TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-15-00209-CR

DeAndre Dwight Joseph a/k/a Joseph DeAndre a/k/a DeAndre Dwight Parks a/k/a/ DeAndre Parks a/k/a DeAndre Joseph a/k/a DeAndra Dwight Joseph, Appellant

v.

The State of Texas, Appellee

FROM THE DISTRICT COURT OF TRAVIS COUNTY, 403RD JUDICIAL DISTRICT NO. D-1-DC-15-904009, HONORABLE BRENDA KENNEDY, JUDGE PRESIDING

M E M O R A N D U M O P I N I O N

A jury found appellant DeAndre Dwight Joseph guilty of aggravated assault with a deadly weapon and attempted arson. *See* Tex. Penal Code §§ 22.02(a)(2), 28.02(d)(2). After finding two enhancement paragraphs to be true, the jury assessed punishment at 54 years' imprisonment and a $10,000 fine for aggravated assault and 25 years' imprisonment for attempted arson, with the sentences to run concurrently. In four issues, Joseph contends that the evidence is insufficient to support his conviction for aggravated assault, that the trial court erred in refusing to instruct the jury on the lesser-included offense of assault, and that the evidence is insufficient to support his conviction for attempted arson. We will affirm the trial court's judgments of conviction.

BACKGROUND

At trial, the complainant, Jillian Higgins, testified to the following facts. She was in her yard in July 2014 when Joseph approached her and helped her bury her pet rat. Higgins then went inside the house where she lived with roommates, and Joseph followed her into her room. Joseph shut the door behind them and would not allow Higgins to leave the room for two hours. Joseph told Higgins that he was going to use her as a pawn to get in contact with his ex-girlfriend, who was one of Higgins's roommates. Joseph carried a water bottle that he said was full of gasoline and smoked cigarettes throughout the encounter.

Higgins further testified that one of her roommates came to the door to check on her because the roommate smelled gasoline. Higgins told the roommate that she was fine, but she covertly signaled that there was someone else in her room and that she needed help. The roommate left, and Joseph asked Higgins if she had signaled for help. When Higgins acknowledged that she had, Joseph said, "[Y]ou fucked up." Joseph then started to take a tapestry down from a wall and poured gasoline on it. When Higgins tried to leave the room, Joseph threw her onto the bed and poured gasoline on her. Joseph jabbed at Higgins with a lit cigarette, but Higgins kicked him away, tore the door off its hinges, and ran out of the room. Joseph followed her and pulled her back inside the room. He then went into the living room and returned with a can of gasoline. While he was opening the can, Higgins escaped through a window and ran down the street to a neighbor's house.

Other witnesses also testified on behalf of the State, including Lieutenant Joseph Loughran, a fire and arson investigator with the Austin Fire Department. Lieutenant Loughran testified that, based on his examination of the house and interviews with

witnesses, he "came to the conclusion that the events did happen as the victim said they did and that the defendant did intentionally pour gasoline on her and try to ignite that gasoline with a cigarette butt." He further testified that an attempted arson and "probably also an aggravated assault" had occurred. The State also presented evidence of text messages that Joseph had sent to his ex-girlfriend days before this incident. These messages threatened his ex-girlfriend's friends and family and told her that she "was going to be crying forever." In addition, the State presented evidence that Higgins's clothes, Joseph's clothes, and the water bottle all tested positive for flammable liquids. Joseph was convicted and sentenced, and this appeal followed.

DISCUSSION

Sufficiency of the Evidence: Aggravated Assault

In his first issue, Joseph contends that the evidence is insufficient to support his conviction for aggravated assault because there was no evidence that he ever started a fire during the commission of this offense and unignited gasoline is not a deadly weapon. Joseph argues that he had ample opportunity to start a fire during his encounter with Higgins and the fact that he did not shows that he was only trying to use Higgins to contact his ex-girlfriend. Joseph also points to evidence presented at trial that it is unlikely that a cigarette butt could ignite gasoline.[1]

The Texas Penal Code's definition of "deadly weapon" includes "anything that in the

[1] When reviewing the sufficiency of the evidence supporting a conviction, we view the evidence in the light most favorable to the verdict and determine whether any rational trier of fact could have found each essential element of the offense beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Brooks v. State*, 323 S.W.3d 893, 895 (Tex. Crim. App. 2010) (plurality op.); *Schneider v. State*, 440 S.W.3d 839, 841 (Tex. App.—Austin 2013, pet. ref'd) (mem. op.).

