Affirmed and Opinion filed January 27, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-98-01089-CR

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JAMES MERRELL KEMP, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 208th District Court
Harris County, Texas
Trial Court Cause No. 727,180

O P I N I O N

James Merrell Kemp appeals his conviction by jury for aggravated assault. The jury assessed his punishment at thirty-six years confinement in the Texas Department of Criminal Justice. In three points of error, appellant contends: (1) the evidence was legally insufficient to support conviction where the State failed to prove that appellant had intentionally used or exhibited an automobile to threaten the complainant; (2) the evidence was factually insufficient to support conviction where the State failed to prove that appellant had intentionally used or exhibited an automobile to threaten the complainant; and (3) the evidence was legally

insufficient to support conviction where the State failed to prove that the automobile appellant was driving was a deadly weapon. Because the evidence is legally and factually sufficient, we affirm.

BACKGROUND

On July 9, 1996, Barbara Wells, the complainant and wife of appellant, met appellant after work at a park. At the time appellant and Wells were separated. After talking for a while, appellant asked Wells for her car keys. After she gave appellant the keys, he stood up and, without warning, struck her several times in the head. Wells ran away, but stopped after realizing that appellant still had her car keys. When she saw appellant get in her car, Wells went to a nearby house to call the police. She observed appellant make a U-turn and drive toward her. She described the car's speed as "real fast." Appellant then drove the car up the curb in Wells' direction. As Wells continued to retreat, she saw appellant drive the car over the curb and onto the lawn. Wells kept running in order to avoid being hit. The car missed Wells and came down off the curb, hitting a fire hydrant. At this point the car, being heavily damaged, came to a stop. The police arrived shortly thereafter.

During the trial Wells recounted these events and testified that she believed appellant was trying to kill her. Tymon Lewis witnessed the incident and corroborated Wells' statements. Lewis further testified that there was no doubt in his mind that the car was trying to run Wells over. Dennis Neal, the arresting officer testified that as he approached the wrecked car, appellant told him, "I did it. Do what you got to do." Neal also heard appellant shout several times, "I'm going to kill her if it takes thirty years. I'm going to kill her."

During his case-in-chief appellant called Dr. Robert Okpara to testify that appellant suffered from diabetes and high blood pressure. Dr. Okpara stated that if a diabetic takes too much insulin and does not eat correctly, the person may become confused and act bizarre. Appellant then testified as a witness in his own behalf. He confirmed that he suffered from hypertension and diabetes. Appellant stated that he remembered meeting Wells in the park but

claimed that he did not recall driving Wells' car or trying to run over her. Appellant testified that he had not been taking his medication for several days and that he was not eating right.

The State then called Ezekial Gomez as its rebuttal witness. Gomez worked as an emergency medical technician and treated both appellant and Wells on the day of the incident. He found appellant's blood sugar level to be within the normal range and that appellant did not require hospitalization.

POINT OF ERROR ONE

In his first point of error, appellant argues that the evidence was legally insufficient to sustain a conviction for aggravated assault where the State failed to prove that appellant had intentionally used or exhibited an automobile to threaten the complainant. We disagree.

Standard of Review: When reviewing the legal sufficiency of the evidence, the appellate court will look at all of the evidence in a light most favorable to the verdict. *See Garrett v. State*, 851 S.W.2d 853, 857 (Tex. Crim. App. 1993); *Houston v. State*, 663 S.W.2d 455, 456 (Tex. Crim. App. 1984). In so doing, the appellate court is to determine whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *Ransom v. State*, 789 S.W.2d 572, 577 (Tex. Crim. App. 1989). This standard is applied to both direct and circumstantial evidence cases. *See Chambers v. State*, 711 S.W.2d 240, 245 (Tex. Crim. App. 1986).

The appellate court is not to reevaluate the weight and credibility of the evidence, but only ensure that the jury reached a rational decision. *See Muniz v. State*, 851 S.W.2d 238, 246 (Tex. Crim. App. 1993); *Moreno v. State*, 755 S.W.2d 866, 867 (Tex. Crim. App. 1988). Once the trier of fact has made its decision assessing and weighing the probative value of the evidence in its determination of guilt or innocence, an appellate court does not have the power to step in and reevaluate the probity of an individual item of evidence in its review of the

sufficiency of the evidence. *See Fernandez v. State*, 805 S.W.2d 451, 456 (Tex. Crim. App. 1991). The appellate court is never to make its own myopic determination of guilt from reading the cold record. It is not the reviewing court's duty to disregard, realign, or weigh evidence. *See Moreno*, 755 S.W.2d at 867. Instead, the appellate court is to ask itself whether the trier of fact, acting rationally, could have found the evidence sufficient to establish the element beyond a reasonable doubt. *See Blankenship v. State*, 780 S.W.2d 198, 206-07 (Tex. Crim. App. 1989) (opinion on reh'g); *Facundo v. State*, 971 S.W.2d 133, 134 (Tex. App.–Houston [14th Dist.] 1998, pet. ref'd); *Muniz*, 851 S.W.2d at 246.

The jury is free to believe or disbelieve any witness. *See Sharp v. State*, 707 S.W.2d 611, 614 (Tex. Crim. App. 1986). The jury as the trier of fact is responsible for resolving any conflicts and inconsistencies in the evidence. *See Bowden v. State*, 628 S.W.2d 782, 784 (Tex. Crim. App. 1982). Even where there is no conflict, the jury may give no weight to some evidence, and thereby reject part or all of a witness's testimony. *See Beardsley v. State*, 738 S.W.2d 681, 684 (Tex. Crim. App. 1987).

Discussion: As a preliminary matter, appellant misstates the State's burden of proof by asserting that the State was required to prove that appellant *intentionally used or exhibited* a deadly weapon. A person commits an aggravated assault under Texas law if he *intentionally or knowingly* threatens another with imminent bodily injury *by using or exhibiting* a deadly weapon. *See* TEX. PEN. CODE ANN. §§ 22.01(a)(2), 22.02(a)(2) (Vernon 1994).

Intent is a fact issue for the jury to resolve. *See Robles v. State*, 664 S.W.2d 91, 94 (Tex. Crim. App. 1984); *Barcenes v. State*, 940 S.W.2d 739, 744 (Tex. App.–San Antonio 1997, pet. ref'd). Proof of a culpable mental state generally relies upon circumstantial evidence. *See Hernandez v. State*, 819 S.W.2d 806, 810 (Tex. Crim. App. 1991); *Dillion v. State*, 574 S.W.2d 92, 94 (Tex. Crim. App. 1978). Intent can be inferred from the acts, words, and conduct of the accused, and is to be resolved by the trier of fact from all the facts and surrounding

circumstances. *Hernandez,* 819 S.W.2d at 809-810; *Dues v. State,* 634 S.W.2d 304, 305 (Tex. Crim. App. 1982).

The trier of fact could have found beyond a reasonable doubt that appellant intentionally threatened Wells with imminent bodily injury using a deadly weapon, namely the automobile. The evidence shows that appellant asked Wells to meet with him. Once together, appellant struck Wells in the face. Appellant drove Wells' vehicle without permission. After driving away in Wells' car, appellant made a U-turn and headed toward Wells at a high rate of speed. The car left the roadway, went over the curb, and onto the lawn where Wells had been running. Appellant told the police that he had done it and that the officer would have to do what he had to do. The testimony showed that appellant threatened that he would kill Wells even if it took thirty years. Accordingly, viewed in the light most favorable to the jury's verdict, the evidence is legally sufficient to support appellant's conviction. We overrule appellant's point of error one.

POINT OF ERROR TWO

In his second point of error, appellant argues that the evidence was factually insufficient to support his conviction where the State failed to prove that appellant had intentionally used or exhibited an automobile to threaten the complainant. We disagree.

Standard of Review: In reviewing the factual sufficiency of the evidence to support a conviction, we must look to all of the evidence "without the prism of 'in the light most favorable to the verdict.'" *Clewis v. State,* 922 S.W.2d 126, 129 (Tex. Crim. App. 1996) (*citing Stone v. State,* 823 S.W.2d 375, 381 (Tex.App.–Austin 1992, pet. ref'd, untimely filed)). However, our review is not unfettered, for we must give "appropriate deference" to the fact finder. *See id.* at 136. We may not impinge upon the fact finder's role as the sole judge of the weight and credibility of witness testimony. *See Santellan v. State,* 939 S.W.2d 155, 164 (Tex. Crim. App. 1997); *Dimas v. State,* 987 S.W.2d 152, 155 (Tex.App.–Fort Worth 1999, no pet.). The jury, as fact finder, was the judge of the facts proved and of reasonable inferences to be

