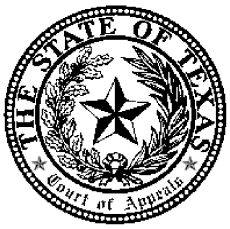
Affirmed and Opinion filed December 6, 2001.



In The

Fourteenth Court of Appeals

NO. 14-01-00479-CR

TOMMY EROLE PALMER, JR., Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 338th District Court
Harris County, Texas
Trial Court Cause No. 863,328

O P I N I O N

Following a trial to the court, the court found appellant Tommy Erole Palmer, Jr., guilty of aggravated assault with a deadly weapon. *See* Tex. Pen. Code § 29.03(a)(2) (Vernon 1994). After finding the two enhancement paragraphs true, the court assessed punishment at 45 years confinement. We affirm.

FACTUAL BACKGROUND

Appellant telephoned Ora Steward telling her he needed ten dollars. Steward agreed to meet appellant, and Steward's friend, Denise Damian, drove Steward to the building

where appellant and Steward were to meet. Damian let Steward out of her car and pulled forward while Steward walked toward appellant's truck. An altercation occurred, during which Damian observed appellant hit Steward. Appellant then left. Houston police officer James Chism received a call about the assault and arrived at the scene. Chism observed that Steward had a cut or deep scratch on the side of her face and another on her chest. Steward told Chism appellant had assaulted her and had said he was going to kill her. When Chism asked Steward how appellant had inflicted the scratches on Steward's face and chest, Steward told Chism appellant had a kitchen knife. Appellant denied having a knife.

DISCUSSION

In issues one and two, appellant challenges the legal and factual sufficiency of the evidence to show he committed aggravated assault by causing bodily injury by using a deadly weapon, namely a knife. Specifically he challenges the sufficiency of the evidence showing there was a knife and the sufficiency of the evidence showing he used a deadly weapon. He does not challenge the evidence supporting the other elements of the offense.

In a legal sufficiency review, we view the evidence in the light most favorable to the verdict and determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979); *Clewis v. State*, 922 S.W.2d 126, 132 (Tex. Crim. App. 1996). This standard of review is also applicable to bench trials. *Grant v. State*, 989 S.W.2d 428, 432 (Tex. App.—Houston [14th Dist.] 1999, no pet.). We do not reevaluate the weight and credibility of the evidence, but act only to ensure the factfinder reached a rational decision. *Muniz v. State*, 851 S.W.2d 238, 246 (Tex. Crim. App. 1993). The judge, as the trier of fact, is the sole judge of the credibility of the witnesses. *Grant*, 989 S.W.2d at 432.

When reviewing a factual sufficiency claim, we view all the evidence without the prism of "in the light most favorable to the prosecution" and set aside the verdict only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust.

Clewis, 922 S.W.2d at 129; *Franklin v. State*, 928 S.W.2d 707, 708 (Tex. App.—Houston [14th Dist.] 1996, no pet.). In conducting a factual sufficiency review, we begin with the assumption the evidence is legally sufficient under the *Jackson* test. *Santellan v. State*, 939 S.W.2d 155, 164 (Tex. Crim. App.1997). We then consider all of the evidence in the record relating to the sufficiency challenge, not just the evidence supporting the verdict. *Id*. We are authorized to disagree with the trial judge's determination but must be appropriately deferential so as to avoid substituting our judgment for that of the trial court. *See Clewis*, 922 S.W.2d at 133-34; *Franklin*, 928 S.W.2d at 708. Our review should not substantially intrude upon the factfinder's role as the sole judge of the weight and credibility of witness testimony. *See Santellan*, 939 S.W.2d at 164.

The following evidence supports the trial court's finding appellant used a knife in the assault. When, shortly after the offense, the investigating officer asked Steward how appellant inflicted the cuts or scratches on Steward's face and chest, Steward said appellant had a kitchen knife. At the time, Steward thought it was an eight-inch kitchen knife. Steward also told the physician who treated her the same day that she was assaulted with a knife. In the physician's medical opinion, a knife caused Steward's injuries. The following day, Steward gave a sworn statement to the police in which she said, "Tommy put the knife against my throat and told me to get into his truck." At trial, Steward testified that, during the struggle with appellant, there was something cold against her throat and she thought it was a knife because it was cold and it felt like something was pushing against her neck. Steward also testified that, as he drove off, appellant threatened her, telling her he would kill her.

The only evidence that directly controverted the evidence appellant used a knife was appellant's testimony denying he had a knife. Other evidence only indirectly impeached the victim's belief appellant had a knife. Damian, who was "maybe 50 yards or so" away, did not see anything in appellant's hands. Steward testified appellant was hitting her with his fist. She could not actually say the object against her throat was a knife because her eyes

were closed. Steward, however, had visited appellant several times since the incident and still loved him. The treating physician described the stab wounds as "superficial," meaning they did not require stitches. The physician testified it was possible Steward's wounds were caused by a fingernail, but, given the very narrow line of the lacerations, it was highly unlikely.

We conclude the evidence was legally and factually sufficient to establish appellant used a knife in committing the offense.[1]

We also conclude the evidence was sufficient to establish the knife was a deadly weapon. "Deadly weapon" is defined as follows:

> (A) a firearm or anything manifestly designed, made, or adapted for the purpose of inflicting death or serious bodily injury; or
>
> (B) anything that in the manner of its use or intended use is capable of causing death or serious bodily injury.

