COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-16-00307-CR

SCOTTY JOE BRIDGES APPELLANT

V.

THE STATE OF TEXAS STATE

FROM THE 271ST DISTRICT COURT OF WISE COUNTY
TRIAL COURT NO. CR18561

MEMORANDUM OPINION[1]

Appellant Scotty Joe Bridges appeals his conviction for aggravated assault with a deadly weapon.[2] In three points, he argues that the evidence is insufficient to support his conviction because it does not establish that he used or exhibited a deadly weapon during the assault, that the trial court erred by

[1] *See* Tex. R. App. P. 47.4.

[2] *See* Tex. Penal Code Ann. § 22.02(a)(2) (West 2011).

instructing the jury about the law of self-defense only as to aggravated assault and not as to the lesser-included offense of assault, and that the trial court erred in its responses to his objections to the State's closing argument. We affirm.

Background Facts[3]

Appellant and Ronnie Tackel, the complainant, lived in the same trailer park and were once friends. On many mornings, appellant and his wife, Ginger, went to Tackel's house to visit and to drink coffee. Appellant also worked for Tackel, and Tackel paid him for the work.

One day in June 2015, appellant visited Tackel, and Tackel poured appellant a cup of coffee. Tackel noticed that appellant was acting strangely that day; appellant kept "nodding off," and when Tackel took appellant to a store to buy only fabric softener, appellant stayed in the store for thirty to forty-five minutes before purchasing several items. After Tackel urged appellant to complete his purchases and made a couple of other stops with him, Tackel took him home. On the way, appellant told Tackel, "I won't ask you for a damn ride nowhere again because I don't like to be rushed." Tackel responded by stating that appellant had the option to walk.

After Tackel drove back to his own house, appellant returned there. Appellant asked Tackel for a beer, and Tackel allowed him to take one. Appellant said, "Do you know what I think?" Appellant then knocked Tackel out

[3]We recite the facts in the light most favorable to the jury's verdict.

of a chair and began hitting and kicking him. According to Tackel, appellant "put [him] through pure hell," and Tackel never defended himself. Tackel testified, "It . . . wasn't a fight. It was a one-sided assault."

During the incident, appellant beat Tackel's head with a heavy wooden chair, and the chair broke. According to Tackel, appellant used the chair in a way that was meant to hurt Tackel badly. Eventually, at the end of the assault, appellant poured the beer on Tackel's head and said, "Give me your damn pills." According to Tackel, he gave appellant pills[4] and escaped to a neighbor's house. The neighbor called 9-1-1 and told a dispatcher that appellant had "beat[en] the crap out of" Tackel, that Tackel's "face [was] bleeding all over," and that there was blood in Tackel's house.

A sheriff's deputy arrived at the house and met with Tackel. The deputy noticed that Tackel's face was "marred and streaked with blood." He had cuts on various parts of his body, including a large cut above his left eye, and he had bruising on his left side. There was blood splattered across his floor and on a wall. The deputy noticed a broken wooden chair and blood on a broken arm of the chair. Tackel told the deputy that appellant had attacked him. The deputy

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[4]The focus of much of the testimony at trial concerned whether appellant took pills from Tackel, which could have supported the theft allegation within appellant's aggravated robbery charge. Because appellant was not convicted of aggravated robbery but was instead convicted of the lesser-included offense of aggravated assault, we will not detail the witnesses' testimony concerning the pills. *See Ex parte Denton*, 399 S.W.3d 540, 547 (Tex. Crim. App. 2013) (explaining that aggravated assault may be a lesser-included offense of aggravated robbery).

took photos of Tackel's injuries, including his bloodied face; a blood-soiled floor and wall; and the broken chair. Another deputy saw Tackel and noticed that he appeared to be in significant pain and had trouble breathing.

Medical personnel arrived and took Tackel to a hospital, where he received treatment in an emergency room. Tackel saw a doctor the next day. One of Tackel's cuts required fifteen sutures. He also had a fractured rib, but he did not have other broken bones. Tackel told the doctor that he had been beaten up with a chair.

