



COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

SALVADOR LOZOYA,	§	No. 08-15-00278-CR
Appellant,	§	Appeal from the
v.	§	34th District Court
THE STATE OF TEXAS,	§	of El Paso County, Texas
Appellee.	§	(TC# 20140D02390)
	§	

OPINION

Salvador Lozoya was convicted by a jury of one count of aggravated assault, based on the allegation that he threatened his victim with a deadly weapon, and used and exhibited a deadly weapon during the commission of an assault. After finding that Appellant had used a deadly weapon in the commission of the offense, and after Appellant pled true to four enhancement paragraphs in the indictment, the trial court sentenced him to thirty-one years in prison. Appellant argues on appeal that the evidence was insufficient to support his conviction. For the reasons that follow, we affirm.

FACTUAL SUMMARY

At approximately 11 p.m. on April 12, 2014, Julian Mercado drove into the driveway of his residence, where he was confronted by Appellant. Mercado, who had performed mechanical

work in the past for the family of Appellant's girlfriend, recalled that Appellant told him in Spanish: "Give me the F-ing battery," and then proceeded to push and punch him.

The two began wrestling, and Mercado observed Appellant reach into his back pocket and "swing[] something at [him]." After Mercado and Appellant wrestled for two or three minutes, Mercado, feeling threatened and scared, called for assistance from his mother, Denise Asencio, who lived in an adjacent house on the property. She came out and intervened to break Mercado and Appellant apart, and shortly thereafter, her then-husband, Victor Asencio, came out and called out for someone to phone the police. Appellant walked away, yelling in Spanish that they "were all going to get it[,] and named the gang of "Barrio Azteca." All three identified Appellant in court as Mercado's assailant.¹

Before Appellant walked away, Victor observed that Appellant had a knife in his hand, which he later described at trial as being a small blade, which folded. Although Mercado testified that he never saw a knife during the encounter, immediately after Appellant left, Mercado began feeling "weird," and after raising up his shirt and seeing blood, he realized that he had suffered a stab wound to his chest.² An El Paso police officer who arrived at the scene shortly thereafter observed that Mercado had a one-inch laceration to his left chest area, which he described as being quite deep. After being treated at the scene by EMS, Mercado was transported by ambulance to the hospital for additional treatment. Doctors observed that he had an actively bleeding 2.5 centimeter stab wound to his chest, which they closed with six staples.

¹ At trial, Victor Asencio initially testified that he could not identify Appellant in court, but later in his testimony, he positively identified Appellant as Mercado's assailant.

² Denise Asencio was not asked at trial whether she saw a knife.

In the meantime, El Paso Police Officer Jose Rosales, who was responding to the 911 call, observed a car being driven by a Hispanic male matching the description of Mercado's assailant. He, along with Officer Jessica Marquez, stopped the driver who was later identified as Appellant. Shortly thereafter, Denise was brought to the scene to identify Appellant as her son's assailant. Appellant was placed under arrest, and during an inventory search of his car, the police found a kitchen paring knife in the center console. Officer Juan Montelongo took photographs of the knife which revealed that it had a dark substance on it. Based on his experience, he believed the substance was blood. However, he acknowledged that no testing was performed to confirm the presence of blood and he admitted that the substance could have been rust. The knife and photographs were introduced into evidence, revealing it was approximately 7.5 inches in total length, with a blade that was approximately three inches long.

Appellant introduced a copy of a property and evidence voucher that Officer Marquez had filled out, indicating that a red pocketknife had also been found during the search of Appellant's vehicle. However, neither Officer Rosales nor Officer Montelongo recalled seeing the pocketknife during the search, and Officer Marquez was not available to testify at trial. Although the State was prepared to introduce the red pocketknife into evidence, Appellant objected and the trial court sustained the objection. The jury found Appellant guilty of aggravated assault as charged in the indictment, and at sentencing, the trial court made an affirmative finding that Appellant had used a deadly weapon in the commission of the offense. After Appellant pled true to four enhancement paragraphs in the indictment, the trial court sentenced him to 31 years in prison. This appeal follows.