manner of its use or intended use is capable of causing death or serious bodily injury." *Id.* § 1.07(a)(17)(B). Although gasoline is not a deadly weapon per se, it can be a deadly weapon when used in a way that can cause death or serious bodily injury. *See McDowell v. State*, 235 S.W.3d 294, 297 (Tex. App.—Texarkana 2007, no pet.); *see also Leya v. State*, No. 02-15-00244-CR, 2016 WL 1168080, at *3 (Tex. App.—Fort Worth Mar. 24, 2016, no pet. h.) (mem. op., not designated for publication) ("We hold that the flammable liquid, in the manner it was used, qualified as a deadly weapon such that a reasonable fact-finder could have made an affirmative deadly-weapon finding."); *Ellis v. State*, No. 2-02-416-CR, 2004 WL 177851, at *3 (Tex. App.—Fort Worth Jan. 29, 2004, pet. ref'd) (mem. op., not designated for publication) ("The gasoline, as used by Ellis, was 'capable' of causing death or serious bodily injury."); *Rice v. State*, 771 S.W.2d 599, 601 (Tex. App.—Houston [14th Dist.] 1989, no pet.) ("Whether the gasoline, by its manner of use or intended use, was a deadly weapon was properly left for the jury to decide.").

Here, the State presented evidence that Joseph held Higgins captive in her own room, threw her onto a bed, poured gasoline on her, and then tried to ignite her. Specifically, Higgins testified, "He had a lit cigarette in his hand that he was trying to touch to my body." She also explained, "[H]e was kind of like jabbing at me with his lit cigarette sort of near like my feet and legs," and she agreed that Joseph tried to set her on fire. According to Higgins, Joseph told her that "if [she] didn't see tomorrow, it wasn't going to be his fault." Higgins testified that she was terrified and thought she was going to die. Viewing this evidence in the light most favorable to the verdict, we conclude that a rational jury could have determined that Joseph was attempting to set Higgins on fire and was therefore using the gasoline in a manner capable of causing death or serious bodily

injury. We therefore conclude that the evidence is sufficient to support Joseph's conviction for aggravated assault, and we overrule his first issue.

Lesser-Included Offense

In his second issue, Joseph contends that the trial court reversibly erred by refusing to instruct the jury on the lesser-included offense of assault. The State responds that Joseph is estopped from complaining about the lack of an instruction on assault because he agreed with the trial court that there was no evidence that he was guilty only of that offense. The State further argues that, in any event, Joseph was not entitled to an instruction on assault.

"When deciding whether a lesser-included-instruction should have been given, courts must determine whether the offense listed in the requested instruction is actually a lesser-included offense of the offense that the defendant was charged with." *Ritcherson v. State*, 476 S.W.3d 111, 116 (Tex. App.—Austin 2015, no pet.). "If the reviewing court determines that the offense listed in the requested instruction is a lesser-included offense, the reviewing court must then determine whether the evidence presented during the trial supports the requested instruction." *Id.*; *see Cavazos v. State*, 382 S.W.3d 377, 382 (Tex. Crim. App. 2012) ("First, the court determines if the proof necessary to establish the charged offense also includes the lesser offense. If this threshold is met, the court must then consider whether the evidence shows that if the Appellant is guilty, he is guilty only of the lesser offense.") (citation omitted); *see also* Tex. Code Crim. Proc. art. 37.09 (defining lesser-included offense).

Even assuming without deciding that Joseph is not estopped from complaining about the trial court's refusal to include the lesser-included-offense instruction and that assault is a lesser-

included offense of aggravated assault as alleged in the indictment in this case, we nevertheless conclude that no evidence presented at trial supports the requested instruction. Joseph argues that the jury could have disbelieved evidence that he intended to harm Higgins. However, it is not enough that the jury could have disbelieved evidence pertaining to the greater offense—there must also be affirmative evidence that Joseph was guilty only of simple assault. *See Leach v. State*, No. 03-13-00784-CR, 2015 WL 8607060, at *6 (Tex. App.—Austin Dec. 9, 2015, no pet.) (mem. op., not designated for publication) ("However, 'it is not enough that the jury may disbelieve crucial evidence pertaining to the greater offense, but rather, there must be some evidence directly germane to the lesser-included offense for the finder of fact to consider before an instruction on a lesser-included offense is warranted.'") (quoting *Sweed v. State*, 351 S.W.3d 63, 68 (Tex. Crim. App. 2011)). We find no evidence in the record that Joseph was guilty only of simple assault. Although Joseph points to testimony from an arson investigator that it is difficult to ignite gasoline with a lit cigarette, there was no evidence that such ignition is impossible. The jury could have disbelieved the witnesses' testimony and found Joseph not guilty, but they could not have found him guilty only of simple assault. Therefore, we hold that the trial court did not err in refusing to instruct the jury on the lesser-included offense of assault. Accordingly, we overrule Joseph's second issue.

