

Affirmed and Memorandum Opinion filed June 15, 2021.



In The
Fourteenth Court of Appeals

NO. 14-19-00502-CR
NO. 14-19-00503-CR

GERALD JONES, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 338th District Court
Harris County, Texas
Trial Court Cause No. 1599919 & 1631807

MEMORANDUM OPINION

Appellant Gerald Jones (“Jones”) was convicted of aggravated assault of a family member, a first-degree felony, and assault family violence, a third-degree felony.¹ *See* Tex. Penal Code Ann. §§ 22.02(a)(2), (b)(1); 22.01(a)(1), (b)(2). In three issues, Jones argues that: (1) there is a fatal variance as to the deadly weapon

¹ Appellate case 14-19-00502-CR is an appeal from cause number 1599919, Jones’ aggravated assault of a family member charge. Appellate case 14-19-00503-CR is an appeal from cause number 1631807, Jones’s assault family violence charge.

finding, rendering the evidence insufficient to support a conviction for aggravated assault; (2) the trial court used an overly broad definition of “deadly weapon” in the jury charge, causing egregious harm; and (3) the prosecutor committed misconduct by improperly commenting that Smith “may or may not” testify during trial but had not been properly subpoenaed. We affirm.

I. BACKGROUND

The State indicted Jones on three charges: aggravated assault of a family member, assault family violence, and felon in possession of a firearm. *See id.* §§ 22.02(a)(2), (b)(1); 22.01(a)(1); (b)(2); 46.04. The State alleged that Jones intentionally or knowingly caused bodily injury to Lavesha Smith (“Smith”), a person with whom Jones had a dating relationship, by pulling her hair and/or hitting her with an object. *See id.* 22.01(a)(1), (b)(2); Tex. Fam. Code § 71.0021(b). The State further alleged that Jones intentionally or knowingly threatened Smith with imminent bodily injury by using and exhibiting a deadly weapon, namely a firearm. *See Tex. Penal Code Ann.* § 22.02(a)(2), (b)(1). Jones pled “not guilty” to the charged offenses; all three charges were tried together in June 2019.

At trial, Officer James Rogers (“Rogers”) of the Houston Police Department testified that on July 31, 2018, he was dispatched in response to a 911 call by Nichole Richardson (“Richardson”). Richardson told the dispatcher she saw a man beating a woman with a gun. Once Rogers arrived at the scene, he first interviewed Jones, with his body cam turned on. Jones admitted that he had a verbal argument with Smith earlier in the night, but he asserted that there was no physical altercation. Next, Rogers interviewed Smith. Rogers testified that she appeared fearful and distraught. He also testified that she had visible injuries, including a knot on her forehead, several large welts, a head laceration with moderate bleeding, and significant swelling to her head. According to Smith, Jones hit her in

the head with his closed fist about ten times, pulled her hair, and pulled a gun on her and threatened to shoot her. Smith told Rogers that all of this happened while she was holding onto their three-month old baby and pregnant with their second child, and that she dropped the three-month old during the altercation. Smith claimed that Jones assaulted her after he saw that she had received a call from an unknown phone number and believed that she was cheating on him.

Rogers re-interviewed Jones after speaking with Smith. Rogers testified that Jones appeared surprised to learn that Smith was injured; Jones never offered an explanation as to how Smith might have received her injuries and said he did not know how she got her injuries. The police did not find a gun at the scene, but other officers that arrived at the scene testified that Jones had at least eight minutes between when the 911 call was made and when officers arrived at the scene. Rogers testified that it was common not to find a weapon on the scene because of the response time; an individual can easily stash a weapon or hide it, especially if they were outside in the woods, and there was some indication the Jones had gone into the woods. Rogers's body cam footage showed that he spoke to another witness at the scene, Tachaun Bates ("Bates"), who claimed that she saw Jones with a gun that night.

Rogers further testified that Smith was transported to a hospital, where she gave a consistent explanation of her injuries to medical personnel. Smith told the paramedics that her boyfriend struck her multiple times in the head, face, and arm, with closed fists. She also told the paramedics that he had pistol-whipped her. Photographs introduced into evidence showed that Smith had bruises and red marks on her arm, red marks on her cheek, discoloration and knots on her forehead, a huge swollen spot on her forehead, a laceration on the right side of her head which required a staple, and a large gash on the left side of her head, which required four staples.

Jones testified on his own behalf at trial. According to Jones, he got into a verbal argument with Smith at 3:00 a.m. Jones then testified that Smith's injuries were from a fight she had with an unknown woman earlier in the day. He admitted that he had a felony conviction from approximately nine years ago. However, he claims that Bates and Richardson were both lying when they said they had seen Jones with a gun.

