Affirmed and Opinion filed November 30, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-99-00969-CR

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LISA ANN SPENCER, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 182nd District Court
Harris County, Texas
Trial Court Cause No. 806,410

O P I N I O N

Appellant, Lisa Ann Spencer, attempted to appropriate a bottle of wine from a convenience store. When the shopkeeper tried to recover the wine, appellant attacked him with a screwdriver. Appellant was convicted by a jury of aggravated assault. After finding two enhancements true, the jury assessed twenty-eight years confinement. Appellant brings the following issues: (1) the evidence is legally and factually insufficient to establish appellant used a deadly weapon; and (2) the court erred in denying her charges on self-defense, defense of property, and the lesser-included offense of assault. We affirm.

Background

Appellant walked into the convenience store where the complainant, his brother, and his sister-in-law worked. Complainant and his sister-in-law testified that they observed appellant go straight to a beverage cooler, remove a bottle of Boones Farm wine and put it in her jacket. As appellant walked past the cash register and to the exit, complainant's brother told appellant to stop and pay for the wine. However, appellant ignored him and proceeded out the door. Complainant then followed appellant outside and told her to pay for the wine or give it back. At some point, appellant cursed at him and said she had paid for the wine. Appellant then swung the bottle and hit complainant in the head with it. As complainant retreated, appellant, using her other hand, thrust a screwdriver at complainant's head. Complainant raised his arm to protect himself and the screwdriver punctured him through the hand. The wound bled and left a scar, but he did not seek medical treatment. Complainant testified that had he not raised his hand and retreated, the screwdriver would have struck him "straight through the head or through the eyes." He also stated that he was very scared and he thought appellant was trying to kill or hurt him. Complainant had his sister-in-law call police. He then secured his pistol and he and his sister-in-law followed appellant as she walked across the street. Complainant tried to grab the bottle and, again, appellant swung the bottle and thrust the screwdriver at him, this time missing him. Complainant pointed his gun at appellant, grabbed the Boones Farm, and ran back to the store.

Appellant was later arrested with the screwdriver found on her person. The arresting officer, Daniel Tollefson, testified that if a screwdriver is used in the manner described by complainant, it is capable of causing serious or fatal injury.

Legal Sufficiency

When reviewing the legal sufficiency of the evidence, the appellate court looks at all the evidence in the light most favorable to the verdict 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, 319 (1979); *Johnson v. State*, 23 S.W.2d 1, 7 (Tex. Crim. App. 2000). We accord great deference to the responsibility of the trier of fact to fairly resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. *See Clewis v. State*, 922 S.W.2d 126,

133 (Tex. Crim. App.1996) (quoting *Jackson*, 443 U.S. at 319). "We presume that any conflicting inferences from the evidence were resolved by the jury in favor of the prosecution, and we defer to that resolution." *Id.* at 133 n. 13 (quoting *Jackson*, 443 U.S. at 326).

Appellant claims that because complainant was not seriously injured and did not seek medical care, the evidence was insufficient to show she used a deadly weapon. Deadly weapon means: "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(17). The statute does not necessarily require that the actor actually intend death or serious bodily injury. Rather, an object is a deadly weapon if the actor intends a use of the object in which it would be capable of causing death or serious bodily injury. *See McCain v. State*, 22 S.W.3d 497, 503 (Tex. Crim. App. 2000) (placement of the word "capable" in the statute enables it to cover conduct that threatens deadly force, even if the actor has no intention of actually using deadly force).

In this case, Officer Tollefson testified that the screwdriver used by the appellant in the manner described by complainant could cause serious injury or death. Further, we have held that where a defendant brandished and made threatening motions with a screwdriver, the evidence was legally sufficient to support a deadly weapon finding, even though the defendant did not injure the complainant. *See Henderson v. State*, 971 S.W.2d 755, 756-67 (Tex. App.—Houston [14th Dist.] 1998, no pet.).

We therefore find the evidence is legally sufficient to support the conviction because a rational jury could have determined that the screwdriver with which appellant attacked complainant was a deadly weapon. We overrule appellant's legal sufficiency issue.

