In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-17-00170-CR

JACOB PAUDA, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

On Appeal from the 137th District Court
Lubbock County, Texas
Trial Court No. 2017-411,624, Honorable John J. "Trey" McClendon III, Presiding

September 4, 2018

MEMORANDUM OPINION

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

Following a bench trial, appellant Jacob Pauda was convicted of the third-degree felony offense of domestic assault with a prior conviction,[1] enhancing the punishment of the offense to that of a second-degree felony. The trial court also made an affirmative deadly weapon finding. The trial court sentenced appellant to imprisonment for fifteen

[1] TEX. PENAL CODE ANN. § 22.01(b)(2)(A) (West 2018). Near the end of trial, the State abandoned its count charging appellant with aggravated assault.

years.[2] Through this appeal, appellant challenges the sufficiency of the evidence supporting the trial court's affirmative deadly weapon finding. We will affirm the judgment of the trial court.

Background

Appellant does not deny he assaulted his pregnant live-in girlfriend in early February 2016. The central issue at trial, and the only issue disputed on appeal, is whether the evidence at trial sufficiently supported the deadly weapon finding.

On the night of the assault, the victim called her mother to tell her appellant "beat her up." According to the mother's testimony, the victim was "crying very hard." The mother came to get the victim and the victim called 9-1-1 while in the car. The victim told the dispatcher that she was pregnant, her boyfriend had beat her up, and she had a black eye and bumps on her head. She also said appellant "pulled a knife out" on her. A recording of the emergency call was admitted into evidence. No knife was introduced into evidence.

A detective responded shortly after the 9-1-1 call and spoke with the victim at the hospital. He testified the victim told him appellant repeatedly punched her with a "closed right fist" and then went to the kitchen where he grabbed a "large butcher knife" and pointed it "directly at her." Appellant chased her around the bed in the living room but when he couldn't catch her, he "dropped the knife, lunged at her, grabbed her by the hair"

[2] A second-degree felony is punishable by imprisonment for any term of not more than twenty years or less than 2 years and a fine not to exceed $10,000. TEX. PENAL CODE ANN. § 12.33 (West 2018).

and “threw her down onto the floor.” He continued his assault by kicking her and “smashing her head” on the side of the bed frame.

The victim’s mother testified the victim later showed her the knife on the kitchen counter of the home. Another detective interviewed the victim a week after the assault. He testified the victim told him appellant used a knife during the assault. The victim’s medical records indicated she told medical personnel that her boyfriend used his hands and feet to assault her.

At trial, the victim testified she and appellant were “together” and that she did not want to testify against him. She also agreed she had signed an affidavit of non-prosecution. She admitted appellant hit and kicked her but denied appellant had a knife on the night of the assault. She testified, “I mean I remember [the knife] being on the counter” but said he “never” had it in his hands. She told the prosecutor she did not remember telling the 9-1-1 dispatcher or the responding detective that appellant used a knife during the assault. But the victim admitted she “did mention” the knife to the second detective.

Analysis

Reviewing a claim of evidentiary insufficiency with regard to a deadly weapon finding, we view the evidence in the light most favorable to the finding to determine whether any rational trier of fact could have found beyond a reasonable doubt that the defendant used or exhibited a deadly weapon. *Villarreal v. State*, No. 07-05-0421-CR, 2006 Tex. App. LEXIS 10532, at *3 (Tex. App.—Amarillo Dec. 5, 2006, no pet.) (mem. op., not designated for publication) (citations omitted).

During trial, the court addressed hearsay objections to some testimony. No challenge to the court's rulings on those objections is raised on appeal. In reviewing the sufficiency of the evidence, the court considers all evidence that was before the factfinder regardless whether it was properly or improperly admitted. *Clayton v. State,* 235 S.W.3d 772, 778 (Tex. Crim. App. 2007); *Dewberry v. State,* 4 S.W.3d 735, 740 (Tex. Crim. App. 1999).

The Penal Code defines a "deadly weapon" as "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 2018). A knife is not a deadly weapon as a matter of law. *Robertson v. State*, 163 S.W.3d 730, 732 (Tex. Crim. App. 2005). "Whether a particular knife is a deadly weapon by design, a deadly weapon by usage, or not a deadly weapon at all . . . depends on the evidence." *Thomas v. State,* 821 S.W.2d 616, 620 (Tex. Crim. App. 1991). The State need not introduce the knife into evidence to prove it was a deadly weapon, *Magana v. State,* 230 S.W.3d 411, 414 (Tex. App.—San Antonio 2007, pet. ref'd), nor must a victim sustain injury. *Victor v. State*, 874 S.W.2d 748, 751 (Tex. App.—Houston [1st Dist.] 1994, pet. ref'd). But, when there is no actual injury, the State must show the knife's capacity to cause serious bodily injury or death by factors that include the size, shape and sharpness of the weapon, threats made by the accused, the physical proximity of the accused and the victim, and the complainant's fear of serious bodily injury or death. *Id.* (citations omitted). *See also Hernandez v. State,* No. 07-16-00162-CR, 2018 Tex. App. LEXIS 805, at *5-6 (Tex. App.—Amarillo Jan. 29, 2018, no pet.) (mem. op., not designated for publication) (citing *Johnson v. State,* 509 S.W.3d 320, 323 (Tex. Crim. App. 2017)).