Alejandra Segura, a caseworker for the Family Criminal Division of the Harris County district Attorney's Office, testified that she met with Smith about six months after the assault. Segura testified that Smith obtained a ten-year protective order. Segura further stated that even though Smith asked to have the case against Jones dismissed in December 2018, Smith never recanted her allegations.

A latent print examiner with the Harris County Sheriff's Office analyzed Jones's fingerprints and compared them to Harris County judgments. She testified that Jones's prints matched the prints of the individual that was convicted of assault of a family member in July 2014.

During deliberation, the jury sent out a note asking, "What is a deadly weapon (Fist, etc.)[?] Can your fist be aggr. Assault [sic]?" The trial court sent back a note, stating, "'Deadly weapon' is defined in the charge. Please read the charge and continue deliberating." The jury returned a guilty verdict on both assault charges but acquitted Jones on the felon in possession of a firearm charge. Jones elected to have the jury assess punishment. After the jury found one enhancement paragraph to be true and the other to be false, the jury assessed punishment at fifteen years' imprisonment in the Texas Department of Criminal Justice on each case, with the sentences to run concurrently. These appeals were timely filed.

II. ANALYSIS

Jones argues that his convictions should be overturned because: (1) there was a fatal variance in that there was insufficient evidence to sustain a conviction for aggravated assault as a matter of law because the State failed to prove a deadly weapon was involved; (2) the trial court committed jury charge error by expanding the definition of deadly weapon beyond that charged in the indictment as a firearm; and (3) the state committed prosecutorial misconduct in its opening statement by referencing that the complainant may or may not come to court, but failing to properly subpoena the complainant.

A. FATAL VARIANCE

1. STANDARD OF REVIEW AND APPLICABLE LAW

We apply a legal-sufficiency standard of review in determining whether the evidence supports each element of a criminal offense that the State is required to prove beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318–19 (1979); *Temple v. State*, 390 S.W.3d 341, 360 (Tex. Crim. App. 2013); *see also Gear v. State*, 340 S.W.3d 743, 746 (Tex. Crim. App. 2011). Under this standard, we examine all the evidence adduced at trial in the light most favorable to the verdict to determine whether a jury was rationally justified in finding guilt beyond a reasonable doubt. *Temple*, 390 S.W.3d at 360; *Criff v. State*, 438 S.W.3d 134, 136–37 (Tex. App.—Houston [14th Dist.] 2014, pet. ref'd). We consider all evidence in the record, whether admissible or inadmissible. *Winfrey v. State*, 393 S.W.3d 763, 767 (Tex. Crim. App. 2013). We also consider both direct and circumstantial evidence, as well as any reasonable inferences that may be drawn from the evidence. *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007). We will uphold the jury's verdict unless a rational factfinder must have had reasonable doubt as to any essential element. *Laster v. State*, 275 S.W.3d 512, 518

(Tex. Crim. App. 2009); *West v. State*, 406 S.W.3d 748, 756 (Tex. App.—Houston [14th Dist.] 2013, pet. ref'd).

We consider all evidence presented at trial, but we do not re-evaluate the weight and credibility of the evidence or substitute our judgment for that of the fact finder. *Williams v. State*, 235 S.W.3d 742, 750 (Tex. Crim. App. 2007). Because the jury is the sole judge of the witness's credibility and the weight given their testimony, we resolve any evidentiary conflicts or inconsistencies in favor of the verdict. *Wesbrook v. State*, 29 S.W.3d 103, 111 (Tex. Crim. App. 2000).

Sufficiency is measured by the elements of the offense as defined by a hypothetically correct jury charge and as authorized in the indictment. *Zuniga v. State*, 551 S.W.3d 729, 733 (Tex. Crim. App. 2018) (citing *Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997)). “The hypothetically correct jury charge is one that ‘accurately sets out the law, is authorized by the indictment, does not unnecessarily increase the State’s burden of proof or unnecessarily restrict the State’s theories of liability, and adequately describes the particular offense for which the defendant was tried.’” *Id.* (quoting *Malik*, 953 S.W.2d at 240). “The ‘law as authorized by the indictment’ includes the statutory elements of the offense and those elements as modified by the indictment.” *Id.* (quoting *Daugherty v. State*, 387 S.W.3d 654, 665 (Tex. Crim. App. 2013)). Our use of the hypothetically correct jury charge ensures a judgment of acquittal is reserved for cases in which there is an actual failure in the State’s proof of the crime, rather than a mere error in the jury charge. *McCombs v. State*, 562 S.W.3d 748, 759 (Tex. App.—Houston [14th Dist.] 2018, no pet.) (citing *Malik*, 953 S.W.2d at 240).

