TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-15-00632-CR

Christopher David Scott, Appellant

v.

The State of Texas, Appellee

FROM THE DISTRICT COURT OF TRAVIS COUNTY, 147TH JUDICIAL DISTRICT
NO. D-1-DC-14-200161, HONORABLE CLIFFORD A. BROWN, JUDGE PRESIDING

M E M O R A N D U M O P I N I O N

A jury convicted Christopher David Scott of aggravated assault family violence causing serious bodily injury with a deadly weapon and aggravated assault by threat with a deadly weapon. For these offenses, the district court assessed sentences of twenty-five and fifteen years that are to run concurrently. Scott appeals his judgments of conviction, contending for the first time on appeal that they violate the prohibition against double jeopardy. We conclude that a double-jeopardy violation is not clearly apparent on the face of the record, and we will affirm the judgments of conviction.

BACKGROUND

The victim N.H. testified that Scott, with whom she had a non-exclusive dating relationship, asked her to pick him up from a residence to give him a ride. She stated that after she arrived, Scott asked for help getting some things from the residence. Once inside the hallway of the

house, N.H. noticed a sex toy on the floor and said "gross." N.H. testified that Scott then "freaked out on [her]," told her that he "wasn't in the mood to be f'd with," and pushed her from the hallway into the back bedroom where he wrapped a computer cord around her neck, tugged on it trying to choke her, and told her that he was going to kill her. N.H. testified that eventually Scott stopped trying to wrap the cord around her neck, and then he got a pocketknife, held it up to her neck, and told her that he was going to slit her throat. She recalled that Scott was "going in and out of the room," and she tried to use the phone in her coat pocket to dial 911. She testified that Scott saw what she was doing, took her phone away, and proceeded to beat her with a computer cord, a metal belt buckle, a wooden pole, and his closed fist. N. H. further testified that Scott struck her head and stomach and placed his hands around her neck until she passed out on the bed. N.H. stated that when she regained consciousness she was on the floor, her eyes were swollen shut, and Scott was kicking her with his boots and punching her in her side and on her head. N.H. estimated that this went on for two or three hours. She testified that Scott later told her to wash herself off, but she needed assistance doing so because she was unable to see. She said that while she was in the tub Scott called his other girlfriend, A.R. Afterward, N.H. stated that Scott told her to get dressed and wait for him by the car. N.H. testified that she felt weak, that "everything hurt," and she slumped by the car, where she later began vomiting blood.

A.R. testified that Scott called her from her house on the day of the offenses. A.R. explained that she was not home because she went to visit her sister after work. A.R. testified that she put Scott on the speakerphone so that her sister could hear. A.R. recalled Scott saying that he had beaten up N.H., torn up the house, and needed A.R. to come clean up.

A.R.'s sister P.D. testified that she heard Scott's phone call. P.D. recalled Scott saying that he was with a woman named N., that he had beaten her very badly, that there was blood all over the house, and that he wanted A.R. to come help him clean it up. P.D. called 911.

Austin Police Officer Robert Mathis testified that he responded to a report of a man threatening to kill a woman and that he found N.H. at the scene, leaning against a car in the driveway and vomiting blood. He testified that her nose was bleeding, she had a cut to the left of her eye, and both of her eyes were blackened and swollen shut. Officer Mathis photographed N.H.'s injuries. He stated that he called an ambulance and that paramedics began treating N.H. before transporting her to the hospital.

Dr. Paul Riekert, an emergency-room physician in the Level I Trauma Center at Brackenridge Hospital, testified that he treated N.H., who had significant and diffuse bruising on her body, facial abrasions, a broken nose, and swelling and bleeding in her eye. Dr. Riekert testified that he referred N.H. to a neurosurgeon, and that N.H.'s CAT scan showed bleeding in and around her brain, and the presence of blood between her brain and skull in multiple areas.

At the conclusion of the trial, the jury found Scott guilty of aggravated assault family violence causing serious bodily injury with a deadly weapon and aggravated assault by threat with a deadly weapon as charged. The district court assessed sentences of twenty-five and fifteen years for these offenses, running concurrently.

