Affirmed and Opinion filed May 3, 2001.

In The

Fourteenth Court of Appeals

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NO. 14-98-01425-CR

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JAMES CAULEY, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 23rd Judicial District Court
Brazoria County, Texas
Trial Court Cause No. 34,154

O P I N I O N

James Cauley appeals from his conviction for aggravated assault with a deadly weapon. After finding him guilty, a jury sentenced him to 30 years imprisonment. Punishment was enhanced by three prior felony convictions. In three points of error, Cauley contends that: (1) the evidence was legally insufficient; (2) the trial court erred in failing to sustain an objection to the prosecutor's improper jury argument; and (3) the trial court erred in admitting evidence of a prior conviction. We affirm.

Legal Sufficiency

Cauley contends that the trial court erred in not requiring the State to prove each element of the offense beyond a reasonable doubt. He then cites the standard of review for legal sufficiency of the evidence and discusses the evidence in that context. We will, therefore, consider this point as a challenge to the legal sufficiency of the evidence.

In reviewing legal sufficiency, we examine the evidence in the light most favorable to the verdict and ask whether any rational trier of fact could have found all of the elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Santellan v. State*, 939 S.W.2d 155, 160 (Tex. Crim. App. 1997). We accord great deference to the responsibility of the trier of fact to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences therefrom. *See Clewis v. State*, 922 S.W.2d 126, 133 (Tex. Crim. App. 1996). We further presume that any conflicting inferences from the evidence were resolved by the jury in favor of the prosecution, and we must defer to that resolution. *Id*.

The indictment in the present case alleged that Cauley: "did ... intentionally and knowingly threaten Patricia Ruby Hopkins with imminent bodily injury and did use a deadly weapon, namely, a firearm" (capitalization omitted). This language conforms with the relevant sections of the Texas Penal Code. *See* TEX. PEN. CODE ANN. §§ 22.01(a)(1)(assault), 22.02(a)(2)(aggravated by use of deadly weapon)(Vernon 1994).

The main prosecution witness at trial was the victim, Patricia Hopkins. Hopkins and Cauley were living together at the time of the incident. Hopkins testified that around 8 p.m. on June 3, 1997, she was packing to leave. Cauley was "very mad" at her, and he made an obscene remark regarding her prior relationship with an African-American man. Cauley left the house that night but came back the next morning between 4 and 5 a.m. He then hit her in the face.

Hopkins ran to Cauley's mother's house, where she called the police. While she was on the phone with the police, Cauley came out of his house with a Colt .45. Hopkins heard him fire the weapon four or five times. She became hysterical and was crying because she was afraid he might shoot her.

He walked in the house, pulled the phone jack out of the wall, and told everyone to get on the floor. Hopkins complied with the demand. Cauley then said, "If any . . . cops come into this house, I'm going to kill them. I'm the one in charge." He then fired a shot into his mother's stove. The sound of the shot was very loud, and Hopkins was very scared that he might shoot her. Hopkins also stated that Cauley's mother became hysterical at this time.

Officer Dale Meyer of the Manvel Police Department testified that when he arrived at the scene, Hopkins was very upset and crying. He later found a bullet hole in the stove, which appeared to be fresh, and he found a spent .45 caliber shell casing on the kitchen floor. Cauley's mother, Margaret Cauley, also testified. She confirmed that Hopkins ran into her house and that Cauley fired the gun before entering the house himself. The mother stated she stepped in front of him and tried to get him to calm down and give her the gun. She also verified that he shot the stove.

In order to prove aggravated assault with a deadly weapon, the State needed to produce evidence demonstrating that Cauley intentionally and knowingly threatened Hopkins with bodily injury and used a firearm. *See* TEX. PEN. CODE ANN. §§ 22.01(a)(1), 22.02(a)(2)(Vernon 1994). A firearm is *per se* a deadly weapon. TEX. PEN. CODE ANN. § 1.07(a)(17) (Vernon 1994). The mere act of pointing a handgun as someone has been held sufficient to support a conviction for aggravated assault with a deadly weapon. *See Villatoro v. State*, 897 S.W.2d 943, 945 (Tex. App.—Amarillo 1995, pet. ref'd); *Dickerson v. State*, 745 S.W.2d 401, 403 (Tex. App.—Houston [14th Dist.] 1987, pet. ref'd). In the present case, the evidence demonstrated that Cauley hit Hopkins in the face, fired four or five shots from a Colt .45 before following her into his mother's house, pulled a phone jack out of the wall, threatened to kill police officers if they were to come into the house, and shot a stove in the same room where Hopkins was lying on the floor. Testimony also established that Hopkins was afraid Cauley would shoot her and that Cauley's mother herself became hysterical from his actions. Although there was no testimