Affirmed as Modified and Opinion filed April 6, 2000.

In The

Fourteenth Court of Appeals

NO. 14-98-01246-CR

ALARIC KEVIN DAWSON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 182nd District Court
Harris County, Texas
Trial Court Cause No. 786,527

O P I N I O N

Appellant was convicted of aggravated sexual assault and sentenced to ten years probation. On appeal, he argues that the trial court erred in finding that a deadly weapon had been used when the jury expressly found to the contrary. Because he used no deadly weapon in the commission of the offense, appellant also contends the evidence is both legally and factually insufficient to support the conviction. We affirm.

After living together for several months, appellant and the complainant had a heated argument. As a result of the argument, the two were not speaking to each other. That evening, appellant slept on the couch while the complainant slept in the bedroom. At approximately 4:00 a.m., the complainant awoke

to see appellant entering her bedroom holding a knife. Appellant told the complainant he had been planning how to smother her, stab her, and throw her body out of the window. He pushed the complainant onto her stomach, lay on top of her, and removed her panties. The complainant asked appellant how he could have sex with her if he killed her. Appellant responded that "the body stays good up to two hours after you're dead." Appellant then raped the complainant and fell asleep.

The complainant stayed in the apartment until the time she normally went to work. She then contacted the police. Appellant was subsequently arrested and indicted for aggravated sexual assault. The aggravating factor alleged in the indictment was that appellant had "by acts and words placed the complainant in fear that death or serious bodily injury would be inflicted."

The Deadly Weapon Finding

The jury was given a special issue on whether or not a deadly weapon had been used or exhibited in the commission of the sexual assault. They answered "not true." The judge, apparently due to a clerical error, nonetheless circled "yes" on the judgment form. When there is such an error, the proper remedy is the reformation of the judgment. *See Asberry v. State*, 813 S.W.2d 526, 529 (Tex. App.–Dallas 1991, pet. ref'd). Appellant's point of error is sustained, and the judgment is reformed to delete the deadly weapon finding.

Legal Sufficiency of the Evidence

In his second point of error, appellant contends the evidence is legally insufficient. He contends that, since the jury affirmatively found a deadly weapon had not been used in the commission of the offense, there is insufficient evidence to prove that he, by his acts or words, placed the complainant in fear of death or serious bodily injury.

The test for legally sufficient evidence is whether "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Staley v. State*, 887 S.W.2d 885, 888 (Tex. Crim. App. 1994); *Geesa*

v. State, 820 S.W.2d 154, 156 (Tex. Crim. App. 1991). This is a high burden. As the Court of Criminal appeals said in *Ex parte Elizondo*:

> When we conduct a legal sufficiency-of-the-evidence review . . . we do not weigh the evidence tending to establish guilt against the evidence tending to establish innocence. Nor do we assess the credibility of witnesses on each side. We view the evidence in a manner favorable to the verdict of guilty. . . [Regardless of] how powerful the exculpatory evidence may seem to us or how credible the defense witnesses may appear. If the inculpatory evidence standing alone is enough for rational people to believe in the guilt of the defendant, we simply do not care how much credible evidence is on the other side.

947 S.W.2d 202, 206 (Tex. Crim. App. 1996).

In the context of an aggravated sexual assault, the victim's state of fear is normally established through his or her own testimony. *See Brown v. State*, 960 S.W.2d 265, 268 (Tex. App.–Corpus Christi 1997, no pet.). The defendant's conduct, i.e. acts, words, or deeds, is then examined to determine whether it was the producing cause of such fear and whether the subjective state of fear was reasonable in light of such conduct. *See id*. Where the objective facts of the assault would naturally cause the victim to fear for her life or serious bodily injury, it is reasonable to assume that the victim had the requisite level of fear in the absence of some specific evidence to the contrary. *See id*.

A jury may find aggravating circumstances in a sexual assault without a deadly weapon. *See Lewis v. State*, 984 S.W.2d 732 (Tex. App.–Fort Worth 1998, pet ref'd) (finding aggravating circumstances in the assault itself). It is not necessary that a threat be communicated verbally, nor is it necessary to show that the defendant could have inflicted serious bodily injury, but did not. *See Mata v. State*, 952 S.W.2d 30, 32 (Tex. App.–San Antonio 1997, no pet.); *see also Dalton v. State*, 898 S.W.2d 424, 429 (Tex. App.–Ft. Worth 1995, pet. ref'd.). The jury may consider an appellant's objective conduct, his acts, words, or deeds and infer from the totality of the circumstances whether an appellant's overall conduct placed the complainant in fear of serious bodily injury. *Kemp v. State*, 744 S.W.2d 243, 245 (Tex. App.–Houston [14th Dist.] 1987, pet. ref'd)

The complainant testified that she was crying and feared for her life throughout the entire assault. She was asleep in her bedroom when appellant entered holding a knife. A knife, even if not being used

as a deadly weapon, may still create fear. He told her that he had originally planned to smother her, stab her, and throw her body out of the window. She testified that this made her fear that appellant was about to kill her. He told her that if she wanted to date other men, he would "beat the s--t out of her." She testified that she was sobbing from fear. When appellant pushed her down and began disrobing her, he reminded her that "the body stays good up to two hours after you're dead." The complainant said this made her fearful that he had previously killed someone and had sex with the corpse. Moreover, she was afraid appellant had a similar plan for her.

Viewing the evidence in the light most favorable to the verdict, we find the combined and cumulative force of all the incriminating circumstances was sufficient for a rational trier of fact to conclude beyond a reasonable doubt that appellant intentionally placed the victim in fear of death or serious bodily injury. Appellant's point of error is overruled.

Factual Sufficiency of the Evidence

In his third point of error, appellant claims the evidence is factually insufficient to prove that he, by acts or words, placed the complainant in fear of death or serious bodily injury.

A factual sufficiency review must be deferential to the trier of fact, to avoid substituting our judgment for that of the jury. *See Clewis v. State*, 922 S.W.2d 126, 133 (Tex. Crim. App. 1996). We maintain this deference by reversing only when "the verdict is against the great weight of the evidence presented at trial so as to be clearly wrong and unjust." *Santellan v. State*, 939 S.W.2d 155, 164 (Tex. Crim. App. 1997).

Appellant testified that he was angry with the complainant, and that he had stayed away from her for about a week. On the night of the assault, he entered her room at about 4:30 am to tell her he was leaving her. He sat on the edge of the bed for 30 minutes until she awoke. He told her he was leaving and she began to cry. He decided at this point to get a piece of carrot cake. He went to the kitchen, picked up a knife, but as he was cutting the carrot cake, he decided to return to the bedroom. He was still holding the knife. Seeing that she was upset about his leaving, he began to calm her down. They cuddled. She then began to touch him sexually and they had sexual intercourse.

When compared and contrasted with the complainant's testimony, we cannot say the verdict is so against the great weight of the evidence as to be clearly wrong and unjust. Appellant's point of error is overruled.

The judgment of the trial court is reformed and affirmed as modified.

/s/ J. Harvey Hudson
Justice

Judgment rendered and Opinion filed April 6, 2000.

Panel consists of Chief Justice Murphy and Justices Anderson and Hudson.

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