Opinion issued May 24, 2018

In The

Court of Appeals

For The

First District of Texas

NO. 01-17-00528-CR

JASON WAYNE MCBRIDE, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 207th District Court
Comal County, Texas
Trial Court Case No. CR2016-008

MEMORANDUM OPINION

A grand jury in Comal County indicted Jason McBride on six criminal counts: (1) continuous violence against the family; (2) assault—family violence, by impeding breath or circulation, occurring on or about September 20, 2014; (3) assault—family violence, by impeding breath or circulation, occurring on or

about March 29, 2015; (4) aggravated assault with a deadly weapon; (5) three violations of a court order of emergency protection; and (6) evading arrest while having a previous conviction.[1] A jury acquitted McBride of count 3 and found him guilty of the remaining counts. The trial court assessed his punishment at 20 years' confinement for counts 1, 2, and 5; 40 years' confinement for count 4; and 10 years' confinement on count 6.

McBride appeals his convictions for counts 2 and 4, contending that they violate the double-jeopardy clause of the Fifth Amendment to the United States Constitution. McBride further contends that insufficient evidence supports his conviction for the aggravated assault alleged in count 4 because the State failed to show that he used a deadly weapon, and that the trial court's judgments in counts 1, 2, 5, and 6 erroneously reflect that he exhibited a deadly weapon during the commission of those offenses. We hold that McBride failed to preserve his double-jeopardy complaint by objecting in the trial court; sufficient evidence supports the deadly weapon finding; and the judgments in counts 1, 2, 5, and 6 must be reformed to remove the deadly weapon finding for those offenses. We therefore reform the

[1] Pursuant to the Texas Supreme Court's docket equalization powers, this appeal was transferred from the Third Court of Appeals to this Court on July 13, 2017. *See* TEX. GOV'T CODE § 73.001; Order Regarding Transfer of Cases from Courts of Appeals, Misc. Docket No. 17-9066 (Tex. June 20, 2017).

judgment to eliminate the deadly weapon finding for those offenses and, as reformed, affirm.

BACKGROUND

In 2012, Cathy (a pseudonym) contacted McBride after her home, near Canyon Lake in Comal County, was burglarized. Cathy had been referred to McBride to assist her in repairing and securing her home. Within a month or two of meeting each other, Cathy and McBride began dating. McBride moved in to live with Cathy.

Detective A. Moreno of the Comal County Sheriff's Office testified about 11 violent incidents involving McBride and Cathy. Among them was an incident in late August 2014. Deputy M. Sanchez responded to a call from Cathy asking for assistance in removing her boyfriend from her residence. Sanchez noticed that Cathy had two black eyes and her nose was slightly crooked. Cathy stated that McBride had broken her nose by slamming her face into a metal table. He also threw the table at her. Sanchez photographed Cathy's face to document her injuries.

By October 2014, McBride's brother and his brother's girlfriend had moved into Cathy's house. Cathy told McBride that she couldn't afford to take care of all of them and asked him to have them leave. McBride became angry and violent. He began beating Cathy's leg. She tried to escape, but McBride began to strangle her. Cathy called McBride's brother and others in the house to intervene, but she received

no response. McBride placed his hands around Cathy's neck until she became unconscious and urinated on herself. When Cathy regained consciousness, McBride let her go upstairs to change clothes. After changing, Cathy grabbed her purse and car keys and started back down the stairs, where she was confronted by McBride. He slammed her to the ground. She hit the tile floor, knees first. McBride began strangling Cathy again. McBride's brother ran downstairs and pushed McBride away. When the brothers started fighting, Cathy rushed out the door. Cathy met with sheriff's deputies that day and reported the incident.

In another incident in March 2015, McBride hit Cathy on the right side of the leg with a baseball bat. McBride noticed that the blow caused Cathy to urinate on herself; he yelled at her and told her to take a bath. Cathy complied, but when she got into the tub, McBride started to beat her again, this time on the side of her head. Cathy got out of the bathtub and went into the bedroom. McBride started choking her and pushed her head face-down into the mattress. After McBride released her, Cathy grabbed her purse, ran out of the house, got in her car, and called 911. She met with a deputy on the side of the road nearby.

