Opinion issued November 3, 2011.

In The

Court of Appeals

For The

First District of Texas

NO. 01-10-01042-CR

JOHNTAE JAVON JOHNSON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 232nd District Court
Harris County, Texas
Trial Court Case No. 1266218

MEMORANDUM OPINION

A jury convicted appellant, Johntae Javon Johnson, of aggravated assault with a deadly weapon.[1] Appellant pleaded true to an enhancement allegation, after which the jury assessed punishment at five years' confinement. In a single point of error, appellant contends the evidence is insufficient to support his conviction. We affirm.

BACKGROUND

The complainant, Kenneth Suter, had just completed his shift as a DJ for the Vixxen Cabaret when he heard about a fight in the parking lot between two employees, Brittany Brown, a dancer, and Jackie Peppers, a waitress. Suter and another DJ, Matt Graves, went outside and tried to separate the two women. Suter grabbed Peppers, and Graves grabbed Brown. Peppers's boyfriend, appellant, who was with her at the club that night, pulled a gun, pointed it at Suter, and said "get your hand off my f…ing girlfriend." Suter released Peppers and responded to appellant with racial epithets. Suter then told appellant to put away the gun so that the two men could fight one-on-one. The club manager came outside and ordered Suter to go back inside, which Suter did. After having a drink, Suter went home.

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[1] *See* TEX. PENAL CODE ANN. §§ 22.01, 22.02(a)(2) (Vernon 2011).

The other DJ, Graves, testified to essentially the same facts. As he and Suter attempted to break up the fight, appellant pulled a gun and waved it toward Suter and across the crowd toward Graves, stating that he was "calling the shots" now. Graves and Suter released the two women, who resumed fighting. Graves also heard Suter make racial comments toward appellant. Additionally, Graves testified that he saw appellant strike Brown with his fist and a black object in his hand. Brown went limp and fell to the ground.

Brown testified that Peppers was angry because Brown owed Peppers money, so Peppers waited for Brown outside the club after closing. Peppers demanded money and then punched Brown in the face several times. Brown testified that Suter grabbed Peppers to try to break up the fight, but that appellant pulled out a gun and demanded that Suter release Peppers. Brown also testified that appellant struck her in the head with the gun.

During the investigation, Brown gave both a written and videotaped statement to police that differed from her testimony at trial. She told police that two black males held her down while Peppers beat her, and that appellant fired two shots at her. She also changed the amount of money that she claimed Peppers stole from her. In her written statement, Brown never mentioned the two DJs trying to break up the fight.

Peppers also testified, admitting that she assaulted Brown and that appellant was with her at the time.[2] Peppers testified that when Suter grabbed her, appellant told Suter to "take his f…ing hands off his girlfriend." However, Peppers testified that appellant did not have a gun.

Christmas Eve Hall, a former roommate of Peppers, was arrested along with Peppers because Peppers had rented the hotel room in which she and appellant were staying using Hall's name. Hall testified that Peppers told her that Peppers had beaten up another girl and that appellant had pulled a gun on the DJ to prevent him from breaking up the fight.

Houston Police Officer K. Gardner-Sanders testified that, as part of her investigation, she interviewed appellant. In his tape-recorded statement to the officer, appellant admitted being at the club with Peppers and trying to push Suter away from Peppers, but denied pointing or possessing a gun.

SUFFICIENCY OF THE EVIDENCE

In his sole issue on appeal, appellant contends the evidence is legally insufficient to support the jury's verdict.

[2] Although neither Suter nor Graves could identify appellant at trial, Brown identified him as Peppers's boyfriend, "Cook," and Peppers testified that appellant was with her at the club that night.

Standard of Review

When evaluating the legal sufficiency of the evidence, we view the evidence in the light most favorable to the verdict and 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 (1979); *Drichas v. State*, 175 S.W.3d 795, 798 (Tex. Crim. App. 2005). We do not resolve any conflict of fact, weigh any evidence, or evaluate the credibility of any witnesses, as this is the function of the trier of fact. *See Dewberry v. State*, 4 S.W.3d 735, 740 (Tex. Crim. App. 1999).