Factual Sufficiency

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 consider the testimony of defense witnesses and the existence of alternative hypotheses. *Johnson*, 23S.W.2d at 6-7 (Tex. Crim. App. 2000); *Clewis v. State*, 922 S.W.2d 126, 134 (Tex. Crim. App.1996). We consider all of the evidence in the record related to the appellant's sufficiency challenge, comparing the weight of the evidence that tends to prove guilt with the evidence that tends to disprove it. *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. *Cain v. State*, 958 S.W.2d 404, 407 (Tex. Crim. App.1997); *Clewis*, 922 S.W.2d at 135. In order to find the evidence factually insufficient to support a verdict, we must conclude that the jury's finding is manifestly unjust, shocks the conscience, or clearly demonstrates bias. *Id*.

The evidence reveals appellant intended to use the screwdriver to inflict serious injury on complainant in order to keep him from recovering the bottle of cheap wine she had stolen. Appellant's intent is evidenced by the fact that the screwdriver attack followed upon her striking the head of complainant with the bottle. We find the fortuitous fact that the complainant escaped serious bodily injury of insubstantial consequence. Had he not been fleet enough to protect himself with his hand, appellant's screwdriver could have punctured his eye or any soft tissue behind, a potentially serious or deadly injury. We disagree that the jury's finding is manifestly unjust, shocks the conscience, or clearly demonstrates bias. *Clewis*, 922 S.W.2d at 135. We therefore find the evidence is factually sufficient to support appellant's conviction. Appellant's factual sufficiency issue is overruled.

Charge Issues

Self Defense

A defendant is entitled to a jury instruction if the issue is raised by the evidence, whether that evidence be strong, feeble, unimpeached, or contradicted. *See Brown v. State*, 955 S.W.2d 276, 279 (Tex. Crim. App. 1997).

In the first of three charge issues, appellant contends that the trial court erred by refusing to charge the jury on self-defense. A defendant is justified in using 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 force. *See* TEX. PEN. CODE ANN. § 9.31. The force used by a defendant must be reasonable as contemplated from the defendant's point of view. *See Hudson v. State*, 956 S.W.2d 103, 105 (Tex. App.–Tyler 1997, no pet.).

Appellant complains she was entitled to a self defense charge because the evidence showed the

complainant pointed a gun at her. We disagree. First, appellant did not testify and there is no evidence from her (or anyone else) to indicate that she reasonably believed she was in danger. *See Smith v. State*, 676 S.W.2d 584, 585 (Tex. Crim. App. 1984) (noting self-defense is rarely raised where the defendant fails to testify). Further, there is no evidence that the complainant or anyone else had caused anything to justify appellant's stabbing complainant with the screwdriver (and hitting him with the bottle of wine). Finally, the undisputed evidence shows that the complainant only got his gun after appellant committed the charged offense. Therefore, his pointing the gun at her is immaterial to the issue of self defense. In light of these facts, we find that there is no evidence that appellant was justified in using force against complainant; therefore, her self-defense issue is overruled.

Defense of Property

Appellant contends she was entitled to a lesser included offense charge of defense of property because there was some evidence she was in lawful possession of the wine. She points to the testimony of a customer at the store who testified that appellant claimed she had paid for the wine after complainant asked her to pay for it.[1] As noted, the undisputed evidence shows that complainant and his sister observed appellant enter the store, take the bottle from the cooler, conceal it in her jacket, and attempt to leave without paying for it. Appellant's mere protestations to the contrary do not constitute some evidence that she was in lawful possession of the bottle.

