Opinion issued March 27, 2018

In The

Court of Appeals

For The

First District of Texas

NO. 01-16-00774-CR

DERICK BELL, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 262nd District Court
Harris County, Texas
Trial Court Case No. 1476651

MEMORANDUM OPINION

A jury convicted appellant Derick Bell of aggravated robbery with a deadly weapon, and it assessed a punishment of imprisonment for 12 years. *See* TEX. PENAL CODE § 29.03(a)(2). On appeal, Bell challenges the sufficiency of the

evidence to support his conviction. Finding that the evidence allowed a rational trier of fact to find Bell guilty beyond a reasonable doubt, we affirm.

Background

Zayda Carmona lived at a Houston apartment complex for approximately two years, and she frequently used the exercise room there. The room had video surveillance and could be accessed only by those who had a key.

Early one morning, Carmona went to the exercise room and observed appellant Derick Bell lying on the floor. After hesitating to enter, Bell assured her he would not do anything to her "because there were cameras." She started to use the treadmill. Bell approached her and asked a question, which she answered. He then left the room.

Bell returned at a later time wearing different clothing, while Carmona was still there. He knocked on the door and she opened it, assuming that he lived in the complex since she had seen him there earlier. She continued to exercise. After some time, Bell approached her again and asked her what kind of phone she had. She replied that she did not know. He moved closer to her, within arm's reach, and said, "I want your phone."

Carmona attempted to call 911, but Bell stopped her. When she refused to give him her phone, he demanded it, saying "Give me your phone . . . because I have a gun." He held a gun, which was in his waistband, throughout most of the

encounter. At one point Bell showed the gun to Carmona by pulling it slightly out of his waistband, then he immediately put it back in his pants. He attempted to grab the phone several times as he got "closer and closer" to her. Carmona held out her arm to prevent Bell from removing the gun from his waistband until she was able to push him away and run toward her apartment. Bell did not follow her. She contacted the apartment manager who then reported the incident to police.

Approximately two weeks later, Bell was arrested at the same apartment complex for criminal trespass in the exercise room. No weapons were recovered from him at that time. He was later identified by Carmona and charged with aggravated robbery.

At trial, Carmona stated that she was unfamiliar with firearms, but she had seen them before and saw a gun in Bell's hand during their encounter in the exercise room. She admitted that she could not definitively say that the object in Bell's hand was not a BB gun or a pellet gun, but at the time she believed it was a handgun. Carmona testified that she felt "rage" and fear during the encounter, and that she was "somewhat blocked mentally" because she "couldn't yell." She also testified that she attempted to call 911, and she pushed Bell's hand down to prevent him from pulling the gun out. Following the incident, she never slept at the apartment complex again, and she moved out within 30 days. Sergeant Investigator J. Freeman, who conducted an investigation, testified that based on his review of

video surveillance of the incident, he believed Bell had a firearm in his hand. He admitted he was not certain.

After the State rested, Bell moved for a directed verdict "in regards to the firearm," and the court denied the motion.

During the defense's case-in-chief, Bell admitted that he approached Carmona in the exercise room, but he claimed it was because he had lost his phone in the room the day before and he believed she had it. He never reported the missing phone to the police or to property management because he felt it would be a "waste of time." He admitted that he asked Carmona how she got the phone and that he tried to grab the phone from the treadmill. But he maintained that he never threatened her or demanded the phone from her. After viewing still images from the video surveillance, Bell claimed he had nothing in his hand and whatever appeared to be in his hand was a "reflection off the light and my camera."

The jury found Bell guilty of aggravated robbery with a deadly weapon, specifically a firearm.

Bell appealed. The originally appointed appellate lawyer filed an *Anders* brief, which was struck.[*] A new lawyer was appointed, and a brief was filed on the merits.

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[*] Although the appeal now has been briefed on the merits, the State's appellate brief takes issue with the rejection of the *Anders* brief, complaining in the "Summary of the Argument" section that "this Court did not explain what possibly meritorious issues existed in the record."