SUFFICIENCY OF THE EVIDENCE

In two issues, Appellant challenges the legal and factual sufficiency of the evidence to support his conviction for aggravated assault. As the Court of Criminal Appeals has now abandoned factual sufficiency review, we consider Appellant's complaint as presenting only a question of legal sufficiency. *Brooks v. State*, 323 S.W.3d 893, 894–95 (Tex.Crim.App. 2010) (finding no meaningful distinction between the legal and factual sufficiency standards and no justification for retaining both standards).

Standard of Review

The legal sufficiency standard articulated by the United States Supreme Court in *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979) is the appropriate standard for a reviewing court to apply in determining whether the evidence is sufficient to support a conviction. *Brooks*, 323 S.W.3d at 894–95 (citing *Jackson*, 443 U.S. at 319, 99 S.Ct. at 2789). We must consider all evidence in the light most favorable to the verdict, and in doing so must determine whether a rational justification exists for the jury's finding of guilt beyond a reasonable doubt. *Brooks*, 323 S.W.3d at 894–95 (citing *Jackson*, 443 U.S. at 319, 99 S.Ct. at 2789). In considering the evidence, we keep in mind that the trier of fact is the sole judge of the weight and credibility of the evidence, and we must presume that the fact finder resolved any conflicting inferences in favor of the verdict and defer to that resolution. See TEX. CODE CRIM. PROC. ANN. art. 38.04 (West 1979); *Dobbs v. State*, 434 S.W.3d 166, 170 (Tex.Crim.App. 2014). Further, we are not permitted to reevaluate the weight and credibility of the evidence or substitute our judgment for that of the fact finder. See *Isassi v. State*, 330 S.W.3d 633, 638 (Tex.Crim.App. 2010). Our task is to determine whether, based on the evidence and reasonable inferences drawn therefrom, a rational juror could have found the essential elements of the crime beyond a reasonable doubt. *Id.*

We treat circumstantial evidence as being as probative as direct evidence and the standard of review is therefore the same for both circumstantial and direct evidence. *See Kuciemba v. State*, 310 S.W.3d 460, 462 (Tex.Crim.App. 2010). Therefore, a lack of direct evidence is not dispositive on the issue of a defendant's guilt; to the contrary, circumstantial evidence on its own can establish guilt. *See Guevara v. State*, 152 S.W.3d 45, 49 (Tex.Crim.App. 2004).

Legal sufficiency is measured by the elements of the offense as defined by a hypothetically correct jury charge. *See Villarreal v. State*, 286 S.W.3d 321, 327 (Tex.Crim.App. 2009) (citing *Malik v. State*, 953 S.W.2d 234, 240 (Tex.Crim.App. 1997)); *see also Grotti v. State*, 273 S.W.3d 273, 280 (Tex.Crim.App. 2008); *Garza Vega v. State*, 267 S.W.3d 912, 915-16 (Tex.Crim.App. 2008). A hypothetically correct jury charge accurately sets out the law, is authorized by the indictment, does not unnecessarily increase the State's burden of proof or unnecessarily restrict the State's theories of liability, and adequately describes the particular offense for which the defendant was tried. *Villarreal*, 286 S.W.3d at 327. The law, as authorized by the indictment, means the statutory elements of the charged offense as modified by the charging instrument. *See Curry v. State*, 30 S.W.3d 394, 404 (Tex.Crim.App. 2000).

Aggravated Assault

The Texas Penal Code provides that a person commits "aggravated assault" if the person commits an assault as defined in section 22.01 of the Code, and the person causes "serious bodily injury to another . . . or uses or exhibits a deadly weapon during the commission of the assault."³

³ Section 22.01 of the Code provides that a person commits an assault if the person: "(1) intentionally, knowingly, or recklessly causes bodily injury to another, including the person's spouse; (2) intentionally or knowingly threatens another with imminent bodily injury, including the person's spouse; or (3) intentionally or knowingly causes physical contact with another when the person knows or should reasonably believe that the other will regard the contact as offensive or provocative." TEX. PENAL CODE ANN. § 22.01(a) (West Supp. 2016).