Such a charge in this case would state that a person commits the offense of assault family violence if the person intentionally, knowingly, or recklessly causes bodily injury to an individual with whom the accused is in a dating relationship, while having a prior family violence conviction. *See* Tex. Penal Code

§ 22.01(a)(1), (b)(1); Tex. Fam. Code Ann. § 71.0021(b). The charge would also state that a person commits the offense of aggravated assault of a family member if the person intentionally or knowingly threatens an individual with whom the accused is in a dating relationship with imminent bodily injury by using or exhibiting a deadly weapon. *See* Tex. Penal Code §§ 22.02(a)(2), (b)(1).

There may be insufficient evidence to support a conviction if there is a “fatal variance” between the “offense as charged in the indictment and the offense proved.” *Stevens v. State*, 891 S.W.2d 649, 650 (Tex. Crim. App. 1995). However, “[i]nconsistent verdicts do not necessarily imply that the jury convicted the defendant on insufficient evidence, but may simply stem from the jury’s desire to be lenient or to execute its own brand of executive clemency.” *Thomas v. State*, 352 S.W.3d 95, 101 (Tex. App.—Houston [14th Dist.] 2011, pet. ref’d) (citing *Moranza v. State*, 913 S.W.2d 718, 724 (Tex. App.—Waco 1995, pet. ref’d)). Thus, instead of assessing convictions for consistency, we simply determine if the evidence at trial supports a rational determination of guilt beyond a reasonable doubt. *See U.S. v. Powell*, 469 U.S. 57, 67 (1984).

2. APPLICATION

Jones argues that there is a fatal variance between the allegations in the indictment and the proof adduced at trial. The grand jury indictment alleged specifically that the deadly weapon used in the aggravated assault offense was a firearm. But the jury acquitted Jones on the charge of being a felon in possession of a firearm. Taken in conjunction with the jury note and the fact that no gun was located at the scene, Jones argues that the jury clearly did not believe that a firearm was used in the offense but instead, the jury must have believed that Jones used a deadly weapon other than a firearm, such as his fists.

However, as stated above, instead of looking for inconsistencies, we determine if the convictions are supported by legally sufficient evidence. *See id.* at

67. The jury was provided with the following evidence to support the deadly weapon element of aggravated assault: (1) Richardson reported in her 911 call that she saw Jones striking Smith with a gun; (2) Smith told Rogers in her interview that Jones pointed a gun at her, threatened to shoot her, and said he was going to kill her; (defense exhibit 1 at 39-39) (3) Smith told the paramedic that Jones had pistol-whipped her; (4) the body camera recording of Bates telling Rogers that she saw Jones threaten Smith with a gun; and (5) the photographic evidence of Smith's injuries. Even though Jones testified that he did not have a gun and that Smith received her injuries from an unknown woman, we resolve any evidentiary conflicts or inconsistencies in favor of the verdict. *See Westbrook*, 29 S.W.3d at 111. Viewing the evidence in the light most favorable to the verdict, a jury could rationally conclude beyond a reasonable doubt that Jones used and exhibited a firearm to threaten Smith. *Temple*, 390 S.W.3d at 360.

Additionally, we note that the verdicts in this case are not inconsistent. In the felon in possession of a firearm charge, the State alleged that Jones “intentionally and knowingly possess[ed] a firearm *at a location other than the premises on which the defendant lived*, after being convicted of a felony offense of felon in possession of a weapon.” (emphasis added). None of the evidence clearly established that Jones used a gun away from his own home. Thus, the jury could have rationally concluded that Jones used a firearm to threaten Smith, finding him guilty of aggravated assault of a family member with a firearm, and yet simultaneously acquit him of being a felon in possession of a firearm because no direct evidence established that he possessed or exhibited a gun in a location other than his own premises. We overrule Jones's first issue.