Deputies went to appellant's trailer. They learned that he was carrying a flask that contained eighteen pills. Appellant had blood on his clothing and shoes and cuts on his cheek.

A grand jury indicted appellant for aggravated robbery and aggravated assault. At trial, the State proceeded only on the aggravated robbery count, and appellant pled not guilty. Through his questioning of witnesses and through his closing argument, appellant proposed that Tackel had attacked him with a knife, as evidenced by the cuts on his face. Thus, appellant proposed a theory of self-defense that included his use of the chair to defend himself. The knife was examined for blood and fingerprints; no blood was found on it, nor were any identifiable fingerprints.

After the State rested, the trial court granted appellant's motion for a directed verdict of not guilty on the charge of aggravated robbery on the basis that there was no evidence that there was a nexus between the assault and the

alleged theft of Tackel's pills. Therefore, the trial court submitted a jury charge only on lesser-included offenses of aggravated assault and assault.

After considering the parties' closing arguments, the jury convicted appellant of aggravated assault; thus, the jury did not return a verdict on assault. The parties presented evidence and arguments on appellant's punishment. The jury found a sentence-enhancement allegation to be true and assessed sixty years' confinement. The trial court sentenced him accordingly, and he brought this appeal.

Evidentiary Sufficiency

In his first point, appellant contends that the evidence is insufficient to sustain his conviction for aggravated assault because it fails to show that he used or exhibited a deadly weapon while assaulting Tackel. *See* Tex. Penal Code Ann. § 22.02(a)(2). In our due-process review of the sufficiency of the evidence to support a conviction, we view all of the evidence in the light most favorable to the verdict to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979); *Jenkins v. State*, 493 S.W.3d 583, 599 (Tex. Crim. App. 2016). This standard gives full play to the responsibility of the trier of fact to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. *Jackson*, 443 U.S. at 319, 99 S. Ct. at 2789; *Jenkins*, 493 S.W.3d at 599.

The trier of fact is the sole judge of the weight and credibility of the evidence. *See* Tex. Code Crim. Proc. Ann. art. 38.04 (West 1979); *Blea v. State*, 483 S.W.3d 29, 33 (Tex. Crim. App. 2016). Thus, when performing an evidentiary sufficiency review, we may not re-evaluate the weight and credibility of the evidence and substitute our judgment for that of the factfinder. *See Montgomery v. State*, 369 S.W.3d 188, 192 (Tex. Crim. App. 2012). Instead, we determine whether the necessary inferences are reasonable based upon the cumulative force of the evidence when viewed in the light most favorable to the verdict. *Murray v. State*, 457 S.W.3d 446, 448 (Tex. Crim. App.), *cert. denied*, 136 S. Ct. 198 (2015). We must presume that the factfinder resolved any conflicting inferences in favor of the verdict and defer to that resolution. *Id.* at 448–49; *see Blea*, 483 S.W.3d at 33.

To obtain appellant's conviction for aggravated assault, the State was required to prove that he used or exhibited a deadly weapon while assaulting Tackel. *See* Tex. Penal Code Ann. § 22.02(a)(2). A deadly weapon includes "anything that in the manner of its use or intended use is capable of causing death or serious bodily injury." *Id.* § 1.07(a)(17)(B) (West Supp. 2016); *Daniel v. State*, 478 S.W.3d 773, 780 (Tex. App.—Fort Worth 2015, no pet.); *see also* Tex. Penal Code Ann. § 1.07(a)(46) (defining "serious bodily injury" as "bodily injury that creates a substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ").

“Objects that are not usually considered [deadly] weapons may become so, depending on the manner in which they are used during the commission of an offense.” *Bedford v. State*, No. 02-15-00176-CR, 2016 WL 5220068, at *3 (Tex. App.—Fort Worth Sept. 22, 2016, no pet.) (mem. op., not designated for publication); *see Williams v. State*, No. 05-99-01975-CR, 2001 WL 21514, at *4 (Tex. App.—Dallas Jan. 10, 2001, pet. ref’d) (not designated for publication) (holding that evidence was sufficient to show that a chair was used as a deadly weapon). For evidence to be sufficient to sustain a deadly weapon finding, it must demonstrate that the object meets the statutory definition of a deadly weapon, that the deadly weapon was used or exhibited during the felonious transaction, and that someone was put in actual danger. *Drichas v. State*, 175 S.W.3d 795, 798 (Tex. Crim. App. 2005).

