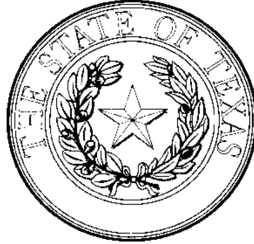
Opinion issued January 27, 2011



In The

Court of Appeals

For The

First District of Texas

NO. 01-10-00028-CR

JAMES HAROLD CHENIER, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 185th District Court
Harris County, Texas
Trial Court Case No. 1177077

MEMORANDUM OPINION

Appellant, James Harold Chenier, appeals a judgment convicting him for aggravated assault with a deadly weapon. *See* TEX. PENAL CODE ANN. §§ 22.01(a)(2), 22.02(a)(2) (West Supp. 2010). Appellant pleaded not guilty to the jury. The jury found him guilty and assessed punishment at forty-three years in

prison and a $10,000 fine. In two issues, appellant contends that the evidence is factually insufficient to sustain his conviction, and that the trial court abused its discretion by admitting evidence in violation of Texas Rule of Evidence 403. We conclude that the evidence is sufficient and that appellant waived his evidentiary challenge by not asserting it at trial. We affirm.

Background

The complainant, Tonyia Banks, and appellant lived together during 2007 and 2008. On August 1, 2008, Banks arrived home from work at approximately 11:30 p.m. Appellant did not arrive until about two in the morning. Appellant appeared to be intoxicated and began an argument with Banks about the rent money. Banks informed appellant that she had no money on her and that they would go to the bank in the morning. Appellant then demanded that Banks return his gun that she had hidden a few days earlier when appellant, who had been drinking, threatened to hurt himself. Banks retrieved the gun and handed it to appellant because it was his and he was insistent.

Banks returned to the bedroom and lay down on the bed. When appellant entered the room, he began choking Banks with his left hand while holding the gun against her head with his right hand. Appellant told Banks that he would kill her, that nobody would ever miss her, and that he would also kill her son. Appellant then removed the gun from Banks's head, but remained in the room, pacing.

Banks was afraid that appellant was going to shoot her because he had a gun and was upset.

After appellant left the room, Banks called 911. When police officers arrived, appellant answered the door unarmed and appeared surprised. Noticing that Banks's eyes were teary, Officer Gonzales spoke alone to Banks, who revealed that appellant had used a gun. Banks then took Gonzales into the bedroom and showed him six guns that belonged to appellant. An investigation into the recovered guns revealed that two were stolen.

Sufficiency of the Evidence

In his first issue, appellant challenges the factual sufficiency of the evidence to support the finding that he intentionally or knowingly threatened Banks.

A. Standard of Review

This Court reviews both legal and factual sufficiency challenges using the same standard of review. *Ervin v. State*, No. 01-10-00054-CR, 2010 WL 4619329, at *2–4 (Tex. App.—Houston [1st Dist.] Nov. 10, 2010, pet. filed) (construing majority holding of *Brooks v. State*, 323 S.W.3d 893, 912, 926 (Tex. Crim. App. 2010)). Under this standard, evidence is insufficient to support a conviction if considering all the record evidence in the light most favorable to the verdict, no rational factfinder could have found that each essential element of the charged offense was proven beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S.

307, 319, 99 S. Ct. 2781, 2789 (1979); *In re Winship*, 397 U.S. 358, 361, 90 S. Ct. 1068, 1071 (1970); *Laster v. State*, 275 S.W.3d 512, 517 (Tex. Crim. App. 2009); *Williams v. State*, 235 S.W.3d 742, 750 (Tex. Crim. App. 2007). Viewed in the light most favorable to the verdict, the evidence is insufficient under this standard in two circumstances: (1) the record contains no evidence, or merely a "modicum" of evidence, probative of an element of the offense; or (2) the evidence conclusively establishes a reasonable doubt. *See Jackson*, 443 U.S. at 314, 318 n.11, 320, 99 S. Ct. at 2786, 2789 n.11; *Laster*, 275 S.W.3d at 518; *Williams*, 235 S.W.3d at 750.

If an appellate court finds the evidence insufficient under this standard, it must reverse the judgment and enter an order of acquittal. *See Tibbs v. Florida*, 457 U.S. 31, 41, 102 S. Ct. 2211, 2218 (1982). An appellate court determines whether the necessary inferences are reasonable based upon the combined and cumulative force of all the evidence when viewed in the light most favorable to the verdict. *See Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007) (citing *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007)). Circumstantial evidence can be as probative as direct evidence in establishing the guilt of an actor, and circumstantial evidence alone can be sufficient to establish guilt. *Id.* An appellate court presumes that the factfinder resolved any conflicting inferences in favor of the verdict and defers to that resolution. *See Jackson*, 443 U.S. at 326, 99

S. Ct. at 2793; *Clayton*, 235 S.W.3d at 778. An appellate court also defers to the factfinder's evaluation of the credibility and weight of the evidence. *See Williams*, 235 S.W.3d at 750.