This court's order explained at length why the *Anders* brief was defective, requiring the appointment of a new lawyer to safeguard the appellant's constitutional right to counsel. In the course of evaluating the effectiveness of trial counsel, the *Anders* brief observed that "trial counsel did not present any evidence on punishment." The *Anders* brief went on to note: "The reason for trial counsel's failure to put on mitigation evidence is not known. Where, as here, there is no proper evidentiary record developed as to trial counsel's reasoning, ineffectiveness cannot be sustained." As explained in the order striking the *Anders* brief, that reasoning did not establish that an ineffectiveness claim would be *frivolous*. Instead, it suggested that a claim of ineffectiveness by the trial lawyer might be *unsuccessful* on direct appeal, because the original appellate lawyer did not know the reason for trial counsel's failure to present mitigation evidence, and because the original appellate lawyer failed to develop a "proper evidentiary record" as to trial counsel's reasoning. Investigating and undertaking the necessary procedural steps to supplement the record with such evidence, if it exists and supports a non-frivolous claim for relief, is one of appellate counsel's duties as part of the "conscientious examination" of the appeal, including a "due diligence investigation" on behalf of the client. *Echeta v. State*, 510 S.W.3d 100, 104 (Tex. App.—Houston [1st Dist.] 2016) (order) (citing *Anders v. California*, 386 U.S. 738, 741, 87 S. Ct. 1396, 1399 (1967), and *In re Schulman*, 252 S.W.3d 403, 407 (Tex. Crim. App. 2008)). The original appellate counsel affirmatively relied on the absence of a "proper evidentiary record" to justify withdrawal, but she herself was the only lawyer representing the appellant who could have created such a record, if it were justified. An appointed appellate lawyer cannot rely entirely on a procedural circumstance that was entirely under her own control (here, the unexplained failure to develop

Analysis

Bell raises two issues on appeal. In his first issue, he challenges the legal sufficiency of the evidence to support his conviction. In his second issue, he contends that the trial court erred by denying his motion for a direct verdict. We treat a contention that a motion for a directed verdict was denied in error as a challenge to the legal sufficiency of the evidence, thus we apply the same analysis to both issues. *Lewis v. State*, 193 S.W.3d 137, 139–40 (Tex. App.—Houston [1st Dist.] 2006, no pet.) (citing *Williams v. State*, 937 S.W.2d 479, 482 (Tex. Crim. App. 1996)).

Every criminal conviction must be supported by legally sufficient evidence as to each element of the offense that the State is required to prove beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 315, 99 S.Ct. 2781, 2787 (1979); *Adames v. State*, 353 S.W.3d 854, 859 (Tex. Crim. App. 2011). To determine whether this standard has been met, we review all of the evidence in the light most favorable to the verdict, and we decide whether a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

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evidence and file a motion for new trial) to demonstrate that an appeal would be frivolous.

The State filed a motion for en banc reconsideration of our abatement of the case for appointment of another lawyer. That motion was denied by the en banc court, unanimously.

Jackson, 443 U.S. at 319, 99 S.Ct. at 2789; *Brooks v. State*, 323 S.W.3d 893, 902 (Tex. Crim. App. 2010). The evidence may be circumstantial or direct, and we permit juries to draw multiple reasonable inferences from the evidence presented at trial. *Hooper v. State*, 214 S.W.3d 9, 14 (Tex. Crim. App. 2007). The jury is the sole judge of witness credibility and the weight given to any evidence presented, and we will not find evidence insufficient based solely upon the fact that an appellant presented a different version of events. *Merritt v. State*, 368 S.W.3d 516, 525–26 (Tex. Crim. App. 2012). We presume that the jury resolved any conflicting inferences in favor of the verdict, and we defer to that determination. *Id*. at 526.

A person commits robbery when, "in the course of committing theft" as defined in Chapter 31, and with intent to obtain or maintain control of the property, he intentionally or knowingly threatens or places another person in fear of imminent bodily injury or death. TEX. PENAL CODE § 29.02(a)(2). "Theft" is defined as the unlawful appropriation of property with intent to deprive the owner of the property. *Id.* § 31.03(a). For purposes of the robbery statute, "[i]n the course of committing theft" includes "conduct that occurs in an attempt to commit . . . theft." *Id.* § 29.01(1). The circumstances that elevate robbery to aggravated robbery include using or exhibiting a deadly weapon in the course of committing robbery. *Id.* § 29.03(a)(2). A firearm is per se a deadly weapon. *See id.* § 1.07(a)(17); *Gomez v. State*, 685 S.W.2d 333, 336 (Tex. Crim. App. 1985).

Bell does not contest his identification in this case. Instead, his evidentiary challenge relies upon the fact that he did not succeed in obtaining the phone from Carmona. However, the element of "in the course of committing theft" does not require proof that a theft was actually completed, rather it refers to any conduct committed during an attempt or commission of theft, or during immediate flight after an attempted or completed theft. *See* TEX. PENAL CODE § 29.01(1); *Wolfe v. State*, 917 S.W.2d 270, 275 (Tex. Crim. App. 1996). While evidence of an intent to steal is essential to proving an attempted theft, it may be inferred from circumstantial evidence. *See Wolfe*, 917 S.W.2d at 275.

