Affirmed and Opinion filed August 16, 2001.

In The

Fourteenth Court of Appeals

NO. 14-00-00299-CR

KERRY LAWRENCE HAYES, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 183rd District Court
Harris County, Texas
Trial Court Cause No. 821678

O P I N I O N

Appellant was charged by indictment with the offense of retaliation. *See* TEX. PENAL CODE ANN. § 36.06. A jury convicted appellant of the charged offense and assessed punishment at ten years confinement in the Texas Department of Criminal Justice--Institutional Division, probated for a period of ten years and a fine of $5,000.00. We affirm.

I. Standards of Appellate Review.

Appellant's sole point of error contends the trial court abused her discretion by failing to grant appellant's motion for an instructed verdict at the conclusion of the State's

case-in-chief. A complaint regarding the denial of an instructed verdict is treated on appeal as a challenge to the sufficiency of the evidence. *See Dunn v. State*, 951 S.W.2d 478, 480 (Tex. Crim. App. 1997); *Griffin v. State*, 936 S.W.2d 353, 356 (Tex. App.–Houston [14th Dist.] 1996, pet. ref'd); *Arizmendez v. State*, 807 S.W.2d 436, 437 (Tex. App.–Houston [14th Dist.] 1991, no pet.). Within this point, appellant contends the evidence is legally and factually insufficient to support the jury's verdict.

When we are asked to determine whether the evidence is legally sufficient to sustain a conviction we employ the standard of *Jackson v. Virginia* and ask "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." 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). However, under a factual sufficiency review, the evidence is viewed in a neutral light favoring neither party. *See Clewis v. State*, 922 S.W.2d at 134. In this light, "the appellate court reviews the fact finder's weighing of the evidence and is authorized to disagree with the fact finder's determination." *Id.* at 133. However, this review must employ appropriate deference to prevent an appellate court from substituting its judgment for that of the fact finder. *See Johnson v. State*, 23 S.W.3d 1, 7 (Tex. Crim. App. 2000). The degree of deference a reviewing court provides must be proportionate with the facts it can accurately glean from the trial record. *Id.* at 8. A factual sufficiency analysis can consider only those few matters bearing on credibility that can be fully determined from a cold appellate record. Under *Johnson*, if the complaining party is attacking the factual sufficiency of an adverse finding on an issue to which he did *not* have the burden of proof, he must demonstrate that there is insufficient evidence to support the adverse finding. In reviewing an insufficiency of the evidence challenge, the court of appeals must first consider, weigh, and examine all of the evidence that supports and that is contrary to the jury's determination. Having done so, the court should set aside the verdict only if the evidence standing alone is so weak as to be clearly wrong and manifestly unjust. *See id.* at 10.

II. Factual Summary and Analysis.

The indictment alleged the offense of retaliation under section 36.06 of the Penal Code, which requires that the actor to threaten to harm another. Appellant posits his challenges in the alternative. First, that he did not threaten the complainant. Second, even if the complainant was threatened, she did not feel endangered.

Appellant and the complainant are husband and wife. On the date alleged in the indictment, their daughter asked appellant for a cookie; he refused. The daughter then asked the complainant for a cookie and she acquiesced. Appellant disciplined the daughter for manipulating the situation. Thereafter, appellant and the complainant argued over the incident. The argument spread from the kitchen to a bedroom where appellant put the complainant on a bed, held her down with his hand on her throat and his knee on her chest and made the alleged threatening remarks. The complainant left the residence, and called the authorities. As a part of the police investigation of the incident, the complainant gave a signed and notarized statement.

By the time of trial, appellant and the complainant had reconciled and were receiving marital counseling through their church. The complainant testified she wished to see appellant acquitted of the charged offense. The complainant's testimony is confusing and difficult to follow because her testimony contradicted her previous statement. She stated the contradictions were from a lack of memory but stated on several occasions that the content of her statement was true. The State offered into evidence a redacted portion of the complainant's statement, which was admitted into evidence without objection. In that portion of the statement, the complainant said: "He continued to hold me down by the throat saying he would kill me. He yelled out Bitch you call the cops on me ever again will be a DOA. As I would try to move, he would bring his fist close to my face with threats of what he will do."[1]

We now turn to appellant's first argument that the evidence is insufficient to prove appellant threatened the complainant. This argument is belied by the record. The redacted

[1] The complainant testified the police had been called to the residence on a prior occasion.

statement is evidence of appellant threatening the complainant. When this evidence is viewed in the light most favorable to the verdict, we find the evidence sufficient to establish appellant threatened the complainant. When this evidence is viewed in a neutral light, the issue of whether appellant threatened the complainant is one of credibility. In this context, our degree of deference to the jury must be high because we cannot glean from the trial record the weight that should be given to appellant's trial testimony compared to her statement, which she said was truthful. Under this level of deference, we do not find the evidence supporting the jury's verdict is so weak as to be clearly wrong and manifestly unjust. *See Johnson*, 23 S.W.3d at 10. Therefore, we reject appellant's first argument.