TEX. PENAL CODE ANN. § 22.02(a) (West 2011). The State’s prosecution was based on the theory that Appellant had used or exhibited a knife during his assault on Mercado. Under this theory, it was incumbent upon the State to prove that the knife Appellant used in the assault was a deadly weapon. The Penal Code sets forth two alternative definitions for the term “deadly weapon,” and provides in effect, that a weapon may be considered “deadly” either by “design or use.” See *Tucker v. State*, 274 S.W.3d 688, 691 (Tex.Crim.App. 2008); *Gil v. State*, No. 08-05-00108-CR, 2007 WL 926470, at *4 (Tex.App.--El Paso March 29, 2007, no pet.) (not designated for publication). Under the first definition, a deadly weapon is defined as “a firearm or anything manifestly designed, made, or adapted for the purpose of inflicting death or serious bodily injury[.]” See TEX. PENAL CODE ANN. § 1.07(a)(17)(A) (West Supp. 2016). Under the second definition, a deadly weapon is defined as “anything that in the manner of its use or intended use is capable of causing death or serious bodily injury.” See TEX. PENAL CODE ANN. § 1.07(a)(17)(B).

In general, kitchen knives and other utility knives, such as folding knives and pocketknives, are designed for other purposes, and consequently do not qualify as deadly weapons per se, and instead, fall under the second category. *McCain v. State*, 22 S.W.3d 497, 502-03 (Tex.Crim.App. 2000); see also *Tucker*, 274 S.W.3d at 691; *Limuel v. State*, 568 S.W.2d 309, 311 (Tex.Crim.App. 1978); *Gil*, 2007 WL 926470, at *4; *Victor v. State*, 874 S.W.2d 748, 751 (Tex.App.--Houston [1st Dist.] 1994, pet. ref’d) (citing *Thomas v. State*, 821 S.W.2d 616, 620 (Tex.Crim.App. 1991)). Nevertheless, almost any knife by virtue of its use, can become a deadly weapon. *McCain*, 22 S.W.3d at 503. In determining whether a defendant used a knife as a deadly weapon during an assault, we review all of the evidence and consider a variety of factors, including the dimensions and sharpness of the knife, the manner of its use, testimony of its life-threatening capabilities, the

physical proximity of the accused and the victim during the assault, and the existence and nature of any wounds inflicted on the victim. *See Thomas*, 821 S.W.2d at 620; *see also Blain v. State*, 647 S.W.2d 293, 293–94 (Tex.Crim.App. 1983). Expert witness testimony is not required and the jury may make that finding based on a consideration of all of the evidence presented at trial. *See Davidson v. State*, 602 S.W.2d 272, 273 (Tex.Crim.App. [Panel Op.] 1980); *see also Blain*, 647 S.W.2d at 293–94 (the State can, without expert testimony, prove a particular knife to be a deadly weapon by showing its size, shape and sharpness, the manner of its use, or intended use and its capacity to produce death or serious bodily injury).

The Paring Knife

Appellant correctly argues that the State relied almost exclusively on the theory that he used the kitchen paring knife found in his car to stab Mercado during the assault, and made little, if any effort, to argue that the Appellant used the red pocketknife, which was also found in his car. The prosecutor stated on the record that the State did not “care” about the pocketknife, and did not seem particularly concerned when the trial court ruled that the pocketknife would not be admitted into evidence. Appellant does not dispute that the paring knife could be considered a deadly weapon, and instead contends that the “issue with the paring knife is that there [was] no evidence that it was used in the assault.” He finds it significant that although Officer Montelongo testified that he believed there was blood on the paring knife, he acknowledged at trial that no testing had been done on the knife to confirm his belief. Appellant also finds it significant that Victor Asencio, the only witness who saw a knife in Appellant’s hands, did not describe it as a paring knife, and instead described it as a small folding blade, which more closely resembled the red pocketknife. Since no witness actually saw Appellant with the paring knife in his hand, he

contends that there was no evidence that he used it as a deadly weapon. This argument is flawed for several reasons.

First, the fact that Victor described the knife he saw as a small folding blade was not fatal to the State's case. Victor, who testified through an interpreter, initially said that when he first walked outside, he saw Appellant holding a knife in his hand. He later modified his testimony by describing the weapon as a small blade, which could be folded. The jury was entitled to weigh the credibility of Victor's testimony on this particular point, and to resolve any contradictions in his testimony in the manner in which it deemed appropriate. *See generally Williams v. State*, 235 S.W.3d 742, 750 (Tex.Crim.App. 2007); *Wyatt v. State*, 23 S.W.3d 18, 30 (Tex.Crim.App. 2000). Accordingly, the jury was not required to believe Victor's testimony that a pocketknife was used in the commission of the assault.