Evidence that a factfinder may consider in determining whether an object was used or exhibited as a deadly weapon includes the physical proximity between the victim and the object, any threats or words used by the defendant, the manner in which the defendant used the object, testimony by the victim of a fear of death or serious bodily injury, and testimony that the object had the potential to cause death or serious bodily injury. *Hopper v. State*, 483 S.W.3d 235, 239 (Tex. App.—Fort Worth 2016, pet. ref’d). To prove that an object was used or exhibited as a deadly weapon, the State is not required to prove that the

defendant intended to cause serious bodily injury or death or that the defendant actually caused serious bodily injury or death.[5] *Id.*

Appellant's indictment alleged that he used a chair as a deadly weapon. The trial court admitted Tackel's broken chair along with photographs of the chair and its broken arms. One broken arm had blood on it, and the chair also had blood on its back side. According to one deputy, the "chair had blood all over the back of it, both the back side and the back front and on the cushion."

The broken chair was part of a four-piece set that appeared to be made of solid wood and that had tall backs, armrests, and cushions. A deputy testified that the chair was capable of causing serious bodily injury or death if used as a weapon. The deputy stated that Tackel's injuries were consistent with "being hit with something" and that he had no reason to believe that Tackel had not been hit with the chair.

Another deputy described the chair as "pretty heavy" and "very solid" and explained that as opposed to the broken chair, the other three chairs were "completely intact." That deputy recognized, however, that based on the way the chair was built, it would tend to break on its arm joints first, where wood pieces were joined together by pegs. The deputy also testified that he could not opine about how loose the joints on the broken chair were before the altercation or about what mechanism of force broke the chair. The chair contained a fingerprint

[5]Thus, we are not persuaded by appellant's argument that Tackel did not actually suffer serious bodily injury from appellant's use of the chair.

that matched appellant's left middle finger. The doctor who evaluated Tackel the day after the assault testified that a chair could cause serious bodily injury or death when used as a weapon.

Tackel testified that appellant beat him on his head with the chair.[6] He described the chair as sturdy and heavy and stated that the chair was not broken before the assault. When the State asked Tackel whether appellant was using the chair in a way that was intended to hurt him "real bad," Tackel responded, "I would think so, yes." Tackel testified that over the course of the entire altercation, appellant "brutally beat the hell out of [him]," and he emphasized that he was "badly hit in the head." Tackel denied that appellant's fists caused the cut over his eye, implying that the chair caused the cut. Tackel believed that appellant was going to kill him.

Viewing this evidence in the light most favorable to the jury's verdict, we conclude that a rational jury could have determined that appellant used the chair as a deadly weapon. *See Jackson*, 443 U.S. at 319, 99 S. Ct. at 2789; *see also* Tex. Penal Code Ann. §§ 1.07(a)(17)(B), 22.02(a)(2). A rational jury could have made that finding based upon the cumulative effect of the descriptions of the chair as sturdy, heavy, and unbroken at the beginning of the assault; evidence that the the chair was broken and bloodied at the end of the assault; the deputy's

[6]Appellant argues that there was "no specificity as to how, or where on [Tackel's] body, or with what force, [the chair] was used." But Tackel testified that appellant hit him "in the head with the chair" and that he was "badly hit in the head."

testimony and the doctor's testimony that the chair was capable of causing death or serious bodily injury; Tackel's testimony that the chair was used during the assault to hit him in the head in a way that was intended to hurt him "real bad"; and Tackel's subjective belief that appellant was going to kill him. *See Hopper*, 483 S.W.3d at 239.

