**Opinion issued December 1, 2011.**

**In The**

# Court of Appeals

**For The**

# First District of Texas

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**NO. 01-11-00085-CR**

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**CHESTER JOSEPH MCCLELLAND, Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

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**On Appeal from the 337th District Court**
**Harris County, Texas**
**Trial Court Case No. 1232804**

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## MEMORANDUM OPINION

A jury convicted Chester Joseph McClelland of aggravated robbery and, after finding true two enhancement paragraphs, assessed his punishment at life in prison. *See* TEX. PENAL CODE ANN. § 29.03 (West 2011). In his sole issue on

appeal, McClelland contends that the evidence is legally insufficient for a jury to find him guilty of aggravated robbery because the evidence does not support a finding that the hammer used by McClelland during the robbery was a deadly weapon. We hold that the evidence is sufficient for a rational jury to find beyond a reasonable doubt that the hammer was a deadly weapon. We therefore affirm the judgment of the trial court.

## Background

On September 14, 2009, Juan Tellez and Dora Garza, employees of EZ Pawn, arrived at the store to prepare for its morning opening. While performing their duties, Tellez and Garza noticed McClelland trying to open the locked front doors. Although unsuccessful the first time, McClelland returned to the store and again tried to open its doors. Uneasy about McClelland, Garza asked Tellez to step outside to place the larger display merchandise in front of the store even though it was normally Garza's job to do so. When Tellez walked outside, he noticed McClelland waiting on the curb near the store. Tellez, recognizing McClelland from a prior shoplifting incident at the store, told McClelland to leave the premises. McClelland stood up and pointed a brown paper bag, which appeared to contain a gun, at Tellez's head. McClelland taunted Tellez by saying that he bet that Tellez "did not feel so big anymore." Continuing to hold the bag near Tellez's head, McClelland forced Tellez back into the store.

Once inside, McClelland told Garza and Tellez to lie on the floor. McClelland tied Tellez's hands behind his back with an extension cord but did not tie up Garza. While Tellez and Garza lay on the floor, McClelland put the paper bag down on the counter and began to walk around the store. McClelland picked up a hammer from a counter and used it to hit television equipment located at the rear of the store. When McClelland turned away, Tellez looked inside of the brown bag and noticed that it contained only a wire that was shaped like a gun barrel. Tellez told Garza to run, and she fled. When McClelland noticed Garza's attempt to escape, he ran at Tellez and Garza with the hammer raised. When McClelland got close to Tellez, McClelland lifted his arms to swing the hammer at Tellez. Tellez, unable to completely free himself from the cord, was restrained near the door but wrestled with McClelland and grabbed the hammer. During the ensuing struggle, Tellez hit McClelland multiple times with the hammer. After the police arrived and arrested McClelland, he was treated by EMTs and was later sent to the hospital for treatment.

## Sufficiency of the Evidence

### A. Standard of Review

"[E]vidence is insufficient to support a conviction if, considering all record evidence in the light most favorable to the verdict, a factfinder could not have rationally found that each essential element of the charged offense was proven

beyond a reasonable doubt." *Gonzalez v. State*, 337 S.W.3d 473, 478 (Tex. App.—Houston [1st Dist.] 2011, pet. ref'd). Under this standard there are four circumstances in which the evidence is insufficient: "(1) the record contains no evidence probative of an element of the offense, (2) the record contains a mere "modicum" of evidence probative of an element of the offense, (3) the evidence conclusively establishes a reasonable doubt, and (4) the acts alleged do not constitute the criminal offense charged." *Id.* at 479. An appellate court presumes that the fact finder resolved any conflicting inferences in favor of the verdict and defers to that resolution. *See Jackson v. Virginia*, 443 U.S. 307, 326, 99 S. Ct. 2781, 2793 (1979); *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007). An appellate court may not re-evaluate the weight and credibility of the record evidence and thereby substitute its own judgment for that of the fact finder. *See Williams v. State*, 235 S.W.3d 742, 750 (Tex. Crim. App. 2007).

**B. Applicable Law**

The Texas Penal Code provides, in pertinent part, that a person commits robbery if the person, "in the course of committing theft . . . and with intent to obtain or maintain control of the property, . . . intentionally, knowingly, or recklessly causes bodily injury to another . . . ." TEX. PENAL CODE ANN. § 29.02 (a)(1) (West 2011). The offense is elevated to aggravated robbery when the person uses or exhibits a deadly weapon. *See* TEX. PENAL CODE ANN. § 29.03(a)(2) (West

2011). A deadly weapon is defined as "anything that in the manner of its use or intended use is capable of causing death or serious bodily injury." TEX. PENAL CODE ANN. § 1.07(a)(17)(B) (West 2011).

