TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-21-00041-CR

Edelmiro Huerta, Jr., Appellant

v.

The State of Texas, Appellee

FROM THE 368TH DISTRICT COURT OF WILLIAMSON COUNTY
NO. 20-1187-K368, THE HONORABLE RICK J. KENNON, JUDGE PRESIDING

MEMORANDUM OPINION

Appellant Edelmiro Huerta, Jr., was convicted by the trial court of burglary of a habitation with intent to commit a felony other than theft and sentenced to six years' confinement. *See* Tex. Penal Code § 30.02(a)(1), (d). In a single issue, he challenges the sufficiency of the evidence to support the trial court's deadly weapon finding. We will modify the judgment of conviction to correct two typographical errors and affirm the judgment as modified.

BACKGROUND[1]

At approximately 11:30 p.m. on August 1, 2020, Georgetown Police Department Officer Pablo Felix responded to an active domestic disturbance call. Dispatch advised Felix that the 911 caller, Crystal Huerta, had reported that her ex-husband, appellant, had broken down the door of her apartment and was "assaulting her with a baseball bat." Felix observed appellant jogging away from the building where Crystal's apartment is. Appellant was carrying a baseball bat in his right hand.

Appellant was arrested and charged with burglary of a habitation with intent to commit a felony other than theft. The indictment alleged that appellant used or exhibited "a deadly weapon, namely a bat," "during the commission of the charged offense or during immediate flight following the commission of the charged offense." *See id.* § 1.07(a)(17)(B) (defining deadly weapon as "anything that in the manner of its use or intended use is capable of causing death or serious bodily injury").

The State's witnesses during the guilt/innocence phase of trial included Crystal and Felix. Among the evidence admitted by the trial court were a recording of the 911 call, the bat allegedly wielded by appellant, and photographs of Crystal's apartment. The defense presented testimony from Ashley Varela, the mother of a child by appellant's brother.

Crystal testified that she had known appellant for approximately 10 years and that although they were still legally married, they had been separated for approximately three years at the time of the offense. She has six children, including three by appellant. At the time of the

[1] We limit our recitation to the facts necessary to advise the parties of the Court's decision and reasons for overruling appellant's sole issue. *See* Tex. R. App. P. 47.1, .4. Consistent with the standard of review, the facts are based on the trial evidence viewed in the light most favorable to the trial court's verdict. *See Jackson v. State*, 530 S.W.3d 738, 739 (Tex. App.—Houston [14th Dist.] 2017, no pet.).

break-in, Crystal was living with her children in a two-story, three-bedroom apartment. Her name was the only one on the lease. She testified that while appellant would occasionally spend two or three days a week at the apartment, he had never lived there. In the weeks prior to the incident, appellant was not staying at the apartment on a regular basis and had not spent the night in two or three weeks.

Crystal testified that on August 1, 2020, she asked appellant to watch her children around noon because she had to work. Appellant arrived early, took her purse and wallet, and left. When she called appellant, he admitted that he had taken the items and told her that he had spent all of her money on "another female." At Crystal's request, her brother and oldest daughter came to watch the children instead. Appellant returned to the apartment around the time that they arrived, and an argument ensued. Appellant entered the apartment without Crystal's permission and left only after she called the police, who told her to call them again if appellant came back. Crystal left for work and discovered that the windshield and driver's side window of her company car had been shattered as though "hit with something."

While Crystal was at work, she received a call from her brother, and her daughter told her that appellant had returned to the apartment and was "by the window and by the door." Her daughter told her that they had called the police "right away," but appellant had again left before officers arrived.

Crystal testified that she returned home around 8:30 to 9:00 p.m., when it was dark. At approximately 10:30 or 11:00 p.m., appellant came to her apartment a third time. Her three youngest children were asleep in their upstairs bedroom, but Crystal and her eleven-year-old daughter were still awake. Crystal testified that she knew appellant had come back because he "was being loud at the door, constantly knocking" and apologizing. The

knocking was "calm" at first but later turned into "banging," and she called the police. Crystal told appellant through the locked front door to go away. She testified that she was unsure how appellant was beating against the door, but it sounded as though "somebody was trying to break it." While Crystal was on the phone with the 911 operator, she and her daughter went upstairs.