We conclude that under the standards described above, the evidence is sufficient to support the jury's finding that appellant used or exhibited a deadly weapon while assaulting Tackel. Therefore, we hold that the evidence is sufficient to support appellant's conviction. We overrule his first point.

Jury Charge

In his second point, appellant argues that the trial court erred by instructing the jury about self-defense only on the aggravated assault charge and not on the lesser-included assault charge. During a break after the State rested, the trial court held a charge conference. The court asked the parties whether they had objections to the court's proposed charge, and appellant requested an instruction on the law of self-defense as relating to the aggravated robbery charge, which was the sole charge that the State was proceeding on at that time. The trial court denied the inclusion of a self-defense instruction.

Later, after appellant rested, he again asked the trial court to include a self-defense instruction, and the court granted the request. The court also granted appellant's directed verdict of not guilty on the aggravated robbery charge and decided to submit aggravated assault and assault charges to the jury. The court

prepared a new proposed jury charge and again asked the parties whether they had objections. The State and appellant stated that they had no objections.

The jury charge that the trial court submitted to the jury contained a lengthy discussion concerning the law of self-defense and then stated,

> *In regards [sic] to the offense of Aggravated Assault with a Deadly Weapon* if you find from the evidence beyond a reasonable doubt that on or about the 10th day of June, 2015, . . . the Defendant . . . did [commit aggravated assault against Tackel], but you further find from the evidence, or you have a reasonable doubt thereof, that at that time the Defendant was under attack or attempted attack from [Tackel], and that the Defendant reasonably believed, as viewed from his standpoint, that such deadly force as he used, if any, was immediately necessary to protect himself against such attack or attempted attack, and so believing, if he did, he struck [Tackel] with a chair, if he did, which caused bodily injury to [Tackel], then you will acquit the Defendant and say by your verdict Not Guilty. [Emphasis added.]

On appeal, appellant contends that the trial court reversibly erred by "limit[ing] its application [of the self-defense instruction] to the greater offense of aggravated assault with a deadly weapon." For two reasons, we reject this argument.

First, a defendant who fails to request a jury instruction on a defensive issue, or to object to the omission of such an instruction, forfeits that issue for appeal, unless the instruction is mandated by rule or statute. *See Oursbourn v. State*, 259 S.W.3d 159, 178–81 (Tex. Crim. App. 2008); *Delgado v. State*, 235 S.W.3d 244, 249–50 & n.19 (Tex. Crim. App. 2007). The trial court has no duty to *sua sponte* instruct the jury on unrequested defensive issues because these issues are not "law applicable to the case." *See* Tex. Code Crim. Proc. Ann. art.

36.14 (West 2007); *see also Bennett v. State*, 235 S.W.3d 241, 243 (Tex. Crim. App. 2007) ("Defensive instructions must be requested in order to be considered applicable law of the case requiring submission to the jury."). Based on this authority, because appellant did not object to the lack of a self-defense instruction relating to assault (as opposed to aggravated assault) in the final jury charge but instead stated, "We have no objections, no requests," we conclude that he forfeited this point. *See Hamilton v. State*, No. 02-08-00096-CR, 2009 WL 1650049, at *1 (Tex. App.—Fort Worth June 11, 2009, no pet.) (mem. op., not designated for publication) ("Because Appellant did not request a self-defense instruction at trial, he has forfeited his [compliant]."); *Williams v. State*, No. 09-14-00217-CR, 2015 WL 4312518, at *6 (Tex. App.—Beaumont July 15, 2015, no pet.) (mem. op., not designated for publication) ("[T]o preserve his point of error regarding the trial court's failure to include a self-defense instruction, Williams was required to make a specific objection to the trial court's charge.").

