Affirmed as modified; Opinion Filed December 19, 2017.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-16-01356-CR

PRAMOD FLANDER, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the 283rd Judicial District Court
Dallas County, Texas
Trial Court Cause No. F-1341191-T

MEMORANDUM OPINION

Before Justices Lang, Evans, and Schenck
Opinion by Justice Lang

Following a plea of nolo contendere, the trial court found the appellant Pramod Flander guilty of aggravated assault and placed appellant on five years deferred adjudication probation. In one issue on appeal, appellant asserts the evidence did not "substantiate [his] guilt" because the State failed to produce evidence that he threatened imminent bodily injury.

We decide his sole issue against him. The trial court's judgment is affirmed as modified. Because the law to be applied in this case is well settled, we issue this memorandum opinion. *See* TEX. R. APP. P. 47.2, 47.4.

I. Factual and Procedural Context

Appellant was originally charged by indictment with aggravated assault with a deadly weapon against a member of his family in violation of TEX. PENAL CODE ANN. § 22.02. Appellant entered a plea of nolo contendere, waived his right to a jury, and was tried before the trial court. The trial court found the evidence "substantiated [appellant's] guilt." A finding of

guilt was deferred and appellant was placed on five years deferred adjudication probation. Notice of appeal was timely filed.

The testimony at trial began with the complainant, Alveena Flander. She told the trial court she was introduced to appellant in 2009 by telephone while she was living in India. Appellant received Alveena's contact information from Alveena's father and uncle, who lived in the United States and attended the same church as appellant.

After being introduced, Alveena and appellant spoke on the phone daily, but did not meet in person until January 10, 2010 when appellant traveled to India. Alveena and appellant were married five days later on January 15, 2010. However, Alveena did not move to the United States until three years later.

When Alveena arrived in the United States, she lived in appellant's house from April 2013 to July 2013. After two weeks of living together, appellant's behavior towards Alveena changed and he started "bothering" Alveena by using profanity and calling her names such as "whore." When Alveena told appellant she wanted to work outside the home, appellant told her he would take her to a strip club where Alveena could "do the same thing" as the strippers. Also, the appellant "kicked [Alveena] out of the room" when she refused to have sex with him.

The incident that gave rise to the complaint occurred about June 15, 2013 while Alveena and appellant were sitting on opposite sides of their king-sized bed. Appellant was cleaning a rifle next to a gun safe while Alveena was watching television. Then, appellant pointed a two and a half to three foot long rifle "right in front" of Alveena and asked, "Should I shoot you or not?" Alveena did not know if appellant had his finger on the trigger or if the rifle was loaded, but she was "scared."

"Many days" after the incident, Alveena asked appellant why he pointed the gun towards her and appellant responded he was "kidding around." However, Alveena did not think appellant was "kidding" because he was not smiling when he pointed the rifle and made the statement.

Next, Susan Flander testified. Susan is appellant's adult daughter who lived with appellant and Alveena at the time of the incident. About a month after the incident, on July 13th, 2013 at around 12:30 a.m., Alveena awakened Susan. Alveena asked for a ride to Alveena's father's house and Susan drove her there the next morning. Alveena lived at her father's house for about one and half months, but left to live at a woman's shelter because appellant called and harassed her "constantly." At the time of trial, Alveena no longer lived at the woman's shelter. However, she did not tell her "relatives" or appellant her new address because she was "scared of [the appellant]."

Appellant took the witness stand and stated he disagreed with Alveena's version of the events. He denied ever pointing a gun at Alveena. However, appellant acknowledged he owned guns and he had two gun cabinets located in their bedroom. Additionally, appellant stated he owned about twelve "long guns", "seven handguns", and approximately seventeen or eighteen guns total. After the complaint was made, the Mesquite Police Department inventoried nineteen guns of various sizes that belonged to appellant.

According to appellant, he and Alveena only had three "minor argument[s]" while they were living together. One argument occurred on July 10th, 2013 when appellant tried to hug Alveena. Alveena "pushed [appellant] off the bed", prompting him to tell her to "get out from here". Appellant believed it was this altercation, not the pointing of the gun and the question he asked her, which resulted in Alveena's leaving his home.

II. Standard of Review

The legal effect of a plea of nolo contendere is the same as that of a plea of guilty. TEX. CODE CRIM. PROC. ANN. art. 27.02(5) (West 2006). The State is not required to prove the defendant's guilt beyond a reasonable doubt. *McGill v. State*, 200 S.W.3d 325, 330 (Tex. App.—Dallas 2006, no pet.). Rather, the State must introduce evidence that "embraces every essential element of the offense charged." *Wright v. State*, 930 S.W.2d 131, 133 (Tex. App.—Dallas 1996, no pet.); *Stone v. State*, 919 SW.2d 424, 427 (Tex. Crim. App. 1996). TEX. CODE CRIM. PROC. ANN. art. 1.15 (West 2017).

III. Applicable Law

A person commits aggravated assault if the person 1) intentionally or knowingly threatens another with imminent bodily injury 2) while using or exhibiting a deadly weapon. TEX. PENAL CODE ANN. § 22.02(a)(2)(a)(4) (West). A firearm is defined as a deadly weapon. TEX. PENAL CODE ANN. § 1.07(17)(A) (West). To establish an offense under § 22.01(a)(1), "threats may be conveyed by action or conduct as well as words." *De Leon v. State*, 865 S.W.2d 139, 142 (Tex.App.—Corpus Christi 1993, no pet.) The Court of Criminal Appeals has described "imminent" to mean "near at hand; mediate rather than immediate; close rather than touching; impending; on the point of happening; threatening; menacing; perilous." *Devine v. State*, 786 S.W.2d 268, 270 (Tex. Crim. App. 1989). Imminent harm has also been construed to "require a present, not a future threat." *Id.*

In evaluating whether a threat of imminent harm exists, courts have considered the demeanor of the defendant during the assault and whether the defendant possessed a weapon. *Gaston v. State*, 672 S.W.2d 819 (Tex. App.—Dallas 1983, no pet.); *De Leon*, 865 S.W.2d 139; *Young v. State*, 993 S.W.2d 390, 391 (Tex. App. —Eastland 1999, no pet.). For example, in *Gaston*, the Fifth Court of Appeals in Dallas concluded a complainant felt "threatened with imminent bodily

injury" when the defendant approached the complainant from behind, put "one hand over her mouth," and held a shotgun in "very close proximity" to her. *Id.* The defendant did not "point the shotgun at [the complainant]" and "never verbally threatened her." *Id.* at 821. On that record, this Court concluded "it was the presence of the gun in appellant's hand that instilled fear in complainant and made her feel threatened with bodily injury." Further, a weapon "need not be functioning during the assault" to threaten another with imminent bodily injury. *Id.*

In *De Leon*, the Thirteenth Court of Appeals concluded a threat of imminent bodily harm occurred when three individuals were approached by an appellant who "rapidly" left his car "brandishing a 'Rambo' –style knife." *De Leon*, 865 S.W.2d at 141. During the assault, the complainant "was several feet away from appellant, so that if appellant had lunged at him with the knife, appellant would have gotten 'nothing but air."' *Id.* at 140. Nevertheless, the complainant testified he was "very frightened." *Id.* The complainant also "could not remember whether appellant said anything to him" because he was "concentrating on the knife." *Id.* The court concluded there was evidence in the record that showed the appellant "used the knife to intentionally and knowingly threaten [the complainant] with imminent bodily injury" regardless of whether the appellant "said anything to" the complainant. This was because "the knife and appellant's demeanor caused [complainant] to feel threatened and afraid." *Id.* at 142.

In *Young*, the complainant testified she "heard a gunshot . . . saw appellant trying to break in the back door" and was "afraid that appellant was trying to kill her." *Young*, 993 S.W.2d at 391. Although the complainant "never saw the gun", "a reasonable inference from the evidence" showed the appellant "threaten[ed] bodily injury." *Id.* The Eleventh Court of Appeals concluded this "evidence was sufficient to embrace every element of" aggravated assault to support a nolo contendere plea. *Young*, 993 S.W.2d at 391.

A different result obtained in the *Devine* case. There, the Court of Criminal Appeals concluded the evidence did not "show [the complainant] was threatened with imminent bodily injury" when there was "no evidence the appellant was carrying a gun", the appellant took no "overt action, such as displaying a weapon", and only made "threats of future harm." *Devine*, 786 S.W.2d 268.