One morning in May 2015, McBride blamed Cathy for his dog's injuries. He locked her out of the house when he found out that she had asked a neighbor for help starting her car. McBride allowed her to enter, but he swung a bat toward Cathy's legs. He missed her leg but made contact with her hand, injuring it.

After that incident, McBride was arrested. Cathy received an emergency protective order prohibiting McBride from coming within 500 feet of her home. McBride nevertheless returned to Cathy's house after he was released from jail. Cathy called sheriff's deputies to have McBride removed from her home. McBride was found in Cathy's house, in violation of the protective order, on other occasions as well.

DISCUSSION

I. Double Jeopardy

McBride complains that the jury could have relied on the same conduct and acts found in the second and fourth paragraphs of count 1 to find McBride guilty under counts 2 and 4. Thus, he contends, his convictions for assault—family violence impeding by breath or circulation, occurring on or about September 20, 2014, and for aggravated assault with a deadly weapon violate the Double Jeopardy Clause of the Fifth and Fourteenth Amendments to the United States Constitution.

A. Applicable law

The Double Jeopardy Clause states that no person shall be "subject for the same offence to be twice put in jeopardy of life or limb." U.S. CONST. amend. V. Courts have recognized three types of double-jeopardy claims: a second prosecution for the same offense after acquittal; a second prosecution for the same offense after conviction; and multiple punishments for the same offense. *See, e.g.*, *Illinois v.*

Vitale, 447 U.S. 410, 415, 100 S. Ct. 2260, 2264 (1980); *Garfias v. State*, 424 S.W.3d 54, 58 (Tex. Crim. App. 2014). "A multiple-punishments violation can arise either in the context of lesser-included offenses, where the same conduct is punished under a greater and a lesser-included offense, and when the same conduct is punished under two distinct statutes where the Legislature only intended for the conduct to be punished once." *Garfias*, 424 S.W.3d at 58. The protection against multiple punishments applies when, as here, a defendant is subjected to a single trial. *Eubanks v. State*, 326 S.W.3d 231, 243 (Tex. App.—Houston [1st Dist.] 2010, pet. ref'd) (citing *Ex parte Herron*, 790 S.W.2d 623, 624 (Tex. Crim. App. 1990)).

McBride did not preserve his double-jeopardy complaint in the trial court, but he contends that the error is apparent on the face of the record. A defendant may raise a double-jeopardy complaint for the first time on appeal if the undisputed facts show the double-jeopardy violation is clearly apparent on the face of the record and enforcement of procedural-default rules would serve no legitimate state interest. *Garfias*, 424 S.W.3d at 57–58; *Langs v. State*, 183 S.W.3d 680, 687 (Tex. Crim. App. 2006); *Ellison v. State*, 425 S.W.3d 637, 643 (Tex. App.—Houston [14th Dist.] 2014, no pet.). "A double-jeopardy claim is apparent on the face of the trial record if resolution of the claim does not require further proceedings for the purpose of introducing additional evidence in support of the double-jeopardy claim." *Ex parte Denton*, 399 S.W.3d 540, 544 (Tex. Crim. App. 2013). On the other hand, "[w]hen

offenses, one of which could give rise to a multiple-punishment double-jeopardy violation, are listed disjunctively in a jury charge, the burden is upon the defendant to 'preserve, in some fashion, a double jeopardy objection at or before the time the charge is submitted to the jury.'" *Langs*, 183 S.W.3d at 687 (quoting *Gonzalez v. State*, 973 S.W.3d 427, 431 (Tex. App.—Austin 1998), *aff'd*, 8 S.W3d 640 (Tex. Crim. App. 2000)).