drawn therefrom. *See Kirby v. Chapman*, 917 S.W.2d 902, 914 (Tex.App.–Fort Worth 1996, no pet.). The weight given to contradictory testimonial evidence is within the sole province of the jury, because it turns on an evaluation of credibility and demeanor. *See Cain v. State*, 958 S.W.2d 404, 408-09 (Tex. Crim. App. 1997). Thus, we must defer to the fact finder's weight-of-the-evidence determinations. *See id.* at 408. Consequently, we may set aside a verdict for factual insufficiency only when that verdict is so against the great weight and preponderance of the evidence so as to be clearly wrong and unjust. *See Clewis*, 922 S.W.2d. at 134-35. This standard affords the appropriate deference to the jury's verdict and prevents the reviewing court from substituting its judgment for that of the jury. *See Santellan*, 939 S.W.2d at 164. If there is sufficient competent evidence of probative force to support the trial court's finding, a factual sufficiency challenge cannot succeed. *See D.R.H. v State*, 966 S.W.2d 618, 622 (Tex. App.–Houston [14th Dist.] 1998, no pet.).

Discussion: The testimony as set forth above demonstrates that the evidence is factually sufficient to support the jury's verdict. Appellant through his testimony and the testimony of his physician seemed to be trying to show that his diabetic condition prevented him from being aware of what he was doing on July 9, 1996. However, the fact finder could have given this testimony less credence then the testimony of Ezekial Gomez, who testified that appellant's blood sugar level was normal on the day of the aggravated assault.

Appellant also contends that the record fails to show that he intentionally threatened the complainant by operating the automobile. Because no state's witness could testify as to how close to the vehicle came to Wells, appellant concludes that the evidence was factually insufficient to prove that he intended to harm Wells. The jury was free, however, to reject appellant's testimony to that effect in light of the threats he made to her, the assault he committed against her in the park, and the fact that he purposely made a U-turn and drove directly at Wells. Accordingly, the verdict was not contrary to the great weight of the credible evidence. We find that the evidence supporting the judgment was not so weak as to be

manifestly unjust and clearly wrong. Therefore, we hold that the evidence is factually sufficient to support the judgment. Point two is overruled.

POINT OF ERROR THREE

In his third point of error, appellant contends that the evidence was legally insufficient to support his conviction where the State failed to prove that the automobile appellant was driving was a "deadly weapon." We disagree.

The Penal Code defines "deadly weapon" to include "anything that in the manner of its use or intended use is capable of causing death or serious bodily injury." TEX. PEN. CODE ANN. § 1.07(a)(17)(B) (Vernon 1994). The Penal Code further defines "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." TEX. PEN. CODE ANN. § 1.07(a)(46) (Vernon 1994).

An automobile is not a deadly weapon *per se*. *See Morgan v. State*, 775 S.W.2d 403, 406 (Tex. App.–Houston [14th Dist.] 1989, no pet.). An automobile may, however, constitute a deadly weapon if in the manner of its use it is capable of causing death or serious bodily injury. *See Tyra v. State*, 897 S.W.2d 796, 798-99 (Tex. Crim. App. 1995). In reviewing the sufficiency of the evidence, the appellate court examines each case to determine whether the manner of the instrument's use and intended use was such as to allow the jury to infer that the instrument was a deadly weapon. *See Brown v. State*, 716 S.W.2d 939, 947 (Tex. Crim. App. 1986); *English v. State*, 647 S.W.2d 667, 669 (Tex. Crim. App. 1983). Based upon the testimony delineated above, a rational jury could have found that in the manner of its use, the automobile was a deadly weapon. Having found that the evidence is legally sufficient to support the jury's verdict that appellant was guilty of aggravated assault with a deadly weapon, we overrule appellant's point of error three.

V. CONCLUSION

Because the evidence is legally and factually sufficient, the judgment of the trial court is *affirmed*.

/s/ Maurice Amidei
Justice

Judgment rendered and Opinion filed January 27, 2000.

Panel consists of Justices Amidei, Edelman, and Wittig.

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