IV. Application of the Law to the Facts

In his sole point on appeal, appellant asserts no evidence was presented showing a threat of imminent bodily harm because the statement "Should I shoot you or not?" was a question that did not contain temporal wording such as "Should I shoot you now or not?" We disagree.

Evidence of threatening imminent bodily injury does not require temporal language or even a "verbal threat." *McGowan v. State*, 664 S.W.2d 355, 357 (Tex. Crim. App. 1984). In fact, "[i]t is well established that threats can be conveyed in more varied ways than merely a verbal manner." *Id.* at 357. "A threat may be communicated by action or conduct as well as words." *Id.*

As stated above, in *Gaston*, a threat of imminent harm was supported by evidence of the close proximity of a shotgun. *See Gaston*, 672 S.W.2d 819. In this case, in close proximity to Alveena, appellant pointed a "long" gun "right in front" of Alveena and threatened her by asking "Should I shoot you or not?" *See id.* Alveena testified appellant's actions "scared" her. Therefore, evidence of appellant's demeanor and the presence of the gun were sufficient to embrace the element of imminent harm.

Also, appellant argues that pointing a firearm in Alveena's direction did not threaten imminent harm because Alveena did not know if the rifle was loaded. Further, he contends no ammunition was recovered from appellant's home. Appellant cites no case law to support his argument. However, this Court has long ago concluded a "weapon need not be functioning during the assault" to show there was a threat of imminent bodily injury. *Gaston*, 672 S.W.2d at

821. Additionally, "[t]he State need not prove the ability to commit a battery for a defendant to be convicted of assault." *De Leon* 865 S.W.2d at 142. The fact that Alveena did not know if the gun was loaded is not dispositive to whether the evidence embraced the element of imminent harm.

Next, appellant argues there was no threat of imminent harm because he told Alveena "many days later" he was "kidding around". However, as the Second Court of Appeals concluded, the "focus of the inquiry should be whether the complainant was afraid of imminent serious bodily injury *at the time of the offense*." *In re A.C.*, 48 S.W.3d 899, 904 (Tex.App.—Fort Worth 2001, pet. denied) (emphasis added). Here, Alveena testified four separate times that she was "scared" at the time of the offense.

Finally, appellant cites *Devine* for the proposition that the evidence does not embrace a threat of imminent harm. However, *Devine* does not support appellant's argument. In *Devine,* the appellant was not carrying a weapon, made no threatening movements, and only made threats of future harm. *See Devine*, 786 S.W.2d 268. In contrast, in this case, appellant held a large gun, was sitting near several other guns, and made a present threat.

V. Modification of Adjudication Order

The State raised a cross-issue requesting this Court modify the trial court's order of deferred adjudication to correctly reflect appellant entered a plea of nolo contendere.

A. Applicable Law

This court may modify the trial court's judgment and affirm it as modified. *See* TEX. R. APP. P. 43.2(b); *Bigley v. State,* 865 S.W.2d 26 (Tex. Crim. App. 1993). This Court "has the power to correct and reform the judgment of the court below to make the record speak the truth when it has the necessary data and information to do so." *Asberry v. State*, 813 S.W.2d 526, 529 (Tex.

App.—Dallas 1991, pet. ref'd). Appellate courts may reform trial court judgments where "the evidence necessary to correct the judgment appears in the record." *Id.*

B. Application of the Law to the Facts

The record reflects appellant entered a plea of nolo contendere to the charged offense. However, the trial court's order of deferred adjudication states appellant entered an "open" plea of guilty. We modify the trial court's order of deferred adjudication to correctly reflect that appellant entered a plea of nolo contendere in this case.

VI. Conclusion

Appellant's sole issue is decided against him. We affirm the trial court's judgment as modified.

/Douglas S. Lang/
DOUGLAS S. LANG
JUSTICE

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TEX. R. APP. P. 47.2
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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

PRAMOD FLANDER, Appellant

No. 05-16-01356-CR V.

THE STATE OF TEXAS, Appellee

On Appeal from the 283rd Judicial District Court, Dallas County, Texas
Trial Court Cause No. F-1341191-T.
Opinion delivered by Justice Lang. Justices Evans and Schenck and participating.

Based on the Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

Judgment entered this 19th day of December, 2017.