Affirmed and Opinion filed September 9, 1999.

In The

Fourteenth Court of Appeals

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NO. 14-97-00514-CR

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ALFRED DEASES, JR., Appellant

v.

THE STATE OF TEXAS, Appellee

On Appeal from the 230th District Court
Harris County, Texas
Trial Court Cause No. 9419941

O P I N I O N

A jury found appellant guilty of aggravated assault and the court thereafter assessed his punishment at confinement for 25 years. After appellant successfully appealed his conviction for aggravated assault, the trial court on remand found appellant guilty, found the allegations in the indictment's enhancement paragraphs to be true, and assessed appellant's punishment at confinement for 30 years. We affirm.

SUFFICIENCY OF EVIDENCE/SELF DEFENSE

In point two, appellant contends the evidence is insufficient to support his aggravated assault conviction because a rational factfinder could not have found against him on self-defense beyond a reasonable doubt.

Testimony

After a day spent fishing, Carlos Diaz Rebollar went with his wife and mother to appellant's home at 1716 Wirt Road in Houston, Texas, to pick up his brother. At some point, appellant began fighting with his father, and Carlos attempted to stop the fight by separating the two men. When he did so, appellant threw a full can of beer at him, narrowly missing his head.

Appellant then began beating Carlos. Carlos in turn hit appellant in the face, which knocked him to the floor. When appellant attempted to stand up, both he and Carlos fell to the ground; Carlos got on top of appellant and held him by the neck. As Carlos sat on top of appellant, appellant's father hit Carlos twice from behind and Carlos "saw everything go dark." Then, appellant's father lifted Carlos from appellant's chest and held Carlos's arms back while the appellant took an eight inch long knife from his pocket and stabbed Carlos three times.

As Carlos felt himself losing consciousness, he stumbled to a nearby apartment and found his wife, who helped him try to stop the bleeding. Eventually, Carlos passed out and was transported by ambulance to the hospital. During the next five days, Carlos underwent two operations because appellant's knife had pierced his lung, narrowly missing his heart.

Appellant was eventually arrested and charged with aggravated assault. During his trial, appellant claimed he stabbed the unarmed Carlos three times in self-defense. He testified that Carlos, without any provocation, unexpectedly hit him on the side of the head with his fist. Appellant's father grabbed Carlos and then fell to the ground. Carlos then, according to appellant, kicked appellant in the groin, which knocked him to the ground. As

he lay on the ground, Carlos jumped on top of him, sat on his chest, and began hitting appellant. Appellant contends that he reached into his pocket, pulled out a knife, and stabbed Carlos three times because Carlos continued to hit appellant with his hands.

Standard of Review

In analyzing a challenge to the legal sufficiency of evidence, we examine the evidence in the light most favorable to the verdict. *Narvaiz v. State*, 840 S.W.2d 415, 423 (Tex. Crim. App. 1992), *cert. denied*, 507 U.S. 975 (1993). We consider all of the evidence whether properly or improperly admitted. *Chambers v. State*, 805 S.W.2d 459, 460 (Tex. Crim. App. 1991). We then determine whether any rational trier of fact could have found the elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307 (1979); *Turner v. State*, 805 S.W.2d 423, 427 (Tex. Crim. App.), *cert. denied*, 502 U.S. 870 (1991). The trier of fact is the sole judge of the witness's credibility and can accept or reject any or all of a witness's testimony. *Bonham v. State*, 680 S.W.2d 815, 819 (Tex. Crim. App. 1984), *cert. denied*, 474 U.S. 865 (1985); *Hemphill v. State*, 505 S.W.2d 560, 562 (Tex. Crim. App. 1974). In determining legal sufficiency, we do not examine the fact finder's weighing of the evidence, but merely determine whether there is evidence supporting the verdict. *See Clewis v. State*, 922 S.W.2d 126, 132 n. 10 (Tex. Crim. App. 1996).

In reviewing the factual sufficiency of the evidence, we are not bound to view the evidence in the light most favorable to the prosecution, and may consider the testimony of defense witnesses and the existence of alternative hypotheses. *Clewis*, 922 S.W.2d at 134. We consider all of the evidence in the record related to an appellant's sufficiency challenge, comparing the weight of the evidence that tends to prove guilt with the evidence that tends to disprove it. *See Santellan v. State*, 939 S.W.2d 155, 164 (Tex. Crim. App. 1997). We are not free to reweigh the evidence and set aside a jury verdict merely because we believe that a different result is more reasonable. *See Cain v. State*, 958 S.W.2d 404, 407 (Tex.

Crim. App. 1997); *Clewis*, 922 S.W.2d at 135. Only if the verdict is against the great weight of the evidence presented at trial so as to be clearly wrong and unjust, will we reverse the verdict and remand for a new trial. *Clewis*, 922 S.W.2d at 135.

The factfinder is the sole judge of the witness's credibility and the weight to be given to their testimony. *Bonham v. State*, 680 S.W.2d at 819. Accordingly, the factfinder can accept or reject any or all of a witness's testimony. *Hemphill v. State*, 505 S.W.2d at 562. Self-defense is a fact issue, which is solely within the factfinder's province, and a guilty verdict is an implicit finding rejecting the defendant's self-defense theory. *Saxton v. State*, 804 S.W.2d 910, 913 (Tex. Crim. App. 1991).

Appellant was charged by indictment with aggravated assault. A person commits aggravated assault if he: (1) intentionally or knowingly causes another serious bodily injury; and/or (2) uses a deadly weapon during the assault's commission. TEX. PENAL CODE ANN. §§ 22.01(a)(2) & 22.02(a)(2) (Vernon Supp. 1998). The State alleged that appellant:

> [O]n or about August 6, 1994, did then and there unlawfully, intentionally and knowingly cause bodily injury to Carlos Diaz Rebollar by using a deadly weapon, namely a knife.
>
> [and alternatively, that appellant]
>
> [O]n or about August 6, 1994, did then and there unlawfully intentionally and knowingly cause serious bodily injury to Carlos Diaz Rebollar, hereinafter called the complainant, by stabbing the complainant with a knife.

