

Opinion issued December 16, 2010



In The
Court of Appeals
For The
First District of Texas

NO. 01-10-00102-CR

KIMANI KIAMBU JAMES, Appellant
V.

THE STATE OF TEXAS, Appellee

**On Appeal from the 230th District Court
Harris County, Texas
Trial Court Cause No. 1229072**

MEMORANDUM OPINION

Having convicted appellant, Kimani Kiambu James, of aggravated robbery,¹ the jury then found the allegations in two enhancement paragraphs to be true,² and

¹ See TEX. PENAL CODE ANN. §§ 29.02(a), 29.03(a)(2) (Vernon 2003).

assessed punishment at 75 years confinement. Appellant’s sole point of error on appeal challenges the legal sufficiency of the evidence establishing that appellant used a deadly weapon in the commission of the offense. We affirm.

BACKGROUND

Although the participants agree that appellant and his co-defendant, Sergio Vidale³, knocked on the door of Heidi Clark’s and Joshua Padgett’s apartment in Webster, Texas, they disagree as to what happened next.⁴

Padgett testified that when he opened the door, Vidale forced his way into the apartment, punched Padgett twice in the face, and then appellant entered holding a gun that Padgett later described as a “revolver” with a “wooden handle and metallic gun.” Claiming “this isn’t fake,” appellant hit Padgett on the back of the head with the gun and drew blood. When Padgett’s girlfriend, Clark, came from the back bedroom to investigate the commotion, she saw appellant pointing a “gun” at Padgett’s back. According to Clark, appellant then chased her back to her bedroom, pointed the “gun” in her face, and forced her to rummage through the apartment in search of money and valuables. Although the gun appellant allegedly

² The enhancement paragraphs alleged that appellant had been previously convicted of the felony of burglary of a habitation in 1997 and the felony of possession with intent to deliver a controlled substance in 2002.

³ Vidale pled guilty to aggravated robbery without a plea bargain. His case had not been adjudicated when appellant went to trial.

⁴ Appellant’s appeal challenges the legal sufficiency of the evidence that he used a deadly weapon in the commission of the offense. Our discussion of the relevant facts is limited to this issue.

used was never found, both Padgett and Clark testified at trial that the State's exhibit Smith & Wesson .357 revolver was the same as, or similar to, the "gun" appellant used during the robbery. Like Padgett and Clark, appellant's co-defendant, Vitale, also testified that appellant used a firearm during the robbery. Appellant testified that there was no gun.

STANDARD OF REVIEW

Our review of the legal sufficiency of the evidence is made in the light most favorable to the verdict to determine whether 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, 99 S. Ct. 2781, 2789, 61 L. Ed. 2d 560 (1979); *Vodochodsky v. State*, 158 S.W.3d 502, 509 (Tex. Crim. App. 2005). The standard is the same for both direct and circumstantial evidence cases. *King v. State*, 895 S.W.2d 701, 703 (Tex. Crim. App. 1995). The trier of fact is the sole judge of both the weight and the credibility of the evidence. *Margraves v. State*, 34 S.W.3d 912, 919 (Tex. Crim. App. 2000), *overruled on other grounds by Laster v. State*, 275 S.W.3d 512 (Tex. Crim. App. 2009). Inconsistencies in the evidence are resolved in favor of the verdict. *Curry v. State*, 30 S.W.3d 394, 406 (Tex. Crim. App. 2000).

The sufficiency of the evidence is to be measured against the elements of the offense as defined by a hypothetically correct jury charge which is a charge that

“accurately sets out the law, is authorized by the [charging instrument], 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.”⁵ *Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997). This standard ensures that a judgment of acquittal is reserved for those situations in which there is an actual failure in the State’s proof of the crime. *Id.*

LEGAL SUFFICIENCY OF THE EVIDENCE

Appellant contends that the evidence is legally insufficient to support the jury’s finding that he used or exhibited a “deadly weapon” during the commission of the robbery. Specifically, appellant argues that there is no evidence that the “gun” he used was actually a “firearm” and the jury should not be allowed to draw such an inference.

⁵ The State cites *Cruz v. State* for the proposition that, because the State alleged in the indictment that appellant used or exhibited “a deadly weapon, to wit: A FIREARM,” it necessarily assumed the added burden of proving beyond a reasonable doubt that appellant used or exhibited a “firearm” during the commission of the robbery. 238 S.W.3d 381, 388 (Tex. App.—Houston [1st Dist.] 2006, pet ref’d) (citing pre-*Malik* case *Gomez v. State*, 685 S.W.2d 333, 336 (Tex. Crim. App. 1985)). Although *Gomez* appears to have been implicitly overruled by *Malik v. State*, 953 S.W.2d 234 (Tex. Crim. App. 1997), we need not address this apparent conflict now, because, regardless of whether it was required to do so, the State proved beyond a reasonable doubt that appellant used or exhibited a “firearm” during the commission of the robbery in the present case.

A person commits aggravated robbery if, in the course of committing theft, he: (1) intentionally, knowingly, or recklessly causes bodily injury to another; or (2) intentionally or knowingly threatens or places another in fear of imminent bodily injury or death; and (3) uses or exhibits a deadly weapon. *See* TEX. PENAL CODE ANN. §§ 29.02(a), 29.03(a)(2) (Vernon 2003). A “deadly weapon” is a firearm or anything manifestly designed, made, or adapted for purposes of inflicting death or serious bodily injury. TEX. PENAL CODE ANN. § 1.07(a)(17) (Vernon Supp. 2010). A firearm is a deadly weapon per se. *See id.* at § 1.07(a)(17)(A).

Reasonable inferences that a firearm was utilized during the commission of an offense fall within the sole purview of the jury. *See Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007). Thus, evidence may be sufficient for a rational jury to conclude that a “firearm” was used when only a “gun” is mentioned at trial. *See Wright v. State*, 591 S.W.2d 458, 459 (Tex. Crim. App. 1979) (holding “[t]estimony using any of the terms ‘gun,’ ‘pistol’ or ‘revolver’ is sufficient to authorize the jury to find that a deadly weapon was used” in aggravated robbery); *cf. Carter v. State*, 946 S.W.2d 507, 511 (Tex. App.—Houston [14th Dist.] 1997, pet. ref’d) (concluding testimony that defendant used “gun” similar to .25 caliber automatic pistol displayed at trial was sufficient to prove he used firearm as charged in indictment). Evidence may also be sufficient for a rational jury to

conclude that a “firearm” was used if a witness testifies that the gun is similar to a firearm displayed at trial. *See Arthur v. State*, 11 S.W.3d 386, 389 (Tex. App.—Houston [14th Dist.] 2000, pet. ref’d) (stating jury able to make reasonable inference that appellant used or exhibited firearm as alleged in indictment based, in part, upon witness testimony that gun was similar to or could be exhibit firearm admitted at trial).

Here, Clark, Padgett, and Vidale all testified that appellant exhibited a “gun” during the robbery. Both Padgett and Clark averred that the State’s exhibit firearm was similar to appellant’s gun and both further testified that they were afraid that appellant would shoot them and feared for their lives. Appellant’s co-defendant, Vidale, in fact, testified that he had pled guilty to aggravated robbery with a firearm.

Viewing the evidence in the light most favorable to the verdict, we hold that a rational juror could have found, beyond a reasonable doubt, that appellant used or exhibited a deadly weapon during the commission of the robbery, and thus, that the evidence is legally sufficient to support appellant’s conviction.

CONCLUSION

We affirm the judgment of the trial court.

Jim Sharp
Justice

Panel consists of Justices Jennings, Alcala, and Sharp.

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