DISCUSSION

Double-jeopardy violation not clearly apparent from face of record

Scott contends for the first time on appeal that his two convictions violate the prohibition against double jeopardy. The Double Jeopardy Clause protects defendants from: (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for same offense after a conviction; and (3) multiple punishments for the same offense. *Garfias v. State*, 424 S.W.3d 54, 58 (Tex. Crim. App. 2014); *Ex parte Milner*, 394 S.W.3d 502, 506 (Tex. Crim. App. 2013); *see also* U.S. Const. amend. V. Scott raises a "multiple-punishments" claim. A multiple-punishments claim can arise in the context of lesser-included offenses, where the same conduct is punished under a greater and a lesser-included offense, and when the same conduct is punished under two distinct statutes where the Legislature only intended for the conduct to be punished once. *Garfias*, 424 S.W.3d at 58. The Court of Criminal Appeals has stated that the best indicator of the Legislature's intent to treat the offenses as the same or different for double-jeopardy purposes is the focus, or "gravamen," of the two offenses. *Shelby v. State*, 448 S.W.3d 431, 438 (Tex. Crim. App. 2014). The Court has also stated that the protection against double jeopardy does not apply to separate and distinct offenses that occur during the same transaction. *Milner*, 394 S.W.3d at 506; *see Hutchins v. State*, 992 S.W.2d 629, 633 (Tex. App.—Austin 1999, pet. ref'd) (noting that even acts committed "in close temporal proximity" against same victim may constitute separate and distinct offenses).

In his double-jeopardy claim, Scott specifically contends that his two convictions were based on a different manner and means of committing the same offense, a greater and lesser-

included offense, and a "non-stop" assault of N.H. However, because Scott failed to preserve his double-jeopardy claim at trial, he may raise it for the first time on appeal only if the undisputed facts show that (1) the violation is clearly apparent on the face of the record, and (2) no legitimate state interest was served by enforcement of the usual rules of procedural default. *See Ex parte Denton*, 399 S.W.3d 540, 544 (Tex. Crim. App. 2013); *Langs v. State*, 183 S.W.3d 680, 687 (Tex. Crim. App. 2006); *Gonzalez v. State*, 8 S.W.3d 640, 643 (Tex. Crim. App. 2000). A double-jeopardy claim is apparent on the face of the trial record if resolution of the claim does not require further proceedings for the purpose of introducing additional evidence in support of the double-jeopardy claim. *Denton*, 399 S.W.3d at 544.

Not same conduct

A double-jeopardy violation is not clearly apparent on the face of this record. Scott's convictions were not based on the same conduct but rather, distinct assaultive crimes. The Court of Criminal Appeals has stated that the distinct ways of committing an assault are separate offenses, concluding that the gravamen of an aggravated assault is either "causing bodily injury" or "threatening imminent bodily injury," depending on which theory has been pleaded in the charging instrument. *Shelby*, 448 S.W.3d at 438 ("The gravamen of the offense of aggravated assault is the specific type of assault defined in Section 22.01 of the Texas Penal Code . . . defining assault as either intentionally, knowingly or recklessly causing bodily injury, or intentionally or knowingly threatening another with imminent bodily injury."). The Court has recognized that "each distinct assaultive crime is a separate crime: aggravated assault with the underlying crime of assault by causing bodily injury and aggravated assault with the underlying crime of assault by threat. The first

is a result-oriented offense and the second is a conduct-oriented offense." *Landrian v. State*, 268 S.W.3d 532, 540 (Tex. Crim. App. 2008); *see Perry v. State*, No. 06-13-00051-CR, 2014 Tex. App. LEXIS 9072, at *18 (Tex. App.—Texarkana Apr. 8, 2014, pet. ref'd) (mem. op., not designated for publication) (noting that "the focus or gravamen of the family violence count was on the actual harm inflicted to a victim in the same household, whereas the aggravated assault offense count focused on threatening conduct with a deadly weapon"); *Childress v. State*, 285 S.W.3d 544, 549-50 (Tex. App.—Waco 2009, pet. ref'd) (concluding that Legislature intended to treat dating-violence assault and aggravated assault as separate offenses and that defendant's convictions for those offenses was not double-jeopardy violation).