The State was required to prove that appellant intentionally and/or knowingly caused Carlos serious bodily injury or that he used a deadly weapon. The evidence showed that appellant stabbed Carlos three times with an eight-inch knife, that Carlos barely survived, and that Carlos required two operations.

Appellant used deadly force in stabbing Carlos three times with a knife. *See* TEX. PENAL CODE ANN. § 9.01(3) (Vernon Supp. 1998) (defining deadly force as "force that is intended or known by the actor to cause, or in the manner of its use or intended use is

capable of causing, death or serious bodily injury"). A person is justified in using deadly force against another when and to the degree he reasonably believes the force is immediately necessary to protect himself against the other's use or attempted use of unlawful deadly force, and only if a reasonable person in the situation would not have retreated. TEX. PENAL CODE ANN. §§ 9.31, 9.32 (Vernon Supp. 1998); *see also Hamel v. State*, 916 S.W.2d 491, 493 (Tex. Crim. App. 1996). There must be evidence that the victim's overt acts and/or words would lead the defendant to reasonably believe he was in danger. *Preston v. State,* 756 S.W.2d 22, 24-25 (Tex. App.— Houston [14th Dist.] 1988, pet. ref'd).

Appellant testified that Carlos kicked him in the groin, sat on his chest and hit him several times with his fist, and appellant thought that Carlos would continue hitting him. This did not justify the use of deadly force. *See, e.g., Ogas v. State,* 655 S.W.2d 322, 324 (Tex. App. — Amarillo 1983, no pet.) (holding a blow to the face with an open or closed hand does not justify deadly force). Moreover, Carlos testified that appellant provoked the altercation when appellant threw a beer can at him and then struck him. Force used in self-defense is not justified where the defendant provoked the victim's use or attempted use of force. TEX. PENAL CODE ANN. § 9.31 (b)(4) (Vernon Supp. 1998). There is also no evidence that appellant attempted to or was unable to retreat as required by section 9.32(a). *See Coble v. State,* 871 S.W.2d 192, 202 (Tex. Crim. App. 1993), *cert. denied,* 513 U.S. 829 (1994).

Appellant argues that the evidence was insufficient, because the State failed to "disprove that appellant was not justified in his use of force against the complaining witness." However, the State had no burden to affirmatively disprove appellant's defense. *See* TEX. PENAL CODE ANN. §§ 9.02 & 9.32 (Vernon Supp. 1998). The State had the burden to prove its case beyond a reasonable doubt. *Hull v. State,* 871 S.W.2d 786, 789 (Tex. App.— Houston [14th Dist.] 1994, pet. ref'd)(*citing Saxton v. State,* 804 S.W.2d

910, 913 (Tex. Crim. App. 1991)). In so doing, the State satisfied its burden of defeating the defense of self-defense. *See Saxon* 804 S.W.2d at 913.

After viewing the evidence in the light most favorable to the prosecution, a rational factfinder could have found that appellant intentionally or knowingly caused serious bodily injury to Carlos and could have found against appellant on his self-defense claim. Further, the verdict was not against the great weight of evidence as to be clearly wrong and unjust. Point two is overruled.

EXCLUSION OF EVIDENCE

In his first point of error, appellant complains that the trial court committed reversible error in excluding a portion of the victim's, Carlos Diaz Rebollar's, testimony. This testimony supposedly would have shown Carlos's propensity for dangerous conduct and appellant's apprehension. During appellant's cross-examination of Carlos, he was asked:

Q: Did you live in Chicago before you moved to Houston?

A: Yes.

Q: Did you leave Chicago because you had assaulted someone and needed to get away from that -

[THE STATE]: Objection, Judge.

THE COURT: What is your objection?

[THE STATE]: It's improper impeachment.

[DEFENSE COUNSEL]: I'm not using it for impeachment but for evidence of his character.

The trial court sustained the State's objection, and Carlos did not answer the question. Appellant made no offer of proof, nor did he attempt to perfect a bill of exceptions regarding what Carlos's testimony would have been had the trial court allowed him to answer.

To support a complaint about the exclusion of evidence, the record must indicate what the evidence would have been. *Easterling v. State*, 710 S.W.2d 569, 575, (Tex. Crim. App.) *cert. denied*, 479 U.S. 848, (1986). The defendant must make an offer of proof as to the questions he would have asked and the answers he might have received had he been permitted to question the witness as desired. *Koehler v. State*, 679 S.W.2d 6, 9 (Tex. Crim. App. 1984); TEX. R. APP. P. 33.1

Appellant failed to make an offer of proof as to the questions he would have asked Carlos and the answers he might have provided had he been permitted to question him. Thus, appellant has failed to preserve any error. *See Williams v. State*, 936 S.W.2d 399, 404 (Tex. App. — Fort Worth 1996, pet ref'd) (defendant claimed he was prevented from asking expert witness relevant questions but failed to preserve complaint with bill of exceptions). Point one is overruled.

Judgment of the trial court is affirmed.

/s/ Cynthia Hollingsworth
Justice

Judgment rendered and Opinion filed September 9, 1999.

Panel consists of Justices Yates, Edelman, and Hollingsworth.[1]

Do Not Publish — TEX. R. APP. P. 47.3(b).

[1] The Honorable Cynthia Hollingsworth, former Justice, Court of Appeals, Fifth District of Texas at Dallas, participating by assignment.