Crystal testified that she heard a loud sound and came halfway down the stairs to see appellant standing at the bottom of the stairway with "a bat on the side of his arm." The bat, admitted into evidence at trial, was a 30-inch, silver-and-chrome metal baseball bat. She testified that "[h]e just looked up at [her] and then he got the bat and, like, picked it up, like, above his shoulder and came running up the stairs really fast" toward her. She explained that by picking the bat up, she meant he had raised it "like someone who was going to swing a bat to, like, hit something." The top of the bat was "up at his shoulder, and he was holding it down lower like he was cocking it back to swing it." She testified that she felt threatened "by the bat when [appellant] held it up as if he was going to swing it," that she was afraid appellant was going to strike her or her daughter with the bat, and that she "knew he wanted to hit [her] with it." She testified that appellant had assaulted her before, and she was afraid he was going to do so again.[2] She also testified that appellant "didn't get a chance" to swing the bat at her because she locked herself and her daughter in the bathroom. She testified that she felt that she could have been very seriously injured or killed if appellant had hit her with the bat.

She testified that appellant began "banging on" or "beating at" the bathroom door but that she was not sure how he was hitting it, whether "with the bat or if he was pushing it or kicking it." She also testified that appellant was able to get the door partially open but that she

[2] A 2013 Travis County judgment against appellant for assault family violence was admitted into evidence at trial.

and her daughter—who were both screaming and crying—managed to brace it with their backs. Crystal's phone was "on speakerphone," and she testified that she thinks that somebody outside the bathroom door would have been able to hear the 911 operator. She testified that appellant only ceased banging on the door when the operator stated, "The cops should already be there."

Officer Felix testified that he believed that appellant's bat was capable of causing serious bodily injury or death and that it was being used as a deadly weapon. As he explained: "[Appellant] was no longer staying there, kicking the door and using the bat aggressively and chasing her upstairs, she had reason to believe that she was in imminent threat of serious[] bodily injury or death." Felix also testified that if appellant had charged at him with the bat cocked back as if to swing, he would have responded with deadly force because "it would have been reasonable for [him] to believe that [appellant] was going to strike [him] with the bat if [appellant] ran towards [him] with it cocked like he was going to hit [him]." Felix added that even if appellant had held the bat at his side, it would have caused Felix to fear that appellant was going to hit him with it because "it doesn't take much to swing your arm up and . . . close the distance." Felix testified that he believed that an assault with a deadly weapon by threat had occurred.

The trial court found appellant guilty of the charged offense and made an affirmative deadly weapon finding. Following the punishment phase, the trial court sentenced appellant to six years' confinement. This appeal followed.

DISCUSSION

Sufficiency of the Evidence

In his sole issue, appellant contends that the evidence presented at trial was insufficient to support the trial court's finding that he used or exhibited a deadly weapon for purposes of subsection 1.07(a)(17)(B) of the Texas Penal Code. *See id.* He argues that "the evidence presented during the trial showed that he did not hit Crystal Huerta with the bat, attempt to hit her with the bat, or threaten to hit her with the bat. As such, the evidence was insufficient to show that the bat was used or intended to be used in a manner that was capable of causing death or serious bodily injury."

When reviewing the legal sufficiency of the evidence to support a conviction, we consider all the evidence in the light most favorable to the verdict to determine whether, based on that evidence and reasonable inferences therefrom, any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Temple v. State*, 390 S.W.3d 341, 360 (Tex. Crim. App. 2013); *see Musacchio v. United States*, 577 U.S. 237, 243 (2016); *Johnson v. State*, 560 S.W.3d 224, 226 (Tex. Crim. App. 2018). In our sufficiency review, we consider all the evidence in the record, whether direct or circumstantial, properly or improperly admitted, or submitted by the prosecution or the defense. *Thompson v. State*, 408 S.W.3d 614, 627 (Tex. App.—Austin 2013, no pet.); *see Jenkins v. State*, 493 S.W.3d 583, 599 (Tex. Crim. App. 2016); *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007). We presume that the trier of fact resolved conflicts in the testimony, weighed the evidence, and drew reasonable inferences in a manner that supports the verdict. *Jackson*, 443 U.S. at 318; *Laster v. State*, 275 S.W.3d 512, 517 (Tex. Crim. App. 2009). We consider only whether the factfinder reached a rational decision. *Arroyo v. State*,

559 S.W.3d 484, 487 (Tex. Crim. App. 2018); *see Morgan v. State*, 501 S.W.3d 84, 89 (Tex. Crim. App. 2016) (observing that reviewing court's role on appeal "is restricted to guarding against the rare occurrence when a fact finder does not act rationally" (quoting *Isassi v. State*, 330 S.W.3d 633, 638 (Tex. Crim. App. 2010))). The trier of fact is the sole judge of the weight and credibility of the evidence. *Zuniga v. State*, 551 S.W.3d 729, 733 (Tex. Crim. App. 2018); *Blea v. State*, 483 S.W.3d 29, 33 (Tex. Crim. App. 2016). Thus, when performing an evidentiary-sufficiency review, we may not re-evaluate the weight and credibility of the evidence and substitute our judgment for that of the factfinder. *Arroyo*, 559 S.W.3d at 487.