TEX. PEN. CODE § 1.07(a)(17) (Vernon 1994).

To qualify as a deadly weapon, a kitchen knife would have to fall under subsection (B). *See McCain v. State*, 22 S.W.3d 497, 502-03 (Tex. Crim. App. 2000) (quoting *Thomas v. State*, 821 S.W.2d 616, 620 (Tex. Crim. App. 1991), as explaining kitchen knives do not qualify under subsection(A)). As the *McCain* court clarified regarding subsection (B):

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[1] Appellant cites the following five cases as presenting facts "strikingly similar to those of the instant case": *Blain v. State*, 647 S.W.2d 293 (Tex. Crim. App. 1983); *Beller v. State*, 635 S.W.2d 739 (Tex. Crim. App. 1982); *Davidson v. State*, 602 S.W.2d 272 (Tex. Crim. App. 1980); *Alvarez v. State*, 566 S.W.2d 612 (Tex. Crim. App. [Panel Op.] 1978); *Danzig v. State*, 546 S.W.2d 299 (Tex. Crim. App. 1977). In *Blain*, the defendant made no effort to stab or cut the victim. 647 S.W.2d at 294. In *Beller*, the defendant hit and kicked the victim, but did not cut him. 635 S.W.2d at 740. In *Davidson*, the defendant did not get closer than five or six feet from the victim. 602 S.W.2d at 274. In *Alverez*, the defendant was swinging a knife and advancing toward a police officer when the officer shot the defendant. 566 S.W.2d at 613-14. To the extent *Danzig* required expert testimony to establish a knife was a deadly weapon despite the presence of wounds, it has been overruled. *See Denham v. State*, 574 S.W.2d 129, 131 (Tex. Crim. App.1978) (en banc).

> The provision's plain language does not require that the actor actually intend death or serious bodily injury; 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. The placement of the word "capable" in the provision enables the statute to cover conduct that threatens deadly force, even if the actor has no intention of actually using deadly force. *See Tisdale v. State*, 686 S.W.2d 110, 114-115 (Tex. Crim. App.1984).

McCain, 22 S.W.3d at 503.

The State may use the following factors to prove that a knife was used as a deadly weapon in a given case: the size, shape and sharpness of the knife; the manner in which the defendant used the knife; the intended use of the knife; and the knife's capacity to produce death or serious bodily injury. *Blain v. State*, 647 S.W.2d 293, 294 (Tex. Crim. App. 1983). Infliction of wounds on the victim is a factor to consider in determining whether a weapon qualifies as a deadly weapon. *Mixon v. State*, 781 S.W.2d 345, 347 (Tex. App.—Houston [14 th Dist.] 1989), *aff'd*, 804 S.W.2d 107 (Tex. Crim. App. 1991) (per curiam). Words or threats used by the accused are also considerations. *Blain*, 647 S.W.2d at 294; *Soto v. State*, 864 S.W.2d 687, 691 (Tex. App.—Houston [14th Dist.] 1993, pet. ref'd). The State does not have to introduce the knife into evidence to meet its burden. *See Morales v. State*, 633 S.W.2d 866, 868 (Tex. Crim. App. [Panel Op.] 1982).

At the time of the incident, Steward thought the object appellant held against her neck was an eight-inch kitchen knife. The factfinder could reasonably infer from Steward's testimony that the appellant held the knife against Steward's neck. The factfinder could reasonably infer that appellant cut Steward with the knife. Appellant told Steward he was going to kill her.

In *McCain*, the court of criminal appeals concluded the mere carrying of a butcher knife in a defendant's back pocket during a violent attack was "legally sufficient for a factfinder to conclude the 'intended use' for the knife was that it be capable of causing death or serious injury." 22 S.W.3d at 503. The court then held the evidence was legally

sufficient to show the butcher knife was a deadly weapon under the circumstances. *Id.* In *McCain*, the evidence showed the defendant kicked in the victim's kitchen door and hit the victim with his fists several times before the victim was able to escape. *Id*. at 499. In *McCain*, unlike the present case, there was no evidence the defendant touched, brandished, referred to, or overtly displayed the knife in any way other than having it partly protruding from his pocket. *Id*. Just as the evidence was legally sufficient to support a deadly weapon finding in *McCain*, it is legally sufficient here.[2]

The following evidence arguably weighs against a deadly weapon finding: the physician's statement the wounds were superficial and Steward's testimony appellant was driving away when he threatened to kill her. Nevertheless, the court's deadly weapon finding was not against the overwhelming weight of the evidence as to be clearly wrong and unjust. *Clewis*, 922 S.W.2d at 129; *Franklin*, 928 S.W.2d at 708.

The evidence was legally and factually sufficient to establish the knife was a deadly weapon. We overrule issues one and two.

We affirm the judgment of the trial court.

/s/ John S. Anderson
Justice

Judgment rendered and Opinion filed December 6, 2001.
Panel consists of Justices Anderson, Hudson, and Frost.
Do Not Publish — TEX. R. APP. P. 47.3(b).

[2] Unlike the present case, the knife was recovered in the *McCain* case. *McCain v. State*, 22 S.W.3d 497, 499 (Tex. Crim. App. 2000). That fact, however, is relevant to whether there was a knife, not to whether the knife was a deadly weapon.