B. Analysis

To determine whether McBride preserved his double-jeopardy complaint for review, we consider whether the issue he raises is apparent on the face of the record. The instruction for count 1 asked the jury to find whether McBride engaged in conduct that intentionally, knowingly, or recklessly caused bodily injury to Cathy on two or more of the following occasions between July 15, 2014 and June 21, 2015:

> On or about August 29, 2014, the Defendant did then and there intentionally, knowingly, or recklessly cause bodily injury to [Cathy], by grabbing, shoving, striking, or throwing the said [Cathy] with the hands of the said Defendant,
>
> On or about September 20, 2014, the Defendant did then and there intentionally, knowingly, or recklessly cause bodily injury to [Cathy] by striking the said [Cathy], or by shoving the said [Cathy] with the hands of the said Defendant,
>
> On or about March 29, 2015, the Defendant did then and there intentionally, knowingly, or recklessly cause bodily injury to [Cathy] by striking the leg of the said [Cathy] or by striking the face of the said [Cathy] with the hands or fists of the said Defendant,

> On or about May 25, 2015, the Defendant did then and there intentionally, knowingly, or recklessly cause bodily injury to [Cathy], by striking the said [Cathy] on the hand or arms, with a wooden ax handle, a baseball bat, or a similar type of wooden club, or
>
> On or about June 18, 2015, the Defendant did then and there intentionally, knowingly, and recklessly cause bodily injury to [Cathy], by hitting the said [Cathy], then you will find the Defendant guilty of the offense of Continuous Violence Against the Family as charged in Count 1 of the indictment and so answer on the verdict form provided.

Count 2 asks the jury to find whether, on or about September 20, 2014, McBride intentionally, knowingly, or recklessly caused bodily injury to Cathy by impeding the normal breathing or circulation of her blood by applying pressure to her throat or neck with his hands or arms. Count 4 asks the jury to find whether, on or about May 25, 2015, McBride intentionally and knowingly threatened Cathy with imminent bodily injury by swinging a wooden ax handle, baseball bat, or similar type of wooden club, that in the manner of its use or intended use was capable of causing death or serious bodily injury.

McBride correctly observes that counts 2 and 4 of the indictment name two of the incidents alleged in count 1. However, the trial court submitted the charge question on count 1 in the disjunctive, which allowed the jury to enter a guilty verdict if it found that McBride had committed any two of the five specified acts. The jury returned a general verdict of guilty under count 1, which does not identify the acts it found to be true.

Under these circumstances, a double-jeopardy claim is not apparent on the face of the record. *See Benefield v. State*, No. 02-14-00099-CR, 2015 WL 4606273, at *6 (Tex. App.—Fort Worth July 30, 2015, pet. ref'd) (mem. op., not designated for publication); *see generally Pollock v. State*, 405 S.W.3d 396, 404–05 (Tex. App.—Fort Worth 2013, no pet.) (explaining that trial court may submit disjunctive charge and obtain general verdict when alternate theories or "manner and means" involve commission of same offense).

The double-jeopardy complaint addressed in *Benefield* exemplifies the problem with McBride's claim. There, a jury found the defendant guilty of one count of injury to a child by recklessly causing serious bodily injury and one count of continuous violence against the family, and it found true the deadly-weapon allegations for both counts. 2015 WL 4606273, at *1. On appeal, the defendant complained that his convictions violated the prohibition against double jeopardy because at least some of the conduct in the injury-to-a-child offense was the same as an element of the continuous-violence offense. *Id.* at *6. The jury had returned a general verdict on the continuous-violence offense, which required the jury to find that the defendant committed at least two of seven alleged acts of violence, one of which involved the child and arguably involved the same conduct. *Id.*

In rejecting a double-jeopardy claim that had not been raised in the trial court, the Fort Worth Court of Appeals observed that several acts were submitted to the

jury disjunctively, and thus it could not discern from the face of the record whether the jury had based its finding on two acts against the adult family member, which did not give rise to the double-jeopardy claim, or whether it had relied unanimously on the violent act against the child for one of the two acts, which did. *Id.* In this case, as in *Benefield,* the trial court's disjunctive submission makes it impossible to determine from the record alone whether the jury's finding of guilt on count 1 was based on the same two incidents that also served as the basis for the jury's guilty findings on counts 2 and 4, respectively. Because any double-jeopardy violation cannot be determined from the face of the record in this case, we hold that McBride has failed to preserve his double-jeopardy challenge.

