TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-17-00493-CR
NO. 03-17-00494-CR

Jerry Lynn Graves Jr., Appellant

v.

The State of Texas, Appellee

FROM THE DISTRICT COURT OF TOM GREEN COUNTY, 119TH JUDICIAL DISTRICT
NOS. B-14-1102-SA & B-14-1103-SA,
HONORABLE JAY K. WEATHERBY, JUDGE PRESIDING

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

A jury convicted appellant Jerry Lynn Graves Jr. of two counts of retaliation, enhanced by two prior felony convictions, and sentenced him to concurrent sentences of twenty-five and forty years. *See* Tex. Penal Code § 36.06(a)(1). Graves asserts that the evidence is insufficient to support his convictions. As explained below, we will affirm the judgments of conviction.

Factual Summary

The Texas Department of Family and Protective Services removed the son of Graves and his girlfriend, Equila Davis, immediately after his birth due to concerns that Davis had used marihuana during her pregnancy. Shortly after the baby was removed from their care, Graves and Davis arrived at a Department office for visitation. Whitney Aguirre was in charge of supervising the visit, Caryl Beimer was the caseworker assigned to the family, and Kelly Walker was Beimer's

supervisor. During the visit, Graves became upset and started to yell and curse. Aguirre asked Beimer to come to help handle Graves and Davis. When Beimer arrived, Graves cursed at her and demanded that she get her supervisor, Walker. When Walker arrived, Graves carried on cursing, calling the three women "bitches." Graves was eventually told to leave.

Aguirre testified that when Graves was asked to leave:

> He handed the baby to Ms. Davis and said, There is a rash on the baby's face. Y'all can have him now, or I don't want him any more, and he stormed out. But in the hallway, before leaving, he looked back and said, I'm going to kill all of y'all.

Similarly, Walker testified that when Graves was told to leave, "He did exit, like he was going to leave, and then at that time he turned back in and pointed his finger in the room and said, I'm going to kill all of you. And then he left." Graves's statements made Walker concerned for other families and Department workers in the immediate area, and she "felt this threat was very serious, so I felt that I was in danger, as well." Walker asked Beimer to call the police, and Beimer then followed Graves out of the building.

Beimer testified similarly, saying that Graves was asked to leave due to his cursing at the Department's employees, and that she walked him out. She said:

> right at the doorway of the visitation room, he stopped and pointed at Whitney, Kelly and I and said—said to each of us that he was going to kill us. I continued to walk him down the hallway and I got him to the door of our lobby and he turned around and he said, I'm going to get you. And he put his finger in my face and he said, And your two girls. He said, Yes, I know, Ms. Wild; I looked it up. And he walked out the door of the CPS lobby and into the office building hallway.

Walker testified that when Beimer returned from escorting Graves outside, Beimer "was absolutely hysterical. . . . I don't know that I've ever seen her that hysterical." Aguirre said that when Beimer returned, she "had tears in her eyes" and "looked very scared."

Beimer testified that she "went home that night very scared" and since had been "a little more leery" in her work. Beimer explained that she had two daughters, that Wild was her maiden name, and that she did not go by Wild and had not introduced herself under that name. She did not know how Graves knew that information, but believed that he looked her up and that he might have gleaned that information from social media. The incident with Graves had made Beimer question whether to remain in her job "for the safety of my family."

Davis testified that Graves looked up Department personnel to "find whatever kids, or I don't know what. But I know he looked them up." She remembered "him saying something about that she has two kids and a grandma or something." She also testified that "on several occasions" she heard Graves threaten Department personnel, saying, "he just basically said that, If they take mine, then they deserve to—like, I—they take my life or take my kid's life, I'm basically going to take their lives." She did not hear him make such threats while at the Department office.

Graves was charged with two counts of retaliation, one naming Walker as the victim and the other naming Beimer as the victim.

Discussion

Graves argues that there is no evidence that his statements "should have been interpreted by [the Department] employees as a serious expression of intent to harm or assault them." In weighing this issue, we view "the combined and cumulative force of all admitted evidence in the

light most favorable to the verdict to determine whether, based on that evidence and the reasonable inferences therefrom, a jury was rationally justified in finding guilt beyond a reasonable doubt." *Tate v. State*, 500 S.W.3d 410, 413 (Tex. Crim. App. 2016). "The jury is the sole judge of credibility and weight to be attached to the testimony of witnesses, and juries may draw multiple reasonable inferences from the facts so long as each is supported by the evidence presented at trial." *Id.*

As relevant here, a person commits the offense of retaliation if he "intentionally or knowingly . . . threatens to harm another by an unlawful act" "in retaliation for or on account" of the other person's service or status as a public servant, witness, or prospective witness. Tex. Penal Code § 36.06(a)(1)(A). The central purpose of the retaliation statute is to encourage public servants or other specified individuals to perform vital public duties without fear of retribution. *Doyle v. State*, 661 S.W.2d 726, 729 (Tex. Crim. App. 1983); *Lofton v. State*, No. 03-15-00475-CR, 2017 WL 3378880, at *5 (Tex. App.—Austin July 31, 2017, no pet.) (mem. op., not designated for publication); *Brock v. State*, 495 S.W.3d 1, 16 (Tex. App.—Waco 2016, pet. ref'd). A threat to harm another by an unlawful act is sufficient to support a retaliation conviction. *See, e.g.*, *Doyle*, 661 S.W.2d at 729; *Peters v. State*, No. 09-15-00166-CR, 2016 WL 3136114, at *6-7 (Tex. App.—Beaumont June 1, 2016, pet. ref'd) (mem. op., not designated for publication); *Meyer v. State*, 366 S.W.3d 728, 731 (Tex. App.—Texarkana 2012, no pet.). An intent to follow through with the threat is not an element of retaliation. *See Lofton*, 2017 WL 3378880, at *5; *Brock*, 495 S.W.3d at 16; *Lebleu v. State*, 192 S.W.3d 205, 211 (Tex. App.—Houston [14th Dist.] 2006, pet. ref'd);

