Opinion issued August 31, 2010

In The

Court of Appeals

For The

First District of Texas

NO. 01-09-00895-CR

ROBERT LEON STEWART, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 184th District Court
Harris County, Texas
Trial Court Case No. 1173769

MEMORANDUM OPINION

Appellant Robert Leon Stewart pleaded guilty, without an agreed recommendation, to aggravated assault, and the trial court entered affirmative findings that Stewart used a deadly weapon and committed an act of family

violence. *See* TEX. PENAL CODE ANN. § 22.02 (Vernon Supp. 2009) (defining aggravated assault and establishing that offense is first-degree felony if deadly weapon used against person with whom defendant has "dating relationship"); TEX. FAM. CODE ANN. § 71.0021(b) (Vernon 2008) (defining "dating relationship"); TEX. CODE CRIM. PROC. ANN. art. 42.013 (Vernon 2006) (requiring affirmative finding of family violence in certain cases). Stewart brings two issues on appeal. In his first issue, Stewart argues that his conviction should be declared void because the statute under which he was convicted is unconstitutionally vague on its face. Because he did not raise this issue in the trial court, Stewart has waived it. In his second issue, Stewart argues that the judgment of conviction should be reformed to reflect a conviction for "aggravated assault" instead of "Agg. Assault—Family Member SBI." Because this clerical error is not substantial enough to warrant reformation, we affirm the judgment of the trial court.

I. Background

Stewart was dating Autumn Norman. While riding in Stewart's car, they had an argument. Stewart stopped at a gas station, and their argument escalated. Stewart pushed Norman out of the front passenger seat, but Norman's arm became entangled in the seatbelt. Stewart drove about half a mile at approximately 30 miles per hour, dragging Norman alongside the car. Other drivers honked and

notified the police. Stewart pulled onto a side street and stopped the car. A police officer arrived and arrested Stewart. Norman suffered extensive injuries.

Stewart pleaded guilty to "Aggravated Assault—Family Member" without an agreed recommendation. The trial court made affirmative findings that Stewart used a deadly weapon and committed an act of family violence, and it sentenced him to 40 years' confinement in prison.

II. Whether "Dating Relationship" is Unconstitutionally Vague is Not Preserved for Appellate Review

In his first issue, Stewart argues that section 22.02(b)(1) of the Texas Penal Code is unconstitutional on its face because it incorporates the definition of "dating relationship" from Texas Family Code section 71.0021(b), which Stewart contends is unconstitutionally vague.[1] *See* TEX. PENAL CODE ANN. § 22.02(b)(1); TEX. FAM. CODE ANN. § 71.0021. As Stewart does not rely on any evidence but merely on the statute and the charging instrument, his constitutional challenge is a facial challenge. *See Karenev v. State*, 281 S.W.3d 428, 435 (Tex. Crim. App. 2009)

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[1] "[D]ating relationship" means a relationship between individuals who have or have had a continuing relationship of a romantic or intimate nature. The existence of such a relationship shall be determined based on consideration of:

(1) the length of the relationship;
(2) the nature of the relationship; and
(3) the frequency and type of interaction between the persons involved in the relationship.

TEX. FAM. CODE ANN. § 71.0021(b) (Vernon 2008). "A casual acquaintanceship or ordinary fraternization in a business or social context does not constitute a 'dating relationship' . . . ." *Id.* § 71.0021(c)

(Cochran, J., concurring). Stewart relies on *Long v. State*, 931 S.W.2d 285, 287 n.3 (Tex. Crim. App. 1996), and *Woodson v. State*, 191 S.W.3d 280, 282 (Tex. App.—Waco 2006, pet. ref'd), for the proposition that he may raise this constitutional challenge for the first time on appeal because it is a facial challenge. These cases preceded *Karenev v. State*, 281 S.W.3d 428 (Tex. Crim. App. 2009), in which the Court of Criminal Appeals held that "a defendant may not raise for the first time on appeal a facial challenge to the constitutionality of a statute." *Karenev*, 281 S.W.3d at 434. Stewart did not challenge the constitutionality of this statute in the trial court, and thus he may not do so now. *See id.*; *see also Obryant v. State*, No. 01-08-00740-CR, 2009 WL 4724667, at *5 (Tex. App.—Houston [1st Dist.] Dec. 10, 2009, pet. ref'd) (mem. op., not designated for publication).

We overrule Stewart's first issue.

III. The Trial Court's Judgment Need Not Be Reformed

In his second issue, Stewart argues that the trial court's judgment should be reformed to show a conviction for aggravated assault not "Agg. Assault—Family Member SBI" because the Penal Code does not include an offense of aggravated assault on a family member. The trial court's judgment includes affirmative findings that Stewart used a deadly weapon and committed an act of family violence.

An appellate court has the power to correct and reform a trial court's judgment to make the record speak the truth when it has the necessary data and information to do so. *French v. State*, 830 S.W.2d 607, 709 (Tex. Crim. App. 1992); *Nolan v. State*, 39 S.W.3d 697, 698 (Tex. App.—Houston [1st Dist.] 2001, no pet.). Stewart pleaded guilty to an indictment that alleged that he "unlawfully, intentionally and knowingly cause[d] serious bodily injury to AUTUMN NORMAN, a person with whom [Stewart] had a dating relationship . . . ." Before the trial court pronounced Stewart's sentence, the court stated that it had "previously accepted [his] plea of guilty to aggravated assault with a deadly weapon." The judgment adequately states the crime for which Stewart was convicted—aggravated assault—and we do not find this difference substantial enough to warrant reformation.

We overrule Stewart's second issue.

CONCLUSION

We affirm the judgment of the trial court.

Michael Massengale
Justice

Panel consists of Justices Alcala, Bland, and Massengale.

Do not publish. TEX. R. APP. P. 47.2(b).