II. Deadly-Weapon Finding

A. Standard of review and applicable law

McBride contends that the evidence is insufficient to prove beyond a reasonable doubt that he used a deadly weapon in threatening to assault Cathy, a finding required to support his conviction for aggravated assault as set forth in Count 4 of the indictment. *See* TEX. PENAL CODE § 22.02(a)(2). In a review for legal sufficiency, we view all of the evidence in the light most favorable to the verdict and determine whether a rational factfinder could have found the essential elements of the crime beyond a reasonable doubt. *Gear v. State*, 340 S.W.3d 743, 746 (Tex. Crim. App. 2011) (relying on *Jackson v. Virginia*, 443 U.S. 307, 318–19, 99 S. Ct.

2781, 2788–89 (1979)). We defer to the jury's resolution of conflicts in the evidence. *Isassi v. State*, 330 S.W.3d 633, 638 (Tex. Crim. App. 2010).

The ax handle or bat that the witnesses described at trial is not expressly defined to be a deadly weapon under Texas Penal Code section 1.07(a)(17). *See In re S.B.*, 117 S.W.3d 443, 446 (Tex. App.—Fort Worth 2003, no pet.) (baseball bat); *Hammons v. State*, 856 S.W.2d 797, 800 (Tex. App.—Fort Worth 1993, pet. ref'd) (same). Pertinent to this case, however, a deadly weapon is "anything that in the manner of its use or its intended use is capable of causing death or serious bodily injury." TEX. PENAL CODE § 1.07(a)(17)(B).

McBride contends that the bat at issue in this case did not cause Cathy serious bodily injuries and thus it does not meet the catchall definition. Contrary to McBride's contention, however, the State need not prove that the defendant inflicted serious bodily injury, or even that he actually intended his use of the object to cause death or serious bodily injury. "[A]n object is a deadly weapon if the actor intends a use of the object in which it would be capable of causing death or serious bodily injury." *Bailey v. State*, 38 S.W.3d 157, 159 (Tex. Crim. App. 2001) (per curiam). The salient factor is whether the weapon was "used" in facilitating the underlying crime. *McCain v. State*, 22 S.W.3d 497, 503 (Tex. Crim. App. 2000) (butcher knife partially exposed by sticking out of back pocket but not handled during robbery supported finding that knife was exhibited during criminal transaction or, at least, its

presence was used to instill apprehension in complainant, reducing likelihood of resistance); *Adame v. State*, 69 S.W.3d 581, 582 (Tex. Crim. App. 2002) (defendant's use of BB gun during robbery, which he pointed at store clerk, allowed jury to rationally infer that it was loaded and find that it was deadly weapon).

In determining whether the evidence supports a finding that an object constitutes a deadly weapon, the Court of Criminal Appeals has relied on a number of factors. *See S.B.*, 117 S.W.3d at 446–47 (citing *Tisdale v. State*, 686 S.W.2d 110, 111 (Tex. Crim. App. 1984); *Blain v. State*, 647 S.W.2d 293, 294 (Tex. Crim. App. 1983); and *Williams v. State*, 575 S.W.2d 30, 32–33 (Tex. Crim. App. [Panel Op.] 1979)). They include (1) the physical proximity between the victim and the object; (2) the threats or words used by the assailant; (3) the size and shape of the weapon; (4) the weapon's ability to inflict death or serious bodily injury; and (5) the manner in which the assailant used the weapon. *Id.* at 446. No single factor is determinative; the reviewing court must examine each case on its own facts to determine whether the factfinder rationally could have concluded from the surrounding circumstances that the object used was a deadly weapon. *See id.* at 447 (citing *Brown v. State*, 716 S.W.2d 939, 947 (Tex. Crim. App. 1986)).