B. JURY CHARGE ERROR

1. STANDARD OF REVIEW AND APPLICABLE LAW

In analyzing a jury charge issue, we first determine whether error exists. *See Ngo v. State*, 175 S.W.3d 738, 743 (Tex. Crim. App. 2005) (en banc); *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1984) (op. on reh'g). “Only if we find error do we then consider whether an objection to the charge was made and analyze for harm.” *Tottenham v. State*, 285 S.W.3d 19, 30 (Tex. App.—Houston [1st Dist.] 2009, pet. ref'd). If the alleged jury charge error was properly preserved, reversal is required if it is shown that the error caused some harm. *Reeves v. State*, 420 S.W.3d 812, 816 (Tex. Crim. App. 2013). When the defendant fails to object, as in this case, we will not reverse for jury-charge error unless the record shows “egregious harm” to the defendant. *Ngo v. State*, 175 S.W.3d 738, 743–44 (Tex. Crim. App. 2005). Egregious harm deprives appellant of a fair and impartial trial. *See id.* In the egregious-harm analysis, we consider (1) the charge itself; (2) the state of the evidence, including contested issues and the weight of the probative evidence; (3) arguments of counsel; and (4) any other relevant information revealed by the trial record as a whole. *See Taylor v. State*, 332 S.W.3d 483, 489 (Tex. Crim. App. 2011); *Hutch*, 922 S.W.2d at 171.

We presume that jurors follow the trial court’s instructions as presented. *See Kirsch v. State*, 306 S.W. 3d738, 748 n.33 (Tex. Crim. App. 2010); *Thrift v. State*, 176 S.W.3d 221, 224 (Tex. Crim. App. 2005). “Where the application paragraph correctly instructs the jury, an error in the abstract instruction is not egregious.” *Gilbert v. State*, 494 S.W.3d 758, 768 (Tex. App.—Houston [14th Dist.] 2016, pet. ref'd) (quoting *Medina v. State*, 7 S.W.3d 633, 640 (Tex. Crim. App. 1999) (en banc)); *Riggs v. State*, 482 S.W.3d 270, 276 (Tex. App.—Waco 2015, pet. ref'd).

2. APPLICATION

The abstract portion of the charge included the following definition of deadly weapon: “Deadly weapon means a firearm or anything manifestly designed, made, or adapted for the purpose of inflicting death or serious bodily injury; or anything that in the manner of its use or intended use is capable of causing death or serious bodily injury.” This definition exactly copied the language in the Texas Penal Code for “deadly weapon.” Tex. Penal Code Ann. § 1.07(17). Nevertheless, Jones argues that this definition—specifically, the second half of the definition—was overly broad because it permitted the jury to convict Jones for using deadly weapons other than a firearm.

However, on the same page, the application portion of the charge explained that the jury must find beyond a reasonable a doubt that Jones “threaten[ed] [Smith], a member of the defendant’s family . . . with imminent bodily injury by using and exhibiting a deadly weapon, *namely, a firearm.*” (emphasis added). Therefore, assuming without deciding that the abstract paragraph contained error by broadly defining a deadly weapon, we conclude there is no egregious harm because the application paragraph correctly instructed the jury that it needed to find that Jones exhibited or used a firearm. *See Medina*, 7 S.W.3d at 640; *Gilbert*, 494 S.W.3d at 768; *Riggs*, 482 S.W.3d at 276. We overrule Jones’s second issue.

C. PROSECUTORIAL MISCONDUCT

1. STANDARD OF REVIEW AND APPLICABLE LAW

To preserve error regarding alleged prosecutorial misconduct, an appellant must (1) object on specific grounds; (2) request an instruction to disregard any matter improperly placed before the jury; and (3) move for a mistrial. *See Penry v. State*, 903 S.W.2d 715, 764 (Tex. Crim. App. 1995); *Hajjar v. State*, 176 S.W.3d 554, 566 (Tex. App.—Houston [1st Dist.] 2004, pet. ref’d); *see also Artz v. State*,

No. 14-17-00973-CR, 2019 WL 1442069, at *7 (Tex. App.—Houston [14th Dist.] Apr. 2, 2019, no pet.) (mem. op., not designated for publication).

2. APPLICATION

Jones alleges prosecutorial misconduct based on a statement made by the prosecutor during opening statements that Smith “may or may not” testify during trial. However, Jones made no objections to the trial court about this statement. Because this issue cannot be raised for the first time on appeal, Jones needed to object to the trial court in order to preserve error. *See Proenza v. State*, 541 S.W.3d 786, 793-4 (Tex. Crim. App. 2017); *Hardeman v. State*, 1 S.W.3d 689, 690 (Tex. Crim. App. 1999). Therefore, any alleged error is unpreserved. *See Penry*, 903 S.W.2d at 764; *Hajjar*, 176 S.W.3d at 566. We overrule Jones’s third issue.

III. CONCLUSION

We affirm the trial court’s judgment.

/s/ Margaret “Meg” Poissant
Justice

Panel consists of Justices Zimmerer, Poissant, and Wilson.
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