Further, the fact that neither Victor nor any of the other witnesses actually saw Appellant with the paring knife in his hand did not preclude the jury from finding that he used it in the assault. There is no requirement that a witness actually observe a weapon in the defendant's hand in order for a jury to conclude that a deadly weapon was used in an assault. *See Tucker*, 274 S.W.3d at 690-91 (finding that object used by defendant to stab his victim was a deadly weapon despite fact that victim was unable to see the object being used); *Barnett v. State*, 344 S.W.3d 6, 16 (Tex.App.-Texarkana 2011, pet. ref'd) (witnesses' failure to perceive a knife in the defendant's hand did not negate the allegation that the defendant used a deadly weapon in the commission of a crime). The jury could have inferred that Appellant used the paring knife during the assault, in light of the other evidence presented at trial, including the fact that Officer Montelongo testified that he observed what he believed to be blood on the knife. The fact that the officer could not say with certainty

that the substance on the paring knife was blood was not fatal to the prosecution. A police officer is entitled to provide a lay opinion that is rationally based on his perceptions, as well as his training and experience. *See generally Osbourn v. State*, 92 S.W.3d 531, 539 (Tex.Crim.App. 2002) (recognizing that police officers are permitted to offer “lay opinion[s]” based on their training and experience with regard to events that they have personally observed). Officer Montelongo not only expressed his opinion that the substance found on the paring knife was blood, but the jury was also able to examine the knife itself. As such, it was free to determine whether they agreed with Officer Montelongo’s opinion that the substance was blood and to consequently infer that it had been used in the assault.

The Pocketknife

Contrary to Appellant’s argument, the jury was equally free to conclude that Appellant had used either the small folding knife described by Victor Asencio and/or the red pocketknife as a deadly weapon during the assault. Even a small pocketknife or folding knife can be considered a deadly weapon if the defendant uses it in close proximity to an intended victim, when the defendant makes threats while using the knife, and/or when the victim is wounded by its use. *See Tucker*, 274 S.W.3d at 691 (two-inch folding knife could be considered deadly weapon where evidence revealed that the victim had been stabbed several times during the assault); *Limuel*, 568 S.W.2d at 312 (evidence was sufficient to demonstrate that pocketknife was used as a deadly weapon during the course of a robbery where defendant used the knife to stab his victim in the stomach); *Barnett v. State*, 344 S.W.3d 6, 12–13 (Tex.App.--Texarkana 2011, pet. ref’d) (evidence supported determination that a pocketknife was used as a deadly weapon where defendant pressed the knife up to victim’s ribs and made an oral threat to cut him); *Magana v. State*, 230 S.W.3d 411, 413-14

(Tex.App.--San Antonio 2007, pet. ref'd) (evidence supported determination that a "little, black pocket knife" was used as a deadly weapon where defendant stabbed the victim in the shoulder and chest area, and the knife was sufficiently sharp enough to penetrate the victim's body). Here, the undisputed evidence clearly established that Appellant and Mercado were in close proximity to each other during the assault, and that Mercado suffered a stab wound while the two were wrestling with each other.

Nevertheless, Appellant believes that the jury was not entitled to infer that he used the pocketknife as a deadly weapon because the State failed to (1) introduce the pocketknife and/or any photographs of it into evidence, (2) present any evidence regarding its dimensions or sharpness, and (3) provide evidence as to how the pocketknife was used. This argument fails for several reasons.

First, to sustain a conviction for aggravated assault based on the use or exhibition of a deadly weapon, the State is not required to introduce the weapon into evidence, nor is it required to provide a description of the weapon or the manner in which it was used. *See Tucker*, 274 S.W.3d at 691; *Morales v. State*, 633 S.W.2d 866, 868 (Tex.Crim.App. 1982); *Limuel*, 568 S.W.2d at 312; *Magana*, 230 S.W.3d at 414. More importantly, the Texas Court of Criminal Appeals has expressly held that it is not even necessary for the State to establish with certainty which of two possible weapons a defendant used during the commission of an assault in order to establish that a deadly weapon was in fact used. Instead, the court has expressly held that a jury is free to infer that a defendant used a deadly weapon based solely on the nature of the wounds suffered by the victim. *Tucker*, 274 S.W.3d at 691-92 (despite conflicting evidence regarding whether the

defendant used a knife or a key in the assault, the jury could infer that a deadly weapon had been used from the nature of the victim's wound).