Like a knife or fist, a hammer is not a deadly weapon *per se*. However, depending on the circumstances, a jury may determine it to be a deadly weapon under the statute. *See Bethel v. State*, 842 S.W.2d 804, 807–08 (Tex. App.—Houston [1st Dist.] 1992, no writ.) (hammer used in commission of assault found to be deadly weapon); *see Bui v. State*, 964 S.W.2d 335, 342–43 (Tex. App.—Texarkana 1998, pet. ref'd.) (evidence sufficient to find Duraflame log was deadly weapon). Some of the factors that a jury may consider in determining whether an object is a deadly weapon under this definition include: the size and shape of the weapon, testimony by the victim that he feared death or serious bodily injury, the severity of any wounds inflicted, the manner in which the assailant allegedly used the weapon, physical proximity of the parties, and testimony as to the weapon's potential for causing death or serious bodily injury. *See Denham v. State*, 574 S.W.2d 129, 130 (Tex. Crim. App. 1978) (en banc); *Romero v. State*, 331 S.W.3d 82, 83 (Tex. App.—Houston [14th Dist.] 2010, no pet.); *Jackson v. State*, 668 S.W.2d 723, 725 (Tex. App.—Houston [14th Dist.] 1983, pet. ref'd) (evidence sufficient to find ax handle deadly weapon where victim testified he was afraid and officer testified the ax handle could be a deadly weapon). "No one factor is

determinative and an appellate court must examine each case on its own facts to determine whether the fact finder could have concluded from the surrounding circumstances that the object used was a deadly weapon." *In re S.B.*, 117 S.W.3d 443, 447 (Tex. App.—Fort Worth 2003, no pet.) (citing *Brown v. State*, 716 S.W.2d 939, 947 (Tex. Crim. App. 1986)). The plain language of the Texas Penal Code does not require that the actor actually intend death or serious bodily injury, only that the actor intend to use the object in a manner that renders it capable of causing death or serious bodily injury. *McCain v. State*, 22 S.W.3d 497, 503 (Tex. Crim. App. 2000). Thus, the State must show only that the "use or intended use is *capable* of causing death or serious bodily injury." *Tucker v. State*, 274 S.W.3d 688, 691 (Tex. Crim. App. 2008) (quoting *McCain*, 22 S.W.3d at 503).

**C. Analysis**

On appeal, McClelland asserts that the evidence is insufficient to show that the hammer used during the robbery was a deadly weapon. McClelland points to the testimony of Officer E. Arjona who testified that the hammer in this case was small. McClelland notes that while Arjona testified that *a* hammer could be a deadly weapon, he didn't testify that *this* hammer could be. McClelland also asserts that because Tellez did not suffer any injuries, and McClelland did not make any verbal threats, the evidence is legally insufficient for the jury to find the hammer was a deadly weapon.

At trial, the State presented a surveillance video showing McClelland making his way towards Tellez and Garza, with the hammer in his hand. The State also put on testimony from Tellez and Garza that McClelland had charged at Tellez and tried to hit Tellez with the hammer. Tellez testified that when McClelland got close to Tellez, McClelland lifted his arms to swing the hammer at Tellez, but the two wrestled and Tellez managed take the hammer away. Garza testified that she saw McClelland holding the hammer up at Tellez, and that McClelland had tried to hit Tellez with the hammer. Garza also testified that she was afraid and thought that she was going to die. From this testimony and from the video that showed the manner in which McClelland held the hammer as he walked towards Tellez and the proximity of the two men during the struggle, a jury rationally could have concluded that McClelland "intend[ed] a use of the object in which it would be capable of causing death or serious bodily injury." *McCain*, 22 S.W.3d at 503.

Although the presence and severity of wounds is not required to find deadliness, it is another factor the jury could have considered. *See Denham*, 574, S.W.3d at 130. Here, Tellez managed to gain control of the hammer before McClelland used it against him. The wounds that McClelland sustained from the hammer were severe enough that, even after McClelland was treated on-site by EMTs, he was taken to a hospital for further treatment. The jury was also able to consider the size and shape of the hammer, as it was offered into evidence at trial.

*See Robertson v. State*, 163 S.W.3d 730, 734 (Tex. Crim. App. 2005) (when switchblade was introduced into evidence fact finder could examine it and ascertain for itself whether it had physical characteristics that revealed a deadly nature).

McClelland relies on *Lewis v. State*, 638 S.W.2d 148 (Tex. App.—El Paso, 1982, pet. ref'd) to support his contention that the evidence was insufficient for a jury to find that the hammer was a deadly weapon. In *Lewis*, the El Paso Court of Appeals found that the evidence was insufficient to support a conclusion that the hammer was a deadly weapon. *Lewis*, 638 S.W.2d at 151–52. This case is distinguishable because, in *Lewis*, the hammer was not introduced into evidence, and there was no evidence of the dimensions or weight of the hammer. *Id.* at 151. Nor was there evidence of the proximity of the combatants or the hammer swing to the victim. *Id.* We find the evidence in *Lewis* significantly different from the evidence adduced in this case.

Based on the evidence presented at trial, we conclude that a rational jury could have found beyond a reasonable doubt that the hammer, in its manner of use, was "capable of causing death or serious bodily injury." *See Bethel*, 842 S.W.2d at 807–08 (hammer used in commission of assault was a deadly weapon); *Charleston v. State*, 33 S.W.3d 96, 99–100 (Tex. App.—Texarkana 2000, pet. ref'd) (finding legally sufficient evidence of deadly weapon when appellant told complainant he

was robbing her, held wrench over her head, and complainant testified wrench could have killed her with one hit); *see Granger v. State* 722 S.W.3d 175, 177 (Tex. App.—Beaumont 1986, pet. ref'd) (evidence appellant, using both hands, swung club at victim multiple times, breaking club and causing injuries to victim's head, was sufficient to find weapon deadly).

Accordingly, we overrule McClelland's sole issue.

## Conclusion

We affirm the judgment of the trial court.

Rebeca Huddle
Justice

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

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