first issue, appellant contends that the evidence at trial was legally insufficient to prove that he committed the offense while using or exhibiting a deadly weapon. In determining the legal sufficiency of the evidence, a court must view the evidence in the light most favorable to the verdict and decide whether any rational trier of fact could have found the essential elements of the charged offense beyond a reasonable doubt. *King v. State*, 29 S.W.3d 556, 562 (Tex. Crim. App. 2000); *Utomi v. State*, 243 S.W.3d 75, 78 (Tex. App.—Houston [1st Dist.] 2007, pet. ref'd). This analysis considers all evidence presented at trial; however, an appellate court may not reevaluate the weight and credibility of the record evidence and substitute its own judgment for that of the trier of fact. *King*, 29 S.W.3d at 562; *Johnson v. State*, 967 S.W.2d 410, 412 (Tex. Crim. App. 1998). Appellant was charged with aggravated assault. As set forth in the information, a person commits this offense when he or she intentionally or knowingly threatens another with imminent bodily injury and the person uses or exhibits a deadly weapon during the commission of the offense. Tex. Penal Code §§ 22.01(a)(2), 22.02(a)(2). The Penal Code expressly defines "deadly weapon" to include a firearm. Tex. Penal Code § 1.07(a)(17)(A); *Ex parte Moore*, 727 S.W.2d 578, 580 (Tex. Crim. App. 1987).

As stated, appellant only attacks the legal sufficiency of the evidence to prove that he used or exhibited a deadly weapon in the commission of the assault. Within this contention are two issues. First, appellant asserts that the evidence was legally insufficient to prove the *presence* of a deadly weapon. Second, assuming evidence establishes a deadly weapon was present, he contends the evidence was legally insufficient to show that he *used* or *exhibited* the deadly weapon during the commission of the assault.

A. Presence of a Deadly Weapon

At trial, Peck testified that both times appellant approached him in the store, appellant carried a black pistol in his right hand. Therefore, the State offered evidence that appellant possessed a firearm during the commission of the offense. Appellant,

however, asserts that this testimony is legally insufficient to prove that he possessed a deadly weapon in the commission of the assault because (1) the firearm that Peck alleged was in appellant's possession was never recovered or otherwise identified by the State; (2) despite the presence of the store clerk during the altercation, the store clerk's testimony was not presented by the State; (3) Peck testified that there were four persons in the store at the time of the incident but named only three persons; and (4) Peck's claim that he continued shopping after the first confrontation is inconsistent with his claim of being afraid.

As stated, in a legal sufficiency analysis, determining the weight and credibility of the evidence is within the exclusive province of the trier of fact rather than that of an appellate court. *King*, 29 S.W.3d at 562; *Johnson*, 967 S.W.2d at 412. Each of the points appellant raises goes to the credibility of Peck's testimony that he saw appellant in possession of a firearm. As trier of fact, the judge was free to consider these points in assessing Peck's testimony. However, it is not the place of this court to reassess that testimony on appeal. Furthermore, a victim's testimony concerning the presence of a pistol by a defendant is generally alone sufficient to support a finding of the presence of a deadly weapon. *Cf. Gomez v. State*, 685 S.W.2d 333, 336 (Tex. Crim. App. 1985) (interpreting the term "uses or exhibits a deadly weapon" in Texas Penal Code section 29.03(a)(2) (aggravated robbery)).[2] Additionally, if the alleged firearm is not recovered by the State, corroboration of the victim's identification of the firearm is not required. *Id.*

Next, in support of his contention that the evidence is legally insufficient to prove the presence of a deadly weapon, appellant points out that Peck testified that he turned his head prior to being struck by appellant; therefore, appellant argues, Peck did not actually

[2] In *Gomez*, the defendant was convicted of aggravated robbery. *Gomez*, 685 S.W.2d at 335. The victim testified that, during the commission of the offense, the defendant pointed a revolver at the victim and stated "[t]his is a holdup." *Id.* at 336. The Court of Criminal Appeals stated that "[t]estimony regarding the *use* of a revolver is sufficient to support a finding of *use* and *exhibition* of a deadly weapon." *Id.* (all emphasis added). In *Gomez*, the victim's testimony that the defendant pointed a revolver at him was sufficient to prove both *presence* and *use* of a deadly weapon; therefore, the principle follows that testimony that the defendant held a firearm, as in this case, is sufficient to prove the presence of a firearm.

see the pistol when appellant struck him. Once again, this argument goes to the weight of Peck's testimony and does not implicate legal sufficiency. We find that the trier of fact could have rationally found that Peck's testimony established the presence of a deadly weapon.

B. Use or Exhibition of a Deadly Weapon

Appellant further argues that even if a deadly weapon were present, Peck never indicated at trial that appellant threatened him with the deadly weapon. We agree with appellant that there generally must be some nexus between the presence of the firearm and the actual offense. *Cf. McCain v. State*, 22 S.W.3d 497, 502 (Tex. Crim. App. 2000) (holding that "a person 'uses or exhibits a deadly weapon' under the aggravated robbery statute if he employs the weapon in any manner that 'facilitates the associated felony'" (quoting Tex. Penal Code § 29.03(a)(2) and *Patterson v. State*, 769 S.W.2d 938, 941 (Tex. Crim. App. 1989)). That nexus is provided with Peck's testimony that both times appellant approached him in the store, appellant openly had the pistol in his right hand and he (Peck) felt threatened. Therefore, the trial judge could have rationally inferred that appellant used or exhibited the pistol in furtherance of the threat.