The second argument is that the evidence is insufficient to prove the complainant felt endangered by the threat. The State argues the offense of retaliation under Texas Penal Code section 36.06 does not have as an element either that the complainant be placed in fear or that the defendant had the capability or intention to carry out the threat. A sufficiency challenge is directed to the essential elements of the offense. *See Jackson*, 443 U.S. at 319, 99 S.Ct. at 2789. Therefore, the threshold issue is whether the complainant in a retaliation prosecution must feel endangered by the threat. If it is not an essential element, appellant's argument fails.

As pled in the indictment, section 36.06 has the following elements:

1. The actor;

2. Intentionally or knowingly;

3. Harms or threatens to harm another by an unlawful act;

4. In retaliation for or on account of the service or status of another;

5. Person who has reported or who the actor knows intends to report the occurrence of a

crime.[2]

Appellant argues the threat element has not been met because appellant did not have the intent or present ability to carry out the threat, and/or the complainant did not believe the threat or take it seriously. Initially, we note that the term "threaten" is not statutorily defined. Therefore, it is to be understood as ordinary usage allows, and jurors may give the term any meaning that is acceptable in common parlance. *See Medford v. State*, 13 S.W.3d 769, 771-72 (Tex. Crim. App. 2000). Threat is defined as an expression of intention to hurt, destroy or punish. Threaten is defined as to make threats against; express one's intention of hurting, punishing, etc. WEBSTER'S NEW WORLD DICTIONARY, 1482 (2nd College ed. 1984). Neither of these definitions requires the present ability to carry out the threat or that the person threatened take the threat seriously. Additionally, this court has held section 36.06 does not require that the threat to harm be imminent. *See Coward v. State*, 931 S.W.2d 386, 389 (Tex. App.–Houston [14th Dist.] 1996, no pet.). It logically follows then, that if the threat to harm need not be imminent, the defendant need not have the intent or present ability to carry out the threat. Additionally, in *Puckett v. State*, 801 S.W.2d 188, 194 (Tex. App.–Houston [14th Dist.] 1990, pet. ref'd), *cert. denied*, 502 U.S. 990, 112 S.Ct. 606, 116 L.Ed.2d 629 (1991), we held it was immaterial that the defendant did not actually intend to carry out the threat. These two holdings were recently employed by the Tyler Court of Appeals in *In re B .M.*, 1 S.W.3d 204 (Tex. App.—Tyler 1999, no pet.), where a school disciplinary supervisor took a prohibited article of clothing from a student. Later when the supervisor refused to return the item, the student threatened to get a gun and shoot the supervisor. The evidence was held sufficient because "[t]he statute does not require that the threatened retaliatory harm be imminent, nor does it require that

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[2] The instant indictment alleged the offense of retaliation as follows:

> [appellant] ... on or about August 22, 1999, did then and there unlawfully, intentionally and knowingly harm and threaten to harm [the complainant] by an unlawful act, namely murder, in retaliation for and on account of the service and status of [the complainant] as a person who has reported the occurrence of a crime and as a person who [appellant] knows intends to report the occurrence of a crime.

the actor actually intend to carry out his threat." *Id.* at 207.

The final question is whether the statute requires that the complainant believe the threat and take it seriously. Section 36.06 does not require that the threat be direct. *See Davis v. State*, 890 S.W.2d 489, 491 (Tex. App.—Eastland 1994, no pet.). If there is no requirement that the threat be made directly, it necessarily follows there is no statutory requirement that the complainant believe the threat and take it seriously.

For these reasons, we hold section 36.06 does not require either that the actor have the intent or present ability to carry out the threat, or that the complainant believe the threat and take it seriously. Since these are not elements of the charged offense, appellant's sufficiency challenges fail as a matter of law.

Appellant's sole point of error is overruled and the judgment of the trial court is affirmed.

/s/ Charles F. Baird[3]
Justice

Judgment rendered and Opinion filed August 16, 2001.
Panel consists of Justices Yates, Fowler and Baird.
Do Not Publish — TEX. R. APP. P. 47.3(b).

[3] Former Judge Charles F. Baird sitting by assignment.