B. Analysis

In this case, the State adduced evidence to show that the bat in question was a deadly weapon. The charge instructed the jury to consider whether McBride used or exhibited "a deadly weapon, namely, a wooden ax handle, baseball bat, or similar type of wooden club, that in the manner of its use or intended use was capable of causing death or serious bodily injury."

Sergeant Mueck, a 13-year veteran of the Comal County Sheriff's office, recounted that he found the wooden ax handle—which Cathy referred to as the "bat"—by the bed stand. The State questioned Mueck as follows:

> Q. Are you trained in law enforcement on the use of an asp?
>
> A. Yes, ma'am.
>
> . . .
>
> Q. What is an asp?
>
> A. An asp baton is basically—the law enforcement version is a collapsible baton. . . ., so it's easy to carry around. But, basically, it's a hard object that you train to use to strike someone . . . for pain compliance to stop the—either strike them in the arm or in the leg to try to stop an attack.
>
> Q. Are there certain areas that you're supposed to avoid when using an asp or baton?
>
> A. Yes. As recommended, you avoid some of the extremities, such as hands and feet, because of the possibility for broken bones, and also avoid head range just because of the—could cause serious injury of the head, or genital reasons—genital area, for the same reasons. It could cause serious injury there.

Q. Based on your training and experience, is it your understanding that if an asp or baton were used to strike someone in the hand, it could cause broken bones or serious bodily injury?

A. Yes, ma'am, it could.

The State then had Mueck hold the ax handle, asking:

Q. Sergeant Mueck, that item—is that item heavier than an asp or baton?

A. Yes, it is.

Q. So if an item such as [the ax handle] were used to strike someone in the hand, would that be capable of causing broken bones?

A. Yes, ma'am, I believe it could.

Q. Similarly, if it were used to strike somebody in the leg, could that cause a broken bone?

A. Yes, ma'am, it could.

Based on his experience in responding to service calls, Mueck itemized the types of hard, slender objects he recovered that were used in assaults and the types of injuries they have caused. He recalled observing injuries from frying pans, baseball bats, and golf clubs, including "cuts, lacerations, broken bones, open head wounds, [and] open wounds on the body." Mueck opined that those items are capable of causing serious bodily injury and death, and that the ax handle that McBride used was similar to these items. The State also introduced photographs showing dents and cracks in the doors of Cathy's home that McBride made by swinging the ax handle at them.

Cathy testified that during the May 2015 incident, McBride banged the ax handle, and then swung it at her, aiming for her leg but hitting her hand. Cathy

appeared in pain; she had swelling on top of her left hand and a cut on her left ring finger. Given the ax handle's size and its location when Mueck found it—near where McBride's assault on Cathy took place—we hold that a rational factfinder could have found beyond a reasonable doubt that the McBride used or exhibited the ax handle as a deadly weapon.

III. Reformation

Finally, McBride contends that the judgment incorrectly reflects a deadly weapon finding with respect to counts 1, 2, 5, and 6. The State concedes that the deadly weapon finding should apply only to the offense of aggravated assault in count 4, which is consistent with the position the State took in the trial court.

An appellate court has the authority to reform an error in the judgment when the matter has been called to its attention by any source. *French v. State*, 830 S.W.2d 607, 609 (Tex. Crim. App. 1992); *Dromgoole v. State*, 470 S.W.3d 204, 226 (Tex. App.—Houston [1st Dist.] 2015, pet. ref'd). We therefore sustain this issue and reform the judgment accordingly.

Conclusion

We reform the judgment of the trial court as to counts 1, 2, 5, and 6 to remove the deadly weapon finding for those offenses and, as reformed, affirm.

All pending motions are dismissed as moot.

Jane Bland
Justice

Panel consists of Justices Bland, Lloyd, and Caughey.

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