Sufficiency of the Evidence: Attempted Arson

In his third issue, Joseph contends that the evidence is insufficient to support his conviction for attempted arson of a habitation because there is no evidence that he had the specific intent to set fire to the house where Higgins lived.

A person commits arson if the person "starts a fire . . . with intent to destroy or damage" any habitation. Tex. Penal Code § 28.02(a)(2); *see Orr v. State*, 306 S.W.3d 380, 394 (Tex. App.—Fort Worth 2010, no pet.) ("To establish the corpus delicti in arson cases it is necessary to show that a fire occurred and that the fire was designedly set by someone.") (internal quotation marks omitted). Therefore, Joseph committed attempted arson if, with specific intent to commit arson, he performed an act amounting to more than mere preparation that tended but failed to effect the commission of arson. *See* Tex. Penal Code § 15.01(a) (defining criminal attempt). Intent can be inferred from the acts, conduct, and words of the accused, and circumstantial evidence can be used to establish intent. *See Barnes v. State*, 62 S.W.3d 288, 298 (Tex. App.—Austin 2001, pet. ref'd); *see also Moore v. State*, 969 S.W.2d 4, 10 (Tex. Crim. App. 1998) ("Mental states are almost always inferred from acts and words."); *Patrick v. State*, 906 S.W.2d 481, 487 (Tex. Crim. App. 1995) ("Intent can be inferred from the acts, words, and conduct of the accused."); *Shaw v. State*, No. 03-10-00790-CR, 2012 WL 3797606, at *5 (Tex. App.—Austin Aug. 29, 2012, no pet.) (mem. op., not designated for publication) ("Rarely will there be direct evidence of what an accused intended at the time of the incident. Thus, as with the other essential elements of the offense, circumstantial evidence can be used to establish intent.") (citation omitted); *Christensen v. State*, 240 S.W.3d 25, 32 (Tex. App.—Houston [1st Dist.] 2007, pet. ref'd) (op. on reh'g) ("Intent is most often proven through the circumstantial evidence surrounding the crime, rather than through direct evidence.").

As discussed above, the State presented evidence that Joseph poured gasoline on a tapestry and on Higgins, attempted to set Higgins on fire, and had in his possession both a bottle

filled with gasoline and a gas can. Higgins testified that Joseph had brought the can to her room and was opening it when she fled. From this evidence, the jury could have inferred that Joseph intended to set fire to the house in which he was confining Higgins. Therefore, we conclude that the evidence is sufficient to support his conviction for attempted arson, and we overrule his third issue.

In his fourth issue, Joseph contends that the evidence is insufficient to sustain his conviction for attempted arson because there is a material variance between the indictment, which alleged that he doused Higgins with gasoline and contacted her clothing with a lit cigarette, and the evidence presented a trial, which shows only that he *attempted* to contact her with a lit cigarette.

The indictment alleged that Joseph "did then and there, with specific intent to commit the offense of Arson of a Habitation of Jillian Higgins, do an act, to wit: dousing the person of Jillian Higgins with gasoline and contacting the clothing of Jillian Higgins with a lit cigarette." At trial, Higgins testified that Joseph "was kind of like jabbing at [her] with his lit cigarette sort of near like [her] feet and legs." When asked, "And was he also jabbing any portion of your clothing with the lit cigarette?," Higgins replied, "I was wearing long pants at the time so like, yes, in the pants vicinity." Although other testimony from Higgins was less clear about whether Joseph actually contacted her with the cigarette, the jury could have resolved any conflict in the testimony and found that Joseph did contact Higgins. *See* Tex. Code Crim. Proc. art. 38.04 ("The jury, in all cases, is the exclusive judge of the facts proved, and of the weight to be given to the testimony . . . ."); *Rivera v. State*, No. 03-15-00116-CR, 2016 WL 2941961, at *2 (Tex. App.—Austin May 11, 2016, no pet. h.) (mem. op., not designated for publication) ("We assume that the jury resolved conflicts in the testimony, weighed the evidence, and drew reasonable inferences in a manner that supports the verdict, and we defer to the jury's determinations of the witnesses' credibility and the weight to

be given their testimony."). We therefore conclude that there was no variance between the indictment allegations and the trial testimony. Accordingly, we overrule Joseph's fourth issue.

CONCLUSION

Having overruled each of Joseph's issues, we affirm the trial court's judgments of conviction.

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Scott K. Field, Justice

Before Justices Puryear, Goodwin, and Field

Affirmed

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