For the foregoing reasons, we find that the trial evidence was legally sufficient to prove that appellant both possessed and used or exhibited a deadly weapon in the commission of the assault. Accordingly, we overrule his first issue.

III. Factual Sufficiency

In his second issue, appellant contends that the trial evidence was factually insufficient to support the trial court's judgment. In conducting a factual sufficiency analysis, we view the evidence in a neutral light and set aside the trial verdict "only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust." *Johnson v. State*, 23 S.W.3d 1, 6–7 (Tex. Crim. App. 2000) (quoting *Clewis v. State*, 922 S.W.2d 126, 129 (Tex. Crim. App. 1996)). Although less deferential than the legal sufficiency standard, a factual sufficiency review must still "employ appropriate

deference to prevent an appellate court from substituting its judgment for that of the fact finder, and any evaluation should not substantially intrude upon the fact finder's role as the sole judge of the weight and credibility given to witness testimony." *Johnson*, 23 S.W.3d at 7; *Marines v. State*, 292 S.W.3d 103, 107 (Tex. App.—Houston [14th Dist.] 2008, pet. ref'd). Specifically, appellant argues that the evidence was factually insufficient to prove that appellant threatened Peck with a deadly weapon.

In the context of aggravated assault by threat, evidence that establishes (1) that the victim perceived a threat and (2) that a threat was made is factually sufficient to sustain an aggravated assault by threat conviction where only the threat element is at issue. *Olivas v. State*, 203 S.W.3d 341, 350 (Tex. Crim. App. 2006); *Dobbins v. State*, 228 S.W.3d 761, 766–67 (Tex. App.—Houston [14th Dist.] 2007, pet. ref'd).

A. Perception of a Threat

At trial, Peck testified that appellant approached him with a black pistol in his right hand, stood two feet away, and in a "dense" tone, accused Peck of making derogatory remarks about him. When asked how this made him feel, Peck responded that he felt "[t]hreatened" and could only "think about . . . my boys [his children] because I'm all they got." Peck further testified than when appellant confronted him a second time, while still in possession of the black pistol, he (Peck) was afraid of "[l]osing [his] life." When later asked if he was afraid of imminent bodily injury, Peck responded: "Yes." Appellant argues that this testimony is factually insufficient to prove that Peck perceived a threat with a deadly weapon. In support, he points out that Peck continued to shop after the first confrontation with appellant. This fact, appellant argues, is inconsistent with Peck's claims of being afraid; he asserts that a reasonable person would have called the police, tried to escape, determined exactly where appellant went after departing the store, or at least still been under the alleged fear or apprehension created by the confrontation.

Appellant's arguments are without merit for two reasons. First, his assertions call into question the credibility of Peck's testimony. While a factual sufficiency review "occasionally permits some credibility assessment[,] . . . [u]nless the available record

clearly reveals a different result is appropriate, an appellate court must defer to the jury's determination concerning what weight to give contradictory testimonial evidence . . . ." *Johnson*, 23 S.W.3d at 8 (emphasis added). In the face of Peck's unequivocal testimony as to his perception of a threat, the fact that he returned to the cooler to purchase two additional items subsequent to the first encounter does not *clearly* raise a reasonable doubt as to his perception of a threat. Therefore, this court has no authority to disturb the trial court's finding of a threat.

Second, appellant's assertions attack only Peck's testimony concerning the first encounter; appellant's arguments do not address Peck's claims of being fearful for his life during the second encounter. Consequently, Peck's testimony relating to both encounters with appellant is factually sufficient to show that Peck perceived a threat of imminent bodily injury from appellant.

B. Actual Threat

In determining whether a threat was made, the Court of Criminal Appeals has held that threats can be conveyed by conduct or action as well as by words. *McGowan v. State*, 664 S.W.2d 355, 357 (Tex. Crim. App. 1984); *Dobbins*, 228 S.W.3d at 766. In *Dobbins*, the defendant drove a vehicle directly at the victim, stopped at a distance of "about one to one-and-a-half car lengths" from the victim, and then drove the vehicle forward at no more than ten miles per hour before striking the victim with the automobile. 228 S.W.3d at 763. The victim testified that the defendant saw him standing there prior to striking him with the vehicle; additionally, the victim made no mention as to whether the defendant said anything to the victim before being struck. *Id*. This court held that the defendant's conduct in *Dobbins* was factually sufficient to constitute an actual threat. *Id*. at 766–67.

Here, Peck testified that appellant walked into the store with a black pistol in his right hand, confronted Peck at a distance of about two feet, and accused Peck in a "dense" tone of making derogatory remarks about him. Peck further testified that appellant then departed the store but returned before Peck had completed shopping and

again confronted Peck within arm's reach. Peck stated that appellant again possessed the pistol in his right hand with his finger in the trigger guard. Under the analysis used in *Dobbins*, we find that appellant's conduct communicated a threat to Peck. Thus, Peck's testimony provided factually sufficient evidence to prove that appellant communicated a threat to Peck of imminent bodily injury with a deadly weapon.

Therefore, we conclude that Peck's testimony was factually sufficient to prove that appellant threatened Peck with a deadly weapon. Appellant's second issue is overruled.

We affirm the trial court's judgment.

/s/ Adele Hedges
Chief Justice

Panel consists of Chief Justice Hedges and Justices Yates and Boyce.
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