

Affirmed and Memorandum Opinion filed June 28, 2011.



In The

Fourteenth Court of Appeals

NO. 14-10-00222-CR

WILLIAM SOLOMON LEWIS, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the 184th District Court
Harris County, Texas
Trial Court Cause No. 1219699**

MEMORANDUM OPINION

A jury convicted William Lewis of retaliation and sentenced him to three years' imprisonment. On appeal, Lewis argues that the evidence was legally and factually insufficient to support his conviction, and the trial court erred by sustaining the State's objection to evidence about a civil lawsuit. We affirm.

I

Around one o'clock in the morning of April 12, 2007, Nurse Kim Yenn was on duty in the neonatal department of Texas Woman's Hospital and saw William Lewis walking around the hallway holding a newborn baby.¹ Hospital policy demands that all infants be in cribs while in the hallway for their safety, so another staff member told Lewis he could not continue carrying the baby there. Lewis replied "I can do to my baby what I like," in what Nurse Yenn described as a hostile tone before he returned to the baby's room. A few minutes later, Lewis carried the baby into the hallway again, covering her head with something resembling a car seat. He walked toward the elevators, but Nurse Yenn did not feel comfortable objecting due to his initial hostility. Instead, she called security and another staff member called their supervisor, Nurse Melissa Tschoertner. A "code gray" was called, indicating that someone was making a disturbance and causing possible problems for or harm to a patient or personnel.

Nurse Tschoertner took the elevator to the fourth floor. When the doors opened, Lewis entered the elevator "hollering." However, the baby had a security device attached to a clamp on her umbilical cord, and when Lewis tried to take her from the neonatal floor, the device activated an alarm and shut down all the exits and elevators. When Nurse Tschoertner asked Lewis why he was upset, he shoved her aside and demanded she "make this elevator work." He asserted he was willing to hurt someone or start a hostage situation if he was not left alone. Nurse Tschoertner explained that it was not possible for him to leave with the baby at that time and continued asking him what was wrong, but Lewis refused to answer. He continually waved the infant around with his right hand while threatening and yelling at the nurses. When Jacqueline Gray, the baby's mother, came into the hallway, Lewis was confrontational toward her as well.

¹ The record does not specifically indicate the baby's sex, but during Officer D. Boling's testimony he and the State's counsel both consistently refer to the baby as a female. Accordingly, we will refer to the baby as a female for the sake of clarity.

Deputy John Flores of the Harris County Sheriff's Department was working at Texas Woman's Hospital that morning and received a disturbance call about a man on the fourth floor trying to take a baby from the hospital. He immediately reported to the fourth floor and heard Lewis shouting, "You can't stop me, this is my baby." When Lewis saw Deputy Flores, Lewis "bold[ed] up" to him and said, "Come on, you want some of this?" Deputy Flores testified Lewis was hostile, aggressive, and agitated. Lewis then walked in the direction of the elevators, but Deputy Flores told Lewis he was not going anywhere. Lewis refused to listen to or cooperate with Deputy Flores, leading Deputy Flores to conclude that Lewis was not going to calm down anytime soon.

Officer D. Boling of the Houston Police Department, who was also working at Texas Woman's Hospital that morning, received a call over the hospital radio about a possible infant abduction. He used his badge to unlock the elevators and arrived at the fourth floor soon after Deputy Flores. As he ran toward Lewis, Officer Boling passed Gray and heard her say, "He's taking my baby, he's taking my baby." Lewis saw Officer Boling and continued threatening to start a hostage situation and repeatedly asserting, "I could take you," and "Do you want some of this?" Officer Boling described Lewis's manner as aggressive, agitated, and ready and willing to fight. Deputy Flores and Officer Boling feared for their own safety as well as that of the infant, which Lewis continued to swing around. Lewis said he was "done talking." Officer Boling, apprehensive of a possible physical confrontation with Lewis while Lewis held the infant, believed shooting him with a Taser was the only way to control the situation.² Officer Boling whispered his plan to Deputy Flores so Deputy Flores could prepare to catch the infant. When Lewis turned such that his body blocked the baby from the Taser's potential path, Officer Boling shot Lewis with the device. Lewis fell to his knees and dropped the baby about two feet to the floor. Deputy Flores retrieved the baby almost immediately and gave her to Gray.

