NO. 07-12-0044-CR

IN THE COURT OF APPEALS

FOR THE SEVENTH DISTRICT OF TEXAS

AT AMARILLO

PANEL C

NOVEMBER 29, 2012

SIMON FRANCIS, JR.,

Appellant

v.

THE STATE OF TEXAS,

Appellee

FROM THE 30TH DISTRICT COURT OF WICHITA COUNTY;

NO. 50,898-A; HONORABLE ROBERT P. BROTHERTON, PRESIDING

Memorandum Opinion

Before QUINN, C.J., and HANCOCK and PIRTLE, JJ.

Simon Francis, Jr. pled guilty to two counts of robbery but went to trial before the court on whether the robbery was aggravated. The trial court found that it was, convicted him of both counts of aggravated robbery, and sentenced him to seventy-five years in prison on each count. Appellant now argues that the evidence is insufficient to find that the robbery was aggravated as alleged in the indictment. We affirm.

According to the record, appellant, "a large man," attacked two ladies who were over fifty years old. The two ladies were working at a retail establishment at the time.

The first to be attacked was Litteken. Appellant entered the store, struck her with his fist or hand, rendered her momentarily unconscious, placed his arm around her throat, squeezed harder when she attempted to scream, carried her by the waist into a back room, and shoved her away upon spying his second victim. The latter, Robey, was working in the back room when appellant entered with Litteken. At that point, appellant picked up an object and hit Robey with such force so as to break her nose and the crowns of two teeth. The blow also impaired Robey's vision, which impairment continued through the time of trial.

Via the two counts in the indictment, the State accused appellant of aggravated robbery. The first count involved the attack upon Litteken; in committing the robbery he allegedly used or exhibited a deadly weapon, *i.e.* "his arms and hands, that in the manner of their use or intended use were capable of causing death or serious bodily injury." The second count involved the attack upon Robey. Not only was appellant accused of aggravated robbery by causing her serious bodily injury but also by using or exhibiting a deadly weapon during the attack, *i.e.* "an unknown object [that] in the manner of its use or intended use was capable of causing death or serious bodily injury." Appellant would have us conclude that the evidence of record failed to establish any of the aforementioned means by which the robbery was aggravated. We overrule the issues.

A deadly weapon is "anything that in the manner of its use or intended use is capable of causing death or serious bodily injury." TEX. PENAL CODE ANN. § 1.07(a)(17)(B) (West Supp. 2012). This definition does not require the State to prove that anyone actually died or suffered serious bodily injury or that the accused intended

to cause serious bodily injury. *Quincy v. State*, 304 S.W.3d 489, 500 (Tex. App.–Amarillo 2009, no pet.); *accord Baltazar v. State,* 331 S.W.3d 6, 8 (Tex. App.–Amarillo 2010, pet. ref'd). Rather, it need only prove that the weapon in question was capable of causing serious bodily injury in the way it was used or intended to be used. *Baltazar v. State,* 331 S.W.3d at 8. Next, serious bodily injury is 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." TEX. PENAL CODE ANN. § 1.07(a)(46) (West Supp. 2012).

Regarding appellant's use of deadly weapons, we note the concession in appellant's brief that he was a "large" man. Furthermore, both his victims were older females. In addition to being large, he was also quite strong, given his ability to knock out Litteken with one blow, leave her with a concussion due to the single blow, carry her around by her waist, and hit Robey with an object of sufficient force to break crowns and her nose. That he also placed his arm around Litteken's throat and squeezed tighter when she attempted to yell says much as well. According to a physician witness, a chokehold could "either close the airway long enough for the patient to suffer serious bodily injury or death" or fracture the larynx. Simply put, there was and is some evidence of record enabling a rational factfinder to conclude, beyond reasonable doubt, not only that the manner of use or intended use of appellant's hands and arms against Litteken were capable of causing death or serious bodily injury but also that the manner of use or intended use of the object which struck Robey was capable of the same. *See Baltazar v. State,* 331 S.W.3d at 8-9 (finding the evidence sufficient to sustain a conviction for aggravated assault with a deadly weapon when the complainant suffered

a bloody nose, bruises, abrasions, double vision, pain, a headache, blurriness, was briefly unconscious, and a doctor testified that the facial injury was serious).

As for inflicting serious bodily injury upon Robey, her broken crowns, coupled with her broken nose and continued visual impairment were ample evidence to allow a rational factfinder to conclude that the bodily injury she suffered involved, at the very least, "protracted loss or impairment of the function of [a] bodily member or organ." So, the evidence was sufficient to prove that aspect of aggravation as well. *Brown v. State,* 605 S.W.2d 572, 575 (Tex. Crim. App. 1980) (finding a broken nose serious bodily injury on the day it was inflicted even though the effects were later ameliorated by medical treatment).

Accordingly, the judgments are affirmed.

Per Curiam

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