A baseball bat is not a deadly weapon per se but can be found to be a deadly weapon when used or intended to be used in a manner capable of causing death or serious bodily injury. *See* Tex. Penal Code § 1.07(a)(17) (defining "deadly weapon"); *English v. State*, 171 S.W.3d 625, 628 (Tex. App.—Houston [14th Dist.] 2005, no pet.) (observing that "[a] baseball bat is not a deadly weapon per se because it is not made for the purpose of inflicting death or serious bodily injury, although it may be classified as such when used in a manner capable of inflicting death or serious bodily injury"). "[C]ritical to a proper deadly-weapon analysis are the facts of the case showing the defendant's particular manner of use or intended use of the object—his reason for having the object with him." *Flores v. State*, 620 S.W.3d 154, 159 (Tex. Crim. App. 2021) (citing *McCain v. State*, 22 S.W.3d 497, 502–03 (Tex. Crim. App. 2000)).

To determine whether a weapon is deadly in its manner of use or intended use, "we consider words and other threatening actions by the defendant, including the defendant's proximity to the victim; the weapon's ability to inflict serious bodily injury or death, including the size, shape, and sharpness of the weapon; and the manner in which the defendant used the

weapon." *Johnson v. State*, 509 S.W.3d 320, 323 (Tex. Crim. App. 2017) (internal citations omitted). In addition, we may also consider "testimony by the victim that she feared death or serious bodily injury," *Hopper v. State*, 483 S.W.3d 235, 239 (Tex. App.—Fort Worth 2016, pet. ref'd) (citing *Brown v. State*, 716 S.W.2d 939, 946 (Tex. Crim. App. 1986)), as well as the "presence and severity of wounds," though wounds "are not a prerequisite to a finding of deadliness," *Hammons v. State*, 856 S.W.2d 797, 800–01 (Tex. App.—Fort Worth 1993, pet. ref'd) (citing *Denham v. State*, 574 S.W.2d 129, 130 (Tex. Crim. App. 1978)). "No one factor is determinative, and each case must be examined on its own facts." *Adame v. State*, 69 S.W.3d 581, 584 (Tex. Crim. App. 2002); *see Johnson*, 509 S.W.3d at 323 ("These, however, are just factors used to guide a court's sufficiency analysis; they are not inexorable commands."). The State need not present expert testimony to establish the deadliness of a weapon. *Hammons*, 856 S.W.2d at 801 (citing *Denham*, 574 S.W.2d at 131).

Moreover, a deadly-weapon finding does not require that the appellant has "actually inflicted harm on the victim," *Johnson*, 509 S.W.3d at 323, or even *intended* death or serious bodily injury, *McCain*, 22 S.W.3d at 503. "[O]bjects used to threaten deadly force are in fact deadly weapons," "even if the actor has no intention of actually using deadly force." *Id.* The weapon need only be "capable of causing death or serious bodily injury" or be "displayed in a manner conveying an express or *implied* threat that serious bodily injury or death will result if the aggressor is not satisfied." *Hammons*, 856 S.W.2d at 801 (citing *Jackson v. State*, 668 S.W.2d 723, 725 (Tex. App.—Houston [14th Dist.] 1983, pet. ref'd)).

Here, appellant had a history of assaulting Crystal. On the day of the incident, he repeatedly came to her apartment uninvited. When Crystal left for work, she saw that her company car's windshield and driver's side window had been shattered as though "hit with

something." At approximately 11:00 p.m., appellant broke down the door to her apartment and—looking at her—ran "really fast" up the stairs toward her, holding a baseball bat "like he was cocking it back to swing it" and "like someone who was going to swing a bat to . . . hit something." When appellant began running, he was at the bottom of the stairway, and Crystal was halfway up the stairs on a small landing where the stairway turned. A photo of the stairway admitted into evidence at trial shows that there were approximately seven stairs between appellant and Crystal.

Crystal testified that she felt threatened and was afraid that appellant was going to strike her with the bat or might strike her 11-year-old daughter. She also testified that she "kn[e]w he wanted to hit [her] with it." He "didn't get a chance to" only because she locked her daughter and herself in the bathroom. Even then, appellant "bang[ed] on" and "beat[] at" the locked bathroom door, forcing it partially open. Crystal and her daughter, while screaming and crying, managed to keep it closed by bracing it with their backs. Appellant fled when the 911 operator, through Crystal's phone's speaker, stated that officers had arrived.