In re B.P.H., 83 S.W.3d 400, 407 (Tex. App.—Fort Worth 2002, no pet.); *Herrera v. State*, 915 S.W.2d 94, 97-98 (Tex. App.—San Antonio 1996, no pet.).[1]

Instead, retaliation "is a result oriented offense and the focus is on whether the conduct is done with an intent to effect the result specified in the statute," *B.P.H.*, 83 S.W.3d at 407, in this case, the intent to threaten harm by unlawful act against another due to that person's service or status as a public servant, witness, or prospective witness, *see* Tex. Penal Code § 36.06(a)(1)(A). Indeed, our sister courts have observed that the elements of the retaliation statute do not require the State to show an intent to inhibit the victim's behavior or that the victim took the threat seriously. *See Pace v. State*, No. 02-14-00282-CR, 2015 WL 3855588, at *4-5 (Tex. App.—Fort Worth June 18, 2015, no pet.) (mem. op., not designated for publication) (retaliation statute does not require that threatened harm be imminent, that defendant actually intend to carry out threat, or that victim actually feel threatened); *Raybon v. State*, No. 02-12-00071-CR, 2013 WL 4129126, at *6 (Tex. App.—Fort Worth Aug. 15, 2013, pet. dism'd) (mem. op., not designated for publication) ("specific intent to inhibit or influence the types of public service included in the retaliation statute—as distinguished from the intent to harm or threaten harm in retaliation for or on account of public service—is not an element of retaliation"); *Lindsey v. State*, No. 13-09-00181-CR, 2011 WL 2739454, at *4 (Tex. App.—Corpus Christi July 14, 2011, no pet.) (mem. op., not designated for publication)

[1] *See also Dues v. State*, 634 S.W.2d 304, 305-06 (Tex. Crim. App. 1982) (in prosecution for terroristic threat, which occurs when person threatens offense involving violence with intent to place victim in fear of imminent serious bodily injury, "it is immaterial to the offense whether the accused had the capability or the intention to carry out his threat," and State need only show that accused intended threat "to place a person in fear of imminent serious bodily injury").

("a close examination of the statute supports the conclusion that retaliation does not require a showing of intent to inhibit the behavior of the target of the threat").

We agree with Graves that a defendant's comments should be evaluated in the context within which they were uttered. *See Meyer*, 366 S.W.3d at 731. However, we do not agree that the State was required to prove that it was reasonable to interpret Graves's statements as a "serious expression of intent to harm or assault," as he asserts. Nor do we believe the State had to show that it was reasonable for these victims under the circumstances to have believed Graves intended to carry out his threat.

To support his argument, Graves relies on *Peters*, 2016 WL 3136114, at *6, and its quoting of *Manemann v. State*, a case from this Court in which we stated, "Whether a particular statement may properly be considered to be a threat is governed by an objective standard—whether a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of intent to harm or assault." 878 S.W.2d 334, 337 (Tex. App.—Austin 1994, pet. ref'd). However, *Manemann* involved a different statute, which provided that a person committed an offense if he threatened to inflict serious bodily injury on or to commit a felony against the victim "in a manner reasonably likely to alarm the person receiving the threat." *Id.* at 335 (quoting former Tex. Penal Code § 42.07(a)(2) (since amended)). Under that statute, we observed, "The test is whether a threat would justify apprehension by an ordinary hearer, not whether the threat communicated over the telephone caused a particular recipient to actually become apprehensive." *Id.* at 337.

Here, however, the statute does not require that the threatened person actually feel alarmed or fearful. *See* Tex. Penal Code § 36.06(a)(1). Instead, it requires only that the defendant have intentionally threatened to harm another by an unlawful act in retaliation for or on account of the victim's status or service as a public servant or a witness. *See id.* Based on this record, a reasonable juror could have concluded that threatening to kill Aguirre, Walker, and Beimer or making veiled threats about Beimer's children in response to the Department employees' actions as public servants satisfies the elements of retaliation.[2] The evidence was sufficient to support the jury's guilty verdicts and the trial court's subsequent judgments of conviction. *See Lofton*, 2017 WL 3378880, at *7-8. We overrule Graves's issue on appeal.

Conclusion

We have overruled Graves's appellate issue. We affirm the trial court's judgments of conviction.

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Cindy Olson Bourland, Justice

Before Justices Puryear, Field, and Bourland

Affirmed

Filed: August 30, 2018

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[2] Even if there was some requirement that the State prove that the Department employees actually felt fear, Beimer and Walker both testified that they were frightened by Graves.