² Officer Boling testified that his training taught him that the electric current would not pass from Lewis to the baby.

Nurse Tschoertner quickly took the infant from Gray to a security-coded nursery on the other end of the hospital for a medical evaluation. The on-call neonatologist confirmed the baby sustained no injuries as a result of the fall.

Officer Boling handcuffed Lewis with Deputy Flores's help, and they escorted Lewis to the security office. Lewis quickly recommenced yelling, saying they had "fucked up," "this is not over," and that he was going to "come after" them. The Taser caused Lewis to urinate himself, which increased his anger toward Officer Boling. Lewis looked Officer Boling in the face and said, "Look at my face. This is not over. You are going to see me again. I'm going to get you," and "I'm going to dedicate the rest of my life to getting you." Officer Boling and Deputy Flores believed these were real, serious threats of physical harm. They described Lewis as very angry, hostile, and upset, especially at Officer Boling, and Lewis repeated these threats for approximately forty minutes. Lewis did not, however, threaten to go to the media or sue Officer Boling.³

Officer Boling made several phone calls during that forty-minute time: he called the paramedics to check on Lewis and remove the Taser darts, the district attorney's office to bring charges against Lewis, and a transport unit to take Lewis to jail. Later that day, Officer Eddie Rodriguez, an investigator for the Criminal Intelligence Division (CID) of the Houston Police Department, interviewed Lewis, and Lewis claimed his civil rights had been violated and he was going to go the media.

Lewis was indicted on a charge of retaliation. The case was tried to a jury wherein Lewis was convicted and sentenced to three years' imprisonment. Lewis then filed this timely appeal.

³ At trial, Deputy Flores was unable to remember whether Lewis mentioned going to the media or pursuing future civil litigation against him.

II

A

Lewis’s first and second issues are that the evidence against him is legally and factually insufficient, respectively, because the statements in question were a matter of subjective interpretation and thus “too weak” to support the guilty verdict beyond a reasonable doubt. The thrust of Lewis’s argument is that if he threatened anything, it was to complain to the media about how Officer Boling and Deputy Flores treated him, or to report them to “internal affairs,” or to sue them. Lewis maintains that there is no evidence that he ever made a specific threat of physical harm.

1

A majority of the judges on the Court of Criminal Appeals concluded that the *Jackson v. Virginia* legal-sufficiency standard is the only standard a court reviewing a criminal case should apply in determining whether the evidence is sufficient to support each element that the State is required to prove beyond a reasonable doubt. *Brooks v. State*, 323 S.W.3d 893 (Tex. Crim. App. 2010) (plurality op.) (Hervey, J., joined by Keller, P.J., Keasler, and Cochran, J.J.); *id.* at 926 (Cochran, J., concurring, joined by Womack, J.) (agreeing with the plurality conclusion). Accordingly, we will analyze Lewis’s legal- and factual-sufficiency issues under the *Jackson v. Virginia* standard and ask only if the evidence against him was legally sufficient to sustain a verdict of guilty beyond a reasonable doubt. *See id.* at 912 (plurality op.); *see also Pomier v. State*, 326 S.W.3d 373, 378 (Tex. App.—Houston [14th Dist.] 2010, no pet.).

In a legal-sufficiency review, we examine all the evidence in the light most favorable to the verdict to determine whether a 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 (1979). This standard of review applies to cases involving both direct and circumstantial evidence. *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007). Although we consider everything presented at trial, we do not substitute our judgment regarding the weight and credibility of the evidence for that of the fact finder. *Williams v. State*, 235 S.W.3d 742, 750 (Tex. Crim. App. 2007). We presume the jury resolved conflicting inferences in favor of the verdict, and defer to that determination. *Clayton*, 235 S.W.3d at 778. We also determine whether the necessary inferences are reasonable based upon the combined and cumulative force of all the evidence when viewed in the light most favorable to the verdict. *Id.*

2

A person commits a third-degree felony if he (1) intentionally or knowingly (2) harms or threatens to harm another (3) by an unlawful act (4) in retaliation for or on account of the service status of another (5) as a public servant. Tex. Penal Code § 36.06(a)(1)(A). The elements do not require the person intend to carry out the threat or take any affirmative steps to do so. *Lebleu v. State*, 192 S.W.3d 205, 209 (Tex. App.—Houston [14th Dist.] 2006, pet. ref'd).