Here, the aggravated assault family violence offense in the first count of the indictment—charging Scott with intentionally, knowingly, or recklessly causing serious bodily injury to N.H. while using a deadly weapon—was based on his beatings of N.H. *See* Tex. Penal Code § 22.02(b)(1); *see also id.* § 22.01(a)(1) (assault causing bodily injury). The aggravated-assault offense in the second count of the indictment—charging Scott with intentionally or knowingly threatening N.H. with imminent bodily injury while using a deadly weapon—was based on his threat to kill N.H. as he pulled on a cord that was wrapped around her neck, and his threat to slit her throat as he held a pocketknife to her neck. *See id.* § 22.02(a)(2); *see also id.* § 22.01(a)(2) (assault threatening imminent bodily injury).[1] Both counts were submitted to the jury as charged in the indictment. The gravamen of the aggravated assault family violence offense was Scott's "causing bodily injury" to N.H., and the gravamen of the aggravated assault offense was Scott's "threatening

[1] Both counts referred to N.H. as someone with whom Scott has had a dating relationship.

imminent bodily injury" to N.H. These were separate and distinct assaultive crimes, not a different manner and means of committing the same offense. *See Shelby*, 448 S.W.3d at 438; *Landrian*, 268 S.W.3d at 540.

Not lesser-included offense

Further, Scott's convictions were not for a greater and lesser-included offense. The aggravated assault by threat charged in the second count of the indictment is not a lesser-included offense because it is not established by proof of the same or less than all the facts required to establish the aggravated assault causing serious bodily injury in the first count. *See Childress*, 285 S.W.3d at 549; *see also Denton*, 399 S.W.3d 545 (describing lesser-included offense variation of multiple-punishments claim as one where "the same conduct is punished twice—once for the basic conduct and second time for that conduct plus more"). The charge of aggravated assault family violence required proof that Scott caused N.H. serious bodily injury, but the charge of aggravated assault did not. The charge of aggravated assault required proof that Scott threatened N.H. with imminent bodily injury, but the charge of aggravated assault family violence did not. Thus, it was possible for the State to prove that Scott threatened N.H. without injuring her, and to prove that Scott injured N.H. without threatening her. Scott's two convictions do not provide a basis for a lesser-included-offense type of multiple-punishments claim.

No "non-stop" assault

Scott's convictions were not, as he contends, based on a "non-stop" assault in which several statutes were "necessarily violated." The record reflects that the offenses happened in stages over two or three hours and constituted separate assaults, beginning with Scott pushing N.H. from

the hallway into a back bedroom, threatening to kill her while wrapping a cord around her neck, stopping eventually but then getting a pocketknife, holding it to her neck, and threatening to slit her throat, stopping while he was out of the room, resuming with his beating N.H. (using a cord, a metal belt buckle, a wooden pole, and his fist), strangling her to unconsciousness on the bed, and then kicking and beating her on the floor. *See Sanchez v. State*, 269 S.W.3d 169, 170-71 (Tex. App.—Amarillo 2008, pet. ref'd) (rejecting double-jeopardy claim, affirming defendant's convictions for aggravated assault causing bodily injury and aggravated assault by threat, and noting that his assaults of his girlfriend over two-hour period, "though rather close in time," occurred in stages: one involving physical beating and another involving psychological threat to use bullet on her, which were "two different crimes"); *Hutchins*, 992 S.W.2d at 633 (rejecting double-jeopardy claim and noting that even acts committed "in close temporal proximity" against same victim may constitute separate and distinct offenses).

We conclude that Scott failed to meet his burden of showing a double-jeopardy violation clearly apparent on the face of this record based on his convictions for aggravated assault family violence with a deadly weapon and aggravated assault by threat with a deadly weapon. *See Childress*, 285 S.W.3d at 549-50 (rejecting double-jeopardy claim and affirming defendant's convictions for dating-violence assault and aggravated assault by threat); *Sanchez*, 269 S.W.3d at 171 (rejecting double-jeopardy claim and affirming defendant's convictions for aggravated assault causing bodily injury to his girlfriend while using deadly weapon and aggravated assault based on threat with deadly weapon); *see also Perry*, 2014 Tex. App. LEXIS 9072, at *18 (rejecting double-jeopardy claim and affirming defendant's convictions for family-violence assault and aggravated

assault based on threat with deadly weapon). Because Scott failed to raise his double-jeopardy claim in the trial court and failed to show a double-jeopardy violation clearly apparent on the face of the record, he may not raise his double-jeopardy claim in this appeal. *See Denton*, 399 S.W.3d at 544; *Langs*, 183 S.W.3d at 689. We overrule Scott's sole appellate issue.

CONCLUSION

We affirm the judgments of conviction.

Jeff Rose, Chief Justice

Before Chief Justice Rose, Justices Field and Bourland

Affirmed

Filed: June 15, 2017

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