Although Crystal had no physical injuries, she testified that she felt that, if appellant had hit her with the bat, it could have caused "very serious injuries" and might have killed her. Felix testified that he believed appellant's bat was capable of causing serious bodily injury or death and was being used as a deadly weapon. He explained that appellant's "kicking the door," "using the bat aggressively[,] and chasing her upstairs" gave Crystal reason to believe "that she was in imminent threat of serious bodily injury or death." Felix also testified that if he had been in Crystal's position, he would have responded with deadly force because "it would have been reasonable for [him] to believe that [appellant] was going to strike [him] with a bat."

As mentioned above, appellant contends that the evidence is insufficient because he never hit Crystal with the bat, attempted to hit her with it, or threatened to hit her with it. He cites two cases that, he asserts, demonstrate that "Texas courts have found evidence proving an object to be a deadly weapon insufficient" when violent actions such as hitting someone with a bat . . . are absent."

First, we find the assertion that appellant never threatened to hit Crystal with the bat demonstrably contradicted by the record recounted above. Appellant challenges the credibility of Crystal's testimony by emphasizing that trial was the first time that she made certain factual assertions and arguing that jail calls between them indicated that she was fabricating testimony. However, because we view the evidence and resolve evidentiary conflicts in a light favorable to the verdict and do not re-evaluate credibility when performing a sufficiency review, appellant's argument is unavailing. *Jackson*, 443 U.S. at 318–19; *Arroyo*, 559 S.W.3d at 487; *Zuniga*, 551 S.W.3d at 733. Second, as we noted previously, "wounds are not a prerequisite to a finding of deadliness," *Hammons*, 856 S.W.2d at 800–01, and "the defendant need not have actually inflicted harm on the victim," *Johnson*, 509 S.W.3d at 323. Third, the cases cited by appellant do not establish as a matter of law that "violent actions" are necessary for a deadly weapon finding.

In *Flores*—the first of the two cases cited by appellant—the defendant, while robbing a convenience store, pretended that he had a gun by wrapping a cordless electric drill in plastic bags and placing a black sleeve over the drill bit. 620 S.W.3d at 156. The Court of Criminal Appeals determined that the appellate court had erred by not conducting a proper deadly-weapon analysis under the facts of the case and had instead relied on "speculation about some possible use of the drill as a deadly weapon," namely, a witness's testimony that the "sheer

weight [of the drill] could bludgeon someone to death or a drill bit could stab someone." *Id.* at 159. The Court performed the correct analysis and explained:

> [Defendant] waved the drill around and shook it at Shapakota, pretending it was a gun. Shapakota thought it was a gun. Even viewing these facts in a light most favorable to the verdict, they fail to rationally support the conclusion that Appellant intended to use the drill to stab, drill, or bludgeon anyone . . . . Appellant neither threatened nor took any action to hurt anyone with the drill; his only "use or intended use" of the drill was to threaten Shapakota with it by making her believe it was a gun and that he might use it to shoot her, which was factually impossible under the circumstances.

Id. at 160–61. The Court ultimately concluded that the evidence failed to meet the statutory definition for a deadly weapon because it "supports that [defendant] used the drill for intimidation purposes but falls short of establishing any *intended use* of the drill in a violent manner." *Id.* at 161 (emphasis added).

In the present case, by contrast, appellant—who had previously assaulted Crystal—broke down her front door and chased her while holding a bat cocked back like someone intending to swing it at something. When she locked herself in the restroom, he attempted to force open that door as well and only fled when he believed police were at the apartment. Such evidence supports a reasonable inference that appellant threatened action to hurt Crystal with the bat in a factually possible manner. *See id.* at 160–61. Unlike *Flores*, in other words, the evidence shows that appellant intended to use the bat in a violent manner. *See id.* at 161.

The other case cited by appellant is *In re S.B.*, 117 S.W.3d 443, 444–45 (Tex. App.—Fort Worth 2003, no pet.), a juvenile-delinquency case also involving the use of a baseball bat. Defendant, a high school student, became involved in an altercation with another student, D.F, in the school's weight room while D.F. was lifting weights. *Id.* at 447–48.