B. Applicable Law

A person commits aggravated assault if he (1) intentionally or knowingly threatens another with imminent bodily injury and (2) uses or exhibits a deadly weapon in the course of threatening the other with imminent bodily injury. TEX. PENAL CODE ANN. §§ 22.01(a)(2), 22.02(a)(2). A firearm is considered a deadly weapon. *See id.* § 1.07(a)(17)(A) (West Supp. 2010). The jury may infer an intentional or knowing mental state from any facts tending to prove its existence, including the acts, words, and conduct of the accused. *Hart v. State*, 89 S.W.3d 61, 64 (Tex. Crim. App. 2002). Direct evidence of threatening language or gestures is not required to prove a defendant's knowledge or intent. *Dobbins v. State*, 228 S.W.3d 761, 765 (Tex. App.—Houston [14th Dist.] 2007, pet. ref'd, untimely filed); *see Hart*, 89 S.W.3d at 64.

C. Analysis

Appellant contends that the evidence is factually insufficient to support the jury's verdict, specifically the element that he intentionally or knowingly threatened Banks. Although Banks testified that appellant put the gun to her head on several occasions, appellant asserts that "no evidence was presented that

appellant pointed the gun at her, placed the gun to her head, or that his actions were threatening or done in a dangerous manner." Appellant concludes that because the State failed to provide any type of description as to how he wielded the gun, the State failed to prove beyond a reasonable doubt a key element of their case.

An examination of the entire record shows sufficient evidence of the requisite intent to uphold the conviction for aggravated assault. Banks testified that appellant pulled the covers off her, placed his left hand on her throat, and placed the gun to her temple with his right hand. She also testified that while appellant was holding the gun "against [her] head," he told her that "he would kill [her] and nobody would ever miss [her]." Banks further testified that appellant told her that he knew where her son lived and that he would kill her son as well. Banks described how appellant wielded the gun, and that his actions were threatening. Viewing the evidence in the light most favorable to the verdict, we conclude that the jury could have rationally found that appellant intentionally or knowingly threatened Banks with a deadly weapon. We hold the evidence is sufficient to prove appellant's guilt for aggravated assault. *Cf. Tidwell v. State*, 187 S.W.3d 771, 773, 775 (Tex. App.—Texarkana 2006, pet. struck) (holding evidence legally sufficient to sustain aggravated assault conviction where appellant

possessed revolver and used verbal threat even when she did not point gun directly at anyone).

We overrule appellant's first issue.

Rule 403

In his second issue, appellant claims that the trial court abused its discretion by admitting evidence that two of the guns found in appellant's apartment were stolen. Specifically, appellant contends that the probative value of the stolen guns is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, by considerations of undue delay, or by needless presentation of cumulative evidence and, therefore, should have been excluded. *See* TEX. R. EVID. 403.

A. Applicable Law

To preserve a complaint for appellate review, the complaining party must make a specific, timely request, objection, or motion and obtain a ruling on the same. TEX. R. APP. P. 33.1(a); TEX. R. EVID. 103(a)(1); *Wilson v. State*, 71 S.W.3d 346, 349 (Tex. Crim. App. 2002). Subject to two exceptions, a party must continue to object each time inadmissible evidence is offered. *Martinez v. State*, 98 S.W.3d 189, 193 (Tex. Crim. App. 2003). The two exceptions require counsel to either (1) obtain a running objection or (2) lodge a valid objection to all the testimony he deems objectionable on a given subject at one time outside the

hearing of the jury. *Id.*; *Ethington v. State*, 819 S.W.2d 854, 859 (Tex. Crim. App. 1991). "Despite the improper form and content of the question, it is well settled that an error in admission of evidence is cured where the same evidence comes in elsewhere without objection . . . ." *Hudson v. State*, 675 S.W.2d 507, 511 (Tex. Crim. App. 1984). Therefore, if a defendant fails to object until after a question has been asked and answered and no legitimate reason is shown for the delay, his objection is untimely and the prior error is waived. *Lagrone v. State*, 942 S.W.2d 602, 618 (Tex. Crim. App. 1997).

B. Analysis

At trial, appellant's trial counsel objected to the testimony regarding the stolen guns on the basis of relevance: "I'm going to object, Your Honor, to relevance with regard to what he determined with regard to running the weapons and what he determined as to how that's relevant to the offense that's in front of the jury. Objection, relevance."

On appeal, appellant contends that the trial court abused its discretion in admitting this evidence under Rule 403. He asserts that the evidence was not probative and that its sole purpose was to incite and impassion the jury against him. However, the jury had already heard evidence from two different witnesses that the guns were stolen, without objection from appellant. Under established case law, the Rules of Evidence, and the Rules of Appellate Procedure, appellant

did not preserve error because he failed to object to this evidence the first time it was presented. Any error is cured where the same evidence comes in elsewhere without objection. *See Ethington*, 819 S.W.2d at 858 (citing *Hudson*, 675 S.W.2d at 511).

We overrule appellant's second issue.

Conclusion

We affirm the judgment of the trial court.

Elsa Alcala
Justice

Panel consists of Chief Justice Radack and Justices Alcala and Bland.

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