Here, the record shows evidence in favor of the deadly weapon finding. In her 9-1-1 call, the victim told the dispatcher appellant "pulled a knife out." The responding detective testified the victim told him that after punching her repeatedly, appellant got a "large butcher knife" out of the kitchen and pointed it "directly" at her. He chased her with it but when he could not catch her, he dropped it and lunged at her. He then continued his assault by punching and kicking the victim. He also made verbal threats against the victim. The victim admitted she told another detective that appellant used a knife during the assault. The victim's mother testified her daughter later showed her the knife on the kitchen counter when they went to the home. This evidence shows the character of the knife was that of "a large butcher knife" capable of causing serious bodily injury, thus supporting the trial court's finding. *See, e.g., McCain v. State,* 22 S.W.3d 497, 503 (Tex. Crim. App. 2000) (evidence that defendant carried partially-visible butcher knife in his pocket was sufficient to support defendant's use of deadly weapon); *Castillo v. State,* No. 05-02-01108-CR, 2003 Tex. App. LEXIS 3458, at * 11-14 (Tex. App.—Dallas Apr. 23, 2003, no pet.) (mem. op., not designated for publication) (despite lack of injury or admission of knife at trial, evidence that defendant pointed four-or-five-inch butcher knife at victim, made verbal threats, and was in close proximity to the victim was sufficient to find defendant used or exhibited deadly weapon).

The record also shows appellant was close to the victim as the two were circling a bed during the assault. According to the detective's testimony, the victim said appellant was close enough to her to lunge and make contact with her to continue his assault. Appellant's physical and verbal assault against the victim was violent and his introduction of the knife was sufficient to support an inference that appellant was exhibiting the knife

to instill fear into the victim. *Castillo,* 2003 Tex. App. LEXIS 3458, at *12; *see Plummer v. State,* 410 S.W.3d 855, 858 (Tex. Crim. App. 2013); *Patterson v. State,* 769 S.W.2d 938 (Tex. Crim. App. 1989) ("exhibited a deadly weapon" means that the weapon was consciously shown or displayed during the commission of the offense). This evidence too supports the trial court's affirmative finding.

Appellant emphasizes the victim's trial testimony that appellant did not use or exhibit a knife during the assault. However, her testimony contradicted that of the detective and her mother, and what the victim said on the 9-1-1 call. Further, as noted, the victim and appellant were "together" at the time of trial and the victim admitted she did not want to testify against him and had signed an affidavit of non-prosecution. As the sole judge of credibility, the trial court in a bench trial may accept one version of the facts and reject another, and it may reject any part of a witness's testimony. *Robertson v. State,* No. 01-15-00376-CR, 2016 Tex. App. LEXIS 1696, at * 3 (Tex. App.—Houston [1st Dist.] Feb. 18, 2016, no pet.) (mem. op., not designated for publication). We afford almost complete deference to the factfinder's credibility determinations. *Lancon v. State,* 253 S.W.3d 699, 705 (Tex. Crim. App. 2008). "When faced with conflicting evidence on a defendant's appeal of an adverse verdict, we presume the trier of fact resolved conflicts in favor of the prosecution." *Webster v. State,* No. 14-05-00326-CR, 2006 Tex. App. LEXIS 5941, at *13 (Tex. App.—Houston [14th Dist.] July 6, 2006, pet. ref'd) (mem. op., not designated for publication) (citation omitted). *See also Walker v. State,* No. 02-16-00139-CR, 2017 Tex. App. LEXIS 10813, at *24 (Tex. App.—Fort Worth Nov. 16, 2017, no pet.) (mem. op., not designated for publication) (it is within the factfinder's purview to weigh recantations in the consideration of a victim's overall credibility and such conflicts

in the evidence alone are not enough to render the evidence insufficient). From its affirmative deadly weapon finding, it is clear the trial court disbelieved the victim's trial testimony and instead believed the other evidence before it.

And we reiterate that, in a sufficiency review, we are to consider all evidence, whether properly or improperly admitted. *Clayton,* 235 S.W.3d at 778; *Dewberry,* 4 S.W.3d at 740. Accordingly, even if evidence to which appellant refers should not have been admitted, an issue we do not address, we consider it along with all other admitted evidence in determining whether the sufficiency standard was satisfied.

We find the evidence, viewed in the light most favorable to the finding, supports the trial court's deadly weapon finding. We resolve appellant's issue against him.

Conclusion

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

James T. Campbell
Justice

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