Defendant, carrying an aluminum bat, confronted D.F. about an earlier incident in which defendant believed that D.F. had spit water in her face. *Id.* at 444. The evidence included various accounts of the confrontation with contradictory testimony about the distance between defendant and D.F., the position of the bat, and defendant's statements. *Id.* at 443–48. It was undisputed that defendant never swung the bat or attempted to hit D.F. with it. *Id.* at 448. Moreover, there was no evidence of the size or shape of the bat; rather, the trial court admitted only a "similar aluminum bat for demonstrative purposes." *Id.* The appellate court also found that "the State produced no evidence concerning the capability of the baseball bat that [defendant] actually used to inflict death or serious injury" or "evidence as to the relative sizes and strengths of [defendant] and D.F. to show that the manner in which [defendant] was using the bat was capable of causing D.F. death or serious bodily injury." *Id.*

Instead of viewing the evidence in the light most favorable to the deadly-weapon finding and resolving any evidentiary conflicts in favor of the delinquency adjudication, it appears that our sister court was heavily influenced by the conflicting accounts of the incident. *See Jackson*, 443 U.S. at 318 (providing proper sufficiency standard). The majority opinion seemingly pieced together the least inculpatory portions of each witness's testimony in holding that the evidence was legally insufficient to support the jury's finding that the baseball bat constituted a deadly weapon. *S.B.*, 117 S.W.3d at 449. As the majority explained:

> The dissent focuses on one statement by one witness, C.F., that [defendant] came within two or three feet of D.F., but that witness did not say that [defendant] wielded the bat like a baseball player, nor did he testify to any recollection that she made any threat to D.F. No witness other than D.F. testified to any threat by [defendant], and that was D.F., himself, who also testified that he was never in fear because it would have been impossible for her to strike him from the distance at which she stood when she made the statement that "[y]ou don't fucking know me. I'll fucking hit you." While we agree that the jury is free to believe or

> disbelieve all or part of the testimony of any witness, the scenario constructed by the dissent would require the jury to cobble together isolated statements to create, at most, "some evidence" that Appellant used or intended to use the bat in such a manner as to be capable of causing death or serious injury to D.F. But it could not seriously be argued that such a 'modicum' of evidence could by itself rationally support a conviction beyond a reasonable doubt.

Id. (internal quotation marks omitted).

In the present case, there is evidence from which a reasonable juror could infer that appellant attempted to hit Crystal with the bat, and the evidence need not be pieced together as in *S.B*. She testified that appellant ran up the stairs toward her while holding the bat in a threatening manner like he was "cocking it back to swing it" to "hit something." She also testified that appellant "didn't get a chance to" swing the bat because she locked her daughter and herself in the bathroom. She testified that appellant had assaulted her before, that she thought he was going to do so again, and that she "kn[e]w he wanted to hit [her] with it." Felix testified that appellant used the bat as a deadly weapon; that Crystal had reason to believe that she was in imminent threat of serious bodily injury or death; and that Felix would have responded with deadly force had he been in Crystal's position because it would have been reasonable for him to believe that appellant was going to strike him with the bat.

Moreover, unlike *S.B.*, the bat wielded by appellant—a 30-inch silver-and-chrome metal bat—was admitted into evidence at trial, and both Crystal and Felix testified that they believed that the bat was capable of causing serious bodily injury or death. The manner in which appellant held the bat was undisputed, as was the distance between Crystal and appellant when he began charging at her: approximately seven steps.

Viewing the evidence in the light most favorable to the deadly weapon finding, we conclude that it supports a reasonable inference or finding that appellant used or intended to

use the bat in a manner capable of causing serious bodily injury or death. *See* Tex. Penal Code § 1.07(a)(17)(B); *Jackson*, 443 U.S. at 319; *Johnson*, 560 S.W.3d at 226. As such, we conclude that the evidence was sufficient to support the trial court's affirmative deadly weapon finding. We overrule appellant's sole issue.

Modification of the Judgment

While reviewing the record, we found two typographical errors in the judgment against appellant. First, the judgment incorrectly states that appellant pleaded guilty. Second, the deadly weapon finding on the second page of the judgment states that appellant used "**A BAR**" during the commission of the offense. We have the authority to modify a trial court's judgments and affirm them as modified. *See* Tex. R. App. P. 43.2(b); *Bray v. State*, 179 S.W.3d 725, 727 (Tex. App.—Fort Worth 2005, no pet.). Accordingly, we modify the judgment to reflect that appellant pleaded "not guilty" and that "**BAR**" should be changed to "**BAT**." *See Bigley v. State*, 865 S.W.2d 26, 27–28 (Tex. Crim. App. 1993) (courts of appeals have authority to modify judgment).

CONCLUSION

Having modified the trial court's judgment of conviction as set out above and having overruled appellant's only issue on appeal, we affirm the trial court's judgment of conviction as modified.

Edward Smith, Justice

Before Chief Justice Byrne, Justices Baker and Smith

Modified and, as Modified, Affirmed

Filed: December 21, 2022

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