Bell's own testimony that he "attempted to grab" the phone "a couple times," Carmona's similar testimony, and the video surveillance all support a conclusion that he tried to take the phone. Based on this evidence, along with Bell's threatening actions and demands that she give him the phone, the jury rationally could infer that Bell's intent was to take the phone and maintain control of it. *See Ford v. State*, 152 S.W.3d 752, 756 (Tex. App.—Houston [1st Dist.] 2004, pet. ref'd) (holding that "juries may infer intent from the defendant's conduct and surrounding circumstances"). Further, given Carmona's testimony that she felt "rage" and fear, felt "somewhat blocked mentally" because she "couldn't yell," attempted to call 911, pushed Bell's hand down to prevent him from pulling the gun out, ran to her apartment, and never slept at the apartment complex again

following the incident, the jury reasonably could have determined that Bell's actions placed Carmona in fear of imminent bodily injury or death.

The remainder of Bell's argument addresses the sufficiency of the evidence related to the deadly-weapon element of aggravated robbery. He first notes that a firearm was never recovered, and that he was not found in possession of a weapon when he was arrested almost two weeks after the incident. However, neither proof that Bell possessed a weapon before or after the robbery, nor recovery of the firearm, was required to support a conviction. *See Munoz v. State*, No. 01-13-00810-CR, 2015 WL 1020205, at *3 (Tex. App.—Houston [1st Dist.] Mar. 5, 2015, no pet.) (mem. op., not designated for publication); *see also Price v. State*, 227 S.W.3d 264, 266–67 (Tex. App.—Houston [1st Dist.] 2007, pet. dism'd).

Bell also relies upon Carmona's lack of familiarity with firearms, as well as Freeman's inability to testify with certainty that a firearm was used based on his review of the video surveillance. Bell contends that because Carmona did not know the difference between a firearm, BB gun, and a pellet gun, the evidence was not sufficient to support a finding that a deadly weapon was used.

Carmona testified that although she did not know enough about firearms to use one, she had seen them before, and she was convinced that Bell had a handgun in his waistband that day. She also stated that Bell told her he had a gun and that she could see it in his hand when he showed it to her. Freeman also testified that he

reviewed the surveillance and he believed the object to be a firearm which could cause serious bodily injury or death. On cross-examination he further testified that there are pellet guns, BB guns, and even toy guns that look similar to firearms, and that he could not say for certain that the object was not one of these imitation weapons. Just as recovery of the weapon is not required to meet the legal sufficiency standard for a deadly-weapon finding, there is likewise no requirement that a victim be able to distinguish one type of firearm from another or even to describe the firearm used. *See Price*, 227 S.W.3d at 266–67; *see also Wright v. State*, 591 S.W.2d 458, 459 (Tex. Crim. App. 1979) (when complainant stated that appellant pulled a weapon on him and referred to it using the terms "gun," "revolver," and "pistol" interchangeably throughout his testimony, testimony was sufficient to support deadly-weapon finding).

The State presented testimony from Carmona, who testified that Bell told her he had a gun, that she could see it clearly, and that she was confident he had a handgun that day. The video surveillance shown to the jury corroborates her testimony. There was no evidence that the "gun" Bell claimed to have and showed to Carmona was merely a BB or pellet gun. The jury, as factfinder, could evaluate the credibility of the witnesses and determine the weight of any particular testimony or other piece of evidence. *Johnson v. State*, 23 S.W.3d 1, 7 (Tex. Crim. App. 2000). As such, the jury was entitled to believe that Carmona could recognize

a gun capable of deadly force. *See Benavides v. State*, 763 S.W.2d 587, 589 (Tex. App.—Corpus Christi 1988, pet. ref'd) ("Absent any specific indication to the contrary at trial, the jury should be able to make the reasonable inference, from the victim's testimony that a 'gun' was used in the commission of a crime, that the gun was a firearm."); *see also Hunter v. State*, No. 01-00-00722-CR, 2001 WL 754458, at *2 (Tex. App.—Houston [1st Dist.] July 5, 2001, no pet.) (mem. op., not designated for publication). Additionally, Bell's threatening behavior, the fear with which Carmona reacted to the gun, and her testimony that Bell told her he had a gun while demanding her phone, further support a conclusion that the weapon was a firearm rather than a nonlethal or an imitation gun. *See Price*, 227 S.W.3d at 267 (citing *Edwards v. State*, 10 S.W.3d 699, 701 (Tex. App.—Houston [14th Dist.] 1999, pet. dism'd)); *see also Davis v. State*, 180 S.W.3d 277, 286 (Tex. App.—Texarkana 2005, no pet.).

Considering all of the evidence in the light most favorable to the verdict, and permitting reasonable inferences and deductions from the evidence presented, we conclude that a juror could have found, beyond a reasonable doubt, that Bell displayed a firearm and attempted to steal Carmona's phone. We overrule Bell's first and second issues.

Conclusion

We affirm the judgment of the trial court.

Michael Massengale
Justice

Panel consists of Justices Higley, Massengale, and Lloyd.

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