Second, even if appellant had preserved error and even if the trial court had erred by not including a self-defense instruction on assault, there is no harm. The jury did not convict appellant of assault; instead, the jury convicted appellant of aggravated assault, upon which the jury was instructed on self-defense. As the State contends, it is "illogical to presume the jury would have acquitted [a]ppellant [of the greater charge of aggravated assault] had the lesser-included charge also included the self-defense instruction." *See Clark v. State*, 717 S.W.2d 910, 917–18 (Tex. Crim. App. 1986) (holding that when a jury convicted

a defendant of a greater offense, "errors in the charge on the lesser included offense, for which the appellant was not convicted, could not so have misled the jury as to constitute fundamental error"), *cert. denied*, 481 U.S. 1059 (1987); *Tennison v. State*, No. 05-11-01431-CR, 2013 WL 3353329, at *1–2 (Tex. App.—Dallas Jun. 28, 2013, pet. ref'd) (not designated for publication) (holding that an appellant was not harmed because "[w]hen the jury convicted appellant of the greater offense of aggravated assault, the verdict nullified any harm in the lesser included offense portion of the charge").[7]

For these reasons, we overrule appellant's second point.

Jury Argument

In his third point, appellant argues that the trial court erred in its rulings on his objections to the State's closing argument concerning his guilt. During that argument, the following exchange occurred:

> [THE STATE]: Let me tell you, the reason the Defendant and the Defense -- they don't want this tested. They never wanted this tested because it's never going to have the evidence they want. They could test it. Those two have been --
>
> [DEFENSE COUNSEL]: Your Honor, I'm going to object to counsel shifting the burden of proof.
>
> THE COURT: Sustained.

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[7]Appellant relies on our sister court's decision in *Burd v. State*, but there, the trial court did not apply self-defense to a lesser-included charge and the defendant was convicted of the *lesser charge*. 404 S.W.3d 64, 71 (Tex. App.—Houston [1st Dist.] 2013, no pet.). Here, appellant was convicted of the *greater charge*: aggravated assault.

[DEFENSE COUNSEL]: And I'd ask that the jury be instructed to disregard.

THE COURT: The jury is instructed to disregard the last statement.

You may proceed.

[THE STATE]: I can tell you, ladies and gentlemen, I've known [defense counsel for] 20 years. If she said, . . . I want this tested --

[DEFENSE COUNSEL]: And, Judge --

[THE STATE]: -- it is important.

[DEFENSE COUNSEL]: -- I'm going to object that we have no burden of proof, and, again, that is shifting the burden of proof.

THE COURT: I sustain that objection.

[DEFENSE COUNSEL]: And I'd ask the jury be instructed to disregard.

THE COURT: They've been instructed to disregard.

Later during the argument, this exchange occurred:

[THE STATE:] If you find this Defendant either not guilty or guilty of only a misdemeanor, that's fair for time served. He's out. He leaves today. It's over. Is that the message you want to send [Tackel]? If you have a loved one that's beat in this condition, looks like this, who comes in their house, is that the verdict? . . . [Y]ou're telling me, telling the newspaper, you're telling all of us that's just a misdemeanor, that chair didn't hurt. I mean, that's the message you're sending me, that's the message you're sending -- sending your elected --

[DEFENSE COUNSEL]: Judge, I'm going to --

[THE STATE]: -- District Attorney.

[DEFENSE COUNSEL]: -- object. This is not the standard. It's not a question of whether or not the chair hurt or whether or not the chair was a deadly weapon, beyond a reasonable doubt.

> THE COURT: Sustained.
>
> [DEFENSE COUNSEL]: I'd ask the jury be instructed to disregard.
>
> THE COURT: I've told the jury that this isn't evidence. It's final argument of the Defendant and the State.

The State argues that appellant failed to preserve his complaints concerning these arguments for our review. In the first excerpt quoted above, appellant twice objected, the trial court sustained the objections, appellant asked for instructions to disregard, and the trial court gave the instructions. Appellant did not request a mistrial. The trial court gave him all the relief he requested, and he did not obtain an adverse ruling. Thus, we must conclude that appellant did not preserve a complaint concerning the first excerpt for our review. *See* Tex. R. App. P. 33.1(a); *Archie v. State*, 221 S.W.3d 695, 699 (Tex. Crim. App. 2007) ("To preserve error[,] . . . a defendant must pursue to an adverse ruling his objections to jury argument.").