To meet its burden, the State adduced evidence that Lewis made numerous and repeated verbal threats to Officer Boling. Officer Boling testified that Lewis's first words to him were "Do you want some of this." Without more, it is difficult to see how that statement could be interpreted as a threat of going to the media or of future civil litigation, particularly given the testimonies of Nurse Yenn, Nurse Tschoertner, Deputy Flores, and Officer Boling, which consistently described Lewis's manner as very agitated, aggressive, upset, and hostile. Officer Boling and Nurse Tschoertner both testified that Lewis threatened to create a hostage situation if he were not permitted to leave and told Officer Boling, "I could take you." After Officer Boling subdued Lewis with the Taser, Lewis said, "Look at my face. This is not over. You are going to see me again. I'm going to get you," and "I'm going to dedicate the rest of my life to getting you." Deputy Flores

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testified that Lewis said he was going to “come after” the officers and that if Deputy Flores took off Lewis’s handcuffs, Lewis would “show” him, strongly suggesting a threat of a physical nature. Nurse Tschoertner testified Lewis said, “I’m going to get off of—off of this floor. If I have to take hostages or if I have to hurt someone, I’m going to leave with my child,” and that he would fight people if necessary. The jury had before it the undisputed testimony that Lewis repeatedly made these comments. Therefore, the combined and cumulative force of the evidence when viewed in the light most favorable to the verdict is such that the jury could have reasonably interpreted these threats to be of physical violence and not of going to the media or of future civil litigation. *See Clayton*, 235 S.W.3d at 778.

The State also had to prove Lewis made the threats in retaliation for Officer Boling’s service as a public servant, namely a police officer. To prove these elements, the State produced evidence that Lewis made the threats because of Officer Boling’s role in stopping Lewis from leaving with the baby, arresting him, and especially shooting Lewis with the Taser, which caused Lewis to drop the baby and urinate himself. Officer Boling’s role as a police officer made it his duty to resolve the situation, and he testified that, based on Lewis’s conduct and assertions that he was “done talking,” Officer Boling believed he had no choice but to use his Taser. Because of Lewis’s escalating anger regarding Officer Boling’s refusal to let him leave the hospital, Lewis repeatedly threatened Officer Boling, and several witnesses testified to understanding the threats to refer to physical harm. Officer Boling would not have become involved in the situation but for his role as a public servant. Thus, a reasonable jury could have concluded that Lewis uttered his threats in retaliation for Officer Boling’s role and service as a police officer. *See, e.g., Lebleu*, 192 S.W.3d at 209 (concluding threats against a judge were because of the judge’s service as a public servant when appellant’s threats were an outgrowth of extreme dissatisfaction with the judge’s rulings and the judge presided over

the matter because of his role as a public servant). The State's evidence was legally sufficient for each element of retaliation. *See Jackson*, 443 U.S. at 319.

B

In his third issue, Lewis contends the trial court erred by sustaining the State's objection to evidence about a civil lawsuit stemming from the same incident because the excluded testimony was a key piece of evidence for Lewis's defense. The State argues Lewis failed to preserve the error for this appeal and, alternatively, that the excluded testimony was neither relevant nor necessary to prove his defense. The defense adduced the testimony at issue during cross-examination of Deputy Flores:

Q: Now, Deputy, I want to talk to you about kind of the aftermath of this.

This was a pretty big event at the hospital; is that fair?

A: Yes, sir.

Q: Do you recall this making the news within the next few days afterwards?

A: Yes, sir.

Q: You remember seeing Ms. Gray and Mr. Lewis on separate occasions on the news?