Appellant counters that the evidence indicated that Mercado's wound was not sufficiently serious for a jury to infer that it was inflicted by the use of a deadly weapon. He contends that Mercado's medical records established that the treating physicians described his wound as being "superficial" and not life-threatening. Contrary to his belief, there is no requirement that the victim must have suffered serious bodily injury in order to sustain a conviction for aggravated assault where, as here, the State is proceeding on a theory that the defendant used or exhibited a deadly weapon during the commission of an assault. *Tucker*, 274 S.W.3d at 691. Instead, the key question is not whether the object's "use or intended use" actually caused death or serious bodily injury, but whether the "use or intended use [was] *capable* of causing death or serious bodily injury [emphasis in original]." *Id.* (citing *McCain*, 22 S.W.3d at 503). Under this standard, a jury may infer that an object was used as a deadly weapon even when a victim suffers only a superficial wound, particularly when the victim requires medical treatment and/or a medical diagnosis to ensure that he did not suffer internal damage. *See Magana*, 230 S.W.3d at 414 (victim's stab wounds, although superficial in nature, required medical treatment at hospital, which included an x-ray to determine whether the victim's lungs, heart, or major vessels were damaged, jury could infer that defendant's use of a pocketknife to assault his victim was used as a deadly weapon); *see also Morales*, 633 S.W.2d at 868-69 (photographs of a deep slash across the victim's face from her ear to her cheek, which was closed by sutures, was sufficient to show that a deadly weapon was used during an assault). As the court recognized in *Tucker*, the fact that a victim suffered a relatively minor wound during an assault does not mean that the weapon used to inflict

the wound was not *capable* of causing death or serious bodily injury. *Tucker*, 274 S.W.3d at 691. Further, no expert witness testimony is needed on this point, and a jury may determine for itself whether a victim's wounds were inflicted by a weapon capable of inflicting serious bodily injury based on the evidence presented at trial and the nature of the wound itself. *See id.* at 691-92 (it does not take expert testimony to recognize that a stab wound that went through the victim's arm could have easily severed a major blood vessel or nerve, placing the victim's life, or the use of her arm, in jeopardy); *Limuel*, 568 S.W.2d at 312 (court found sufficient evidence to support a finding that a knife was used as a deadly weapon even in the absence of medical testimony where defendant stabbed the victim in the stomach, necessitating surgery).

The State introduced evidence demonstrating that Mercado was bleeding at the scene of the assault from a deep 2.5 centimeter stab wound and was transported by ambulance to the hospital for medical treatment, which required six staples and the administration of morphine for pain. Although the treating doctor described the wound as superficial and non-life-threatening, the records reflect that he was concerned about the location of the wound and the fact that Mercado was experiencing tachycardia at the time of his admission. As a result, he ordered both an x-ray and a CT scan of Mercado's chest to rule out the possibility of a pneumothorax, vascular or pulmonary trauma, and/or a fracture in the chest area. Mercado also testified his doctor advised him that he was lucky that the knife did not puncture one of his major arteries.

This evidence is sufficient to support an inference that Appellant used a knife during the assault—whether it be the paring knife or the pocketknife—which was, at the very least, capable of inflicting death or serious bodily injury, given the nature and location of Mercado's wound, coupled with the fact that the wound was inflicted while Appellant was in close proximity to

Mercado, thereby posing a significant danger of serious bodily injury to Mercado. When viewed in the light most favorable to the verdict, we conclude the evidence was legally sufficient to support the jury's verdict. We overrule Issues One and Two and affirm the judgment below.

ANN CRAWFORD McCLURE, Chief Justice

September 27, 2017

Before McClure, C.J., Rodriguez, and Hughes, JJ.
Hughes, J., not participating

(Do Not Publish)