As to the second excerpt quoted above, the trial court sustained appellant's objection, and when appellant asked for an instruction to disregard, the trial court responded, "I've told the jury that this isn't evidence. It's final argument of the Defendant and the State." We will assume, without deciding, that this comment was sufficient to deny the request for an instruction to disregard and therefore preserved this complaint for our review.

To the extent that the State's argument conveyed to the jury that whether Tackel was "hurt" was the deciding factor between misdemeanor assault and

felony aggravated assault, the argument was improper because it misstated the law. *See* Tex. Penal Code Ann. § 22.02(a)(2); *Slater v. State*, No. 02-11-00368-CR, 2013 WL 2631194, at *4 (Tex. App.—Fort Worth June 13, 2013, pet. ref'd) (mem. op., not designated for publication) ("[A]rgument that misstates the law or is contrary to the court's charge is improper.").

Prosecutorial misstatements of the law do not, however, lead to automatic reversal; instead, we must determine from the entire record whether the trial court's error in failing to instruct the jury to disregard the misstatement caused harm by affecting appellant's substantial rights. *See* Tex. R. App. P. 44.2(b); *Stewart v. State*, 221 S.W.3d 306, 313 (Tex. App.—Fort Worth 2007, no pet.). To determine whether a prosecutor's misstatement of law had a "substantial and injurious effect or influence on the jury's verdict, we look at all the evidence and the court's charge, as well as the alleged misstatement. Absent evidence to the contrary, a jury is presumed to follow the instructions set forth in the court's charge." *Rodriguez-Olivas v. State*, No. 02-13-00520-CR, 2015 WL 6081773, at *20 (Tex. App.—Fort Worth Oct. 15, 2015, pet. ref'd) (mem. op., not designated for publication) (citation omitted).

Considering the context of the entire closing argument along with the explicit language in the jury charge, each of which directed the jury to the correct elements of aggravated assault, we cannot conclude that the isolated misstatement of the law about whether Tackel was "hurt" affected appellant's substantial rights. *See* Tex. R. App. P. 44.2(b). At the beginning of the State's

closing argument, a prosecutor told the jury that to obtain a conviction for aggravated assault, the State had the burden to prove "beyond any reasonable doubt" that appellant used the chair as a deadly weapon. The prosecutor argued, "The only issue really to decide [is] . . . was that chair . . . when [appellant] assaulted [Tackel] . . . a deadly weapon?" Later, the prosecutor said, "So the question is: Was the chair used as a deadly weapon?" Defense counsel then argued, "[T]he only way you can get guilty of aggravated assault/deadly weapon is you have to believe [appellant used] a deadly weapon." Defense counsel then extensively focused on whether the chair qualified as a deadly weapon. Defense counsel concluded that appellant could be, at most, "guilty of assault, not aggravated assault, . . . because there's no evidence of how [the chair] was used as a deadly weapon." In its rebuttal argument, the State reiterated that the "only real issue was" whether the "chair [was] a deadly weapon." The trial court's jury charge plainly and correctly instructed the jury about the elements of aggravated assault (including the use or exhibition of the chair as a deadly weapon), and we presume that the jury followed the instructions. *See Rodriguez-Olivas*, 2015 WL 6081773, at *20.

Given the facts above and our review of the entire record from the trial, we cannot conclude that there is any reasonable probability that the complained-of argument misled the jury about the elements of aggravated assault or influenced the verdict. Therefore, we cannot conclude that the trial court's decision to sustain appellant's objection to the State's argument but to not instruct the jury to

disregard the argument affected appellant's substantial rights and caused harm. *See* Tex. R. App. P. 44.2(b).

For all of these reasons, we overrule appellant's third point.

Conclusion

Having overruled all of appellant's points, we affirm the trial court's judgment.

/s/ Terrie Livingston

TERRIE LIVINGSTON
CHIEF JUSTICE

PANEL: LIVINGSTON, C.J.; GABRIEL and SUDDERTH, JJ.

DO NOT PUBLISH
Tex. R. App. P. 47.2(b)

DELIVERED: August 31, 2017