Additionally, even if appellant were in lawful possession of the bottle, she is only permitted to use deadly force "when and to the degree [s]he reasonably believes the deadly force is immediately necessary to . . . prevent the other's imminent commission of arson, burglary, robbery, aggravated robbery, theft during the nighttime, or criminal mischief during the nighttime . . .and . . .[s]he reasonably believes that the . . . property cannot be protected or recovered by any other means; or the use of force other than deadly

[1]Appellant also notes that complainant and his sister testified that they did not hear her say she paid for the wine, thus the evidence is inconsistent. The testimony is not necessarily inconsistent because these witnesses testified they didn't hear something someone else heard. But even assuming it so, we fail to see how the storekeepers' testimony that they didn't hear appellant claim she had paid for the wine constitutes some evidence that appellant was in lawful possession of it.

force to protect or recover the land or property would expose the actor or another to a substantial risk of death or serious bodily injury." TEX. PEN. CODE ANN. § 9.42. There is no evidence that prior to appellant's assault of complainant with the screwdriver, complainant was attempting to commit any of the listed crimes. At the time, he was unarmed and, at worst, only tried to grab the bottle. There is also no evidence that if appellant were in lawful possession of the bottle, it could not have been protected by other means or that the use of force other than deadly force would have subjected her to a substantial risk of death or serious bodily injury. *Id*. Accordingly, this issue is overruled.

Lesser Included Offense

A defendant is entitled to a charge on a lesser-included offense where the proof of the charged offense includes the proof required to establish the lesser-included offense and there is some evidence permitting a jury to rationally find that if the defendant is guilty, he is guilty only of the lesser-included offense. *See Forest v. State*, 989 S.W.2d 365, 367 (Tex. Crim. App.1999). Anything more than a scintilla of evidence is sufficient to entitle a defendant to a lesser charge. *Id*. Essentially, the evidence should establish the lesser-included offense as a rational alternative to the charged offense. *Id*. This is accomplished if the evidence casts doubt on an element of the greater offense, providing the jury with a rational alternative by voting for the lesser-included offense. *Id*.

A person commits the offense of misdemeanor assault if he intentionally, knowingly, or recklessly causes bodily injury to another. *See* Tex. Pen. Code Ann § 22.01(a)(1). A person commits the offense of aggravated assault if he commits misdemeanor assault and either: (1) causes serious bodily injury to another, or (2) uses or exhibits a deadly weapon during commission of the assault. *See* Tex. Pen. Code Ann § 22.02(a). "Serious bodily injury" is defined as any 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." *See* Tex. Pen. Code Ann. § 1.07(a)(46). To be entitled to an instruction on the lesser-included offense of misdemeanor assault, there must have been some evidence permitting a jury to find appellant did not cause serious bodily injury *and* that appellant did not use or exhibit a deadly weapon.

Here, we focus only on the deadly weapon prong. Appellant argues that she was entitled to the lesser-included offense charge because the jury might have believed the screwdriver was not a deadly weapon. In response, the state points to *McElhaney v. State*, 899 S.W.2d 15 (Tex. App.—Tyler 1995, pet. ref'd, untimely filed). The court stated:

> [I]t is not enough, to be entitled to the lesser included offense charge, to posit the possibility of a failure of the evidence on the element or elements that distinguish the greater offense from the lesser included offense. The second prong of the test, whether there is some evidence in the record that, if the defendant is guilty, he is guilty only of the lesser offense, does not mandate a speculative inquiry into whether the jury might not have been convinced about one of the aggravating elements, but requires an examination of the record to see whether it presents an alternative factual scenario which, if believed, would support a finding on the lesser offense. It is not enough that the jury may disbelieve crucial evidence pertaining to the greater offense; there must be some evidence directly germane to a lesser included offense for the factfinder to consider before an instruction on a lesser included offense is warranted.

Id. at 18 (citing *Bignall v. State*, 887 S.W.2d 21 (Tex. Crim App.1994)). Appellant presents no evidence of a factual scenario that would support a finding that a deadly weapon was not used. Her speculation that the jury "might have believed" the screwdriver was not a deadly weapon, without more, does not entitle her to the lesser-included offense of assault. *Id.* The court thus did not err in refusing to submit the charge. We therefore overrule appellant's final issue.

The judgment of the trial court is affirmed.

/s/ Don Wittig
Justice

Judgment rendered and Opinion filed November 30, 2000.

Panel consists of Justices Yates, Wittig, and Frost.

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