

Affirmed and Majority and Concurring Opinions filed December 2, 2010.



In The

Fourteenth Court of Appeals

NO. 14-09-01035-CR

NELSON ROMERO, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the 23rd District Court
Brazoria County, Texas
Trial Court Cause No. 58, 710**

MAJORITY OPINION

Appellant Nelson Romero was indicted for the third-degree felony of possessing a deadly weapon in a penal institution. *See* Tex. Penal Code Ann. § 46.10 (Vernon 2003). A jury found him guilty as charged in the indictment and assessed an enhanced punishment of imprisonment for 30 years. *See* Tex. Penal Code Ann. § 12.42(d) (Vernon 2003). We affirm.

BACKGROUND

Appellant participated in a prison fight with multiple inmates on May 28, 2006. During the fight, appellant was seen holding at least one prison “shank,” which he allegedly used to stab several other inmates. Witnesses testified that appellant either disposed of the weapon after the fight or turned it into prison officials, and the weapon was not admitted into evidence at trial.

The jury found appellant guilty as alleged in the indictment. The jury sentenced him to imprisonment for 30 years, based on two prior felony convictions. *See* Tex. Penal Code Ann. § 12.42(d). The trial court signed a judgment in conformity with the jury’s findings. Appellant appeals, challenging the legal and factual sufficiency of the evidence supporting the jury’s finding that appellant’s weapon was deadly.

ANALYSIS

We address appellant’s sufficiency challenges under a single standard for evaluating legal sufficiency of the evidence to support a finding required to be proven beyond a reasonable doubt. *See Brooks v. State*, No. PD-0210-09, 2010 WL 3894613, at *8 (Tex. Crim. App. Oct. 6, 2010) (plurality opinion) (appropriate standard of review for sufficiency of the evidence considers “all evidence in the light most favorable to the verdict” to determine whether a jury was “rationally justified in finding guilt beyond a reasonable doubt”); *id.* at *15 (Cochran, J., concurring) (concluding that a separate factual sufficiency standard no longer applies in criminal cases).

I. Applicable Law

A person commits an offense under section 46.10 of the Texas Penal Code if, while confined in a penal institution, he intentionally, knowingly or recklessly (1) carries on or about his person a deadly weapon; or (2) possesses or conceals a deadly weapon in the penal institution. *See* Tex. Penal Code Ann. § 46.10. To prove that appellant’s weapon was deadly, the State must prove that the shank (1) was manifestly designed, made, or adapted for the purpose of inflicting death or serious bodily injury; or (2) is

capable of causing death or serious bodily injury in the manner of its use or intended use. See Tex. Pen. Code Ann. § 1.07(a)(17) (Vernon 2003); *Thomas v. State*, 821 S.W.2d 616, 619 (Tex. Crim. App. 1991); *Brown v. State*, 716 S.W.2d 939, 946 (Tex. Crim. App. 1986).

To determine whether appellant's shank was a deadly weapon under the second definition, "capability" must be evaluated in light of the facts that actually existed at the time of the offense. *Drichas v. State*, 175 S.W.3d 795, 799 (Tex. Crim. App. 2005); *Brown*, 716 S.W.2d at 946–47. Factors that a jury may consider in determining whether an object is a deadly weapon under this definition include (1) words of the accused; (2) the intended use of the weapon; (3) the size and shape of the weapon; (4) testimony by the victim that he feared death or serious bodily injury; (5) the severity of any wounds inflicted; (6) the manner in which the assailant allegedly used the object; (7) physical proximity of the parties; and (8) testimony as to the weapon's potential for causing death or serious bodily injury. See *Thomas*, 821 S.W.2d at 619; *Brown*, 716 S.W.2d at 946–47.

Intent to inflict serious bodily injury or death may be shown by evidence of assertive conduct by an attacker. *Johnson v. State*, 919 S.W.2d 473, 477 (Tex. App.—Fort Worth 1996, pet. ref'd). The nature of any inflicted wounds is a factor to be considered, but wounds are not a prerequisite to a deadly weapon finding. *Dominique v. State*, 598 S.W.2d 285, 286 (Tex. Crim. App. 1980). Either expert testimony or lay testimony may be independently sufficient to support a deadly weapon finding. *Banargent v. State*, 228 S.W.3d 393, 399 (Tex. App.—Houston [14 Dist.] 2007, pet. ref'd) (citing *English v. State*, 647 S.W.2d 667, 668–69 (Tex. Crim. App. 1983) (en banc)). It is not necessary for the weapon to be introduced into evidence. *Id.* (citing *Morales v. State*, 633 S.W.2d 866, 868 (Tex. Crim. App. 1982)).

II. Evidence of “Capability”

Inmate Ricky Zackery testified that appellant “tried to take my life” and “tried to kill me” with the shank by stabbing him below the chest and in the shoulder during the prison fight. Zackery testified that he lost consciousness after the fight and was transported to the hospital in an ambulance. Zackery testified that he stayed in the hospital approximately two days, and he was given pain medication for seven days after the incident.

Inmate Adrian Richmond testified at trial that he saw appellant stab Zackery and at least one other inmate with a shank during the prison fight. Richmond testified that Zackery was “covered in blood” after appellant stabbed Zackery two times, and that “blood was everywhere.” Inmate Fred Primes also testified that he saw appellant holding a shank during the fight. Primes testified that although he did not see appellant stab anyone, other inmates did. Richmond and Investigator Rebecca Dougherty testified that weapons similar to the shank appellant used in the prison fight were “capable of causing death or serious bodily injury.”

Richmond admitted that his trial testimony differed from one of his initial statements to police, in that (1) he testified at trial that appellant held two shanks during the fight, but stated at an earlier point that appellant held one shank; and (2) one of his initial statements identified a different inmate as the individual who stabbed Zackery. Richmond testified that “when the shanks came out . . . I mean it happened fast.” Appellant argues that this evidence, along with evidence that the wounds actually inflicted by the shank were not serious, renders the other evidence supporting the jury’s finding insufficient.

We conclude that viewed in the light most favorable to the jury’s guilty verdict, the evidence sufficiently supports the jury’s finding that the weapon used by appellant was deadly. *See Brooks*, 2010 WL 3894613, at *8 (plurality opinion); *id.* at *15 (Cochran, J., concurring).

CONCLUSION

Because we overrule appellant's only issue on appeal, we affirm the judgment of the trial court.

/s/ William J. Boyce
Justice

Panel consists of Justices Seymore, Boyce, and Christopher. (Seymore, J., concurring).
Publish — Tex. R. App. P. 47.2(b).