Analysis

A person commits aggravated assault if he intentionally or knowingly threatens another with imminent bodily injury while using or exhibiting a deadly weapon during the assault. TEX. PENAL CODE ANN. §§ 22.01, 22.02 (Vernon 2011). To show assault by threat, the State must show that appellant acted with the intent to cause in another person a reasonable apprehension of imminent bodily injury, though not necessarily with the intent to actually cause such injury. *Dobbins v. State*, 228 S.W.3d 761, 766 (Tex. App.—Houston [14th Dist.] 2007, pet. ref'd).

Appellant argues that "[t]he evidence of an implicit threat by Appellant pointing a weapon was so weak that a rational trier of fact could not have found that essential element beyond a reasonable doubt." Specifically, appellant argues

that he made no express verbal threat to Suter, and that no threat could be implied because (1) no shots were fired, (2) "the evidence of pointing [the gun] was confused at best," (3) appellant "primarily waved the gun at the crowd," and (4) Peppers testified that she never saw appellant with a gun. We disagree.

A perpetrator's threat of serious bodily injury may be communicated to the victim by his action, conduct, or words. *McGowan v. State*, 664 S.W.2d 355, 357 (Tex. Crim. App. 1984). Here, three witnesses—Suter, Graves, and Brown—saw appellant[3] pull a gun. Suter testified that appellant pulled a gun, pointed it at Suter, and said, "get your hand off my f…ing girlfriend." Although Graves described appellant as waving the gun across the crowd, he described the "wave" as beginning with the gun pointed toward Suter and ending with the gun pointed toward Graves. Graves also testified that appellant shouted that he was "calling the shots." From these words and deeds, a rational jury could have concluded that appellant threatened Suter with bodily injury while using a deadly weapon. *See Ward v. State*, 113 S.W.3d 518, 521 (Tex. App.—Houston [1st Dist.] 2003, pet. ref'd) (holding that aiming deadly weapon at supposed victim is sufficient evidence of threat to sustain aggravated assault conviction); *see also Anderson v.*

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[3] Although Suter and Graves were unable to identify appellant at trial, appellant does not contest the issue of identity. In his statement, he admitted being at the bar with Peppers, and Peppers and Brown both testified that appellant was with Peppers at the bar. Thus, the issue is not one of identity. The issue is whether appellant was armed with a gun and threatened Suter.

State, 11 S.W.3d 369, 375–76 (Tex. App.—Houston [1st Dist.] 2000, pet. ref'd) (pointing a gun at a supposed victim sufficient evidence of threat for aggravated assault); *Rodriguez v. State*, 955 S.W.2d 171, 174 (Tex. App.—Amarillo 1997, no pet.) (same).

Nevertheless, appellant claims that *Ward* is distinguishable because, in that case, the defendant fired shots when he committed the aggravated assault. We note, however, that aggravated assault does not require that the appellant actually discharge the deadly weapon. Rather, it requires only that the assault be committed while using *or exhibiting* a deadly weapon. TEX. PENAL CODE ANN. §§ 22.01, 22.02 (Vernon 2011). Three witnesses testified that appellant exhibited a deadly weapon.

Regarding appellant's claim that the evidence is insufficient because Peppers testified that appellant did not have a gun, we note that the jury resolves conflicting evidence. *See Dewberry*, 4 S.W.3d at 740. In a sufficiency of evidence review, we do not re-evaluate the weight and credibility of the witnesses and substitute our judgment for that of the fact finder. *See Williams v. State*, 235 S.W.3d 742, 750 (Tex. Crim. App. 2007); *see also Lee v. State*, 176 S.W.3d 452, 458 (Tex. App.—Houston [1st Dist.] 2004) ("[T]he jury was free to believe all or any part of the testimony of the State's witnesses, and disbelieve all or any part of the witness

testimony."), *aff'd*, 206 S.W.3d 620 (Tex. Crim. App. 2006). Here, the jury was free to believe Suter, Graves, and Brown, and to disbelieve Peppers.

Viewing the evidence in the light most favorable to the verdict, we conclude that a rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *See Jackson*, 443 U.S. at 319, 99 S. Ct. at 2789; *Drichas*, 175 S.W.3d at 798. Accordingly, we overrule appellant's first issue.

CONCLUSION

We affirm the trial court's judgment.

Sherry Radack
Chief Justice

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

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