A: On the news?

Q: Yes.

A: Maybe later.

Q: And you knew, of course, that there were threats of litigation against the hospital and against you guys?

[The State]: Objection, relevance.

The Court: Sustained.

[Defense Counsel]: I'll pass the witness, Judge.

Error may not be predicated upon a ruling that excludes evidence unless a substantial right of the party is affected and the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked. *Tex. R. Evid.* 103(a)(2). An offer of proof may be in question-and-answer form, or it may be in the form of a concise statement by counsel. *Warner v. State*, 969 S.W.2d 1, 2 (Tex. Crim. App. 1998). A concise statement for this purpose must include a reasonably specific summary

of the evidence offered and must state the relevance of the evidence unless the relevance is apparent, so that the court can determine whether the evidence is relevant and admissible. *Id.* (citing *Love v. State*, 861 S.W.2d 899, 901 (Tex. Crim. App. 1993)). An informal bill will suffice as an offer of proof when it includes a concise statement of counsel's belief of what the testimony would show. *Love*, 861 S.W.2d at 901.

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Lewis's counsel made no attempt to explain the substance of the excluded testimony, nor was it apparent from the context of the other questions being asked. Lewis contends his threat of civil litigation in the media is crucial to his defense given his reliance on the premise that he intended to threaten Officer Boling only with going to the media and pursuing civil litigation and not with causing physical harm. Although it may have been apparent that he sought to introduce the statements themselves to support that proposition, it was not similarly apparent why Lewis sought to introduce Deputy Flores's knowledge, or lack thereof, of those statements. Lewis further argues that the excluded testimony was relevant because the deputy's knowledge of the threats may reflect a bias, interest, and prejudice of which the jurors should have been aware. But, although the trial court could have found this rationale persuasive in ruling on the objection, it was not apparent from the question's context.

Because the substance of the excluded testimony was not apparent from the circumstances, Lewis needed to provide an offer of proof to preserve the error. *See Warner*, 969 S.W.2d at 2. He failed to do so. In fact, his counsel offered no response to the trial court's ruling and passed the witness without further discussion. Any potential error was not preserved and we overrule Lewis's third issue.

9

Assuming *arguendo* that Lewis had preserved the error for appeal, we would review the trial court's ruling on the admissibility of evidence under an abuse-of-discretion standard. *Willlover v. State*, 70 S.W.3d 841, 845 (Tex. Crim. App. 2002). Under this standard, an appellate court must uphold the trial court's ruling if it is within the zone of reasonable disagreement and is correct under any theory of law applicable in the case. *Id.*; *Green v. State*, 934 S.W.2d 92, 101–02 (Tex. Crim. App. 1996).

Relevance is broadly defined as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Tex. R. Evid. 401. Accordingly, Lewis actually threatening civil litigation in the media may have some tendency to make it more probable that Lewis was also threatening to sue during the incident than it would be without that evidence. However, whether Deputy Flores *knew* Lewis made such statements in the media is a separate matter and does not have the same consequence. Further, Deputy Flores's testimony was not the only means through which Lewis could have communicated to the jury that he threatened civil litigation in the media. In fact, the defense counsel called Officer Rodriguez to the stand and asked him about Lewis's statements of intentions to sue but, upon the State's objection and the court's ruling that proceeding with that line of questioning would open the door for other extraneous offenses, the defense counsel opted to pass the witness.

We cannot say that the trial court's ruling was outside the zone of reasonable disagreement. *Green*, 934 S.W.2d at 101–02. Although the fact that Lewis made statements to the media may itself enhance the likelihood that Lewis's threats to Officer Boling reflected his intentions to sue, Deputy Flores's knowledge of those statements does not. Without guidance from Lewis's counsel explaining an alternate purpose, the ruling was clearly within the trial court's discretion. *See Willlover*, 70 S.W.3d at 847.

* * *

For the foregoing reasons, we affirm the trial court's judgment.

/s/ Jeffrey V. Brown
Justice

Panel consists of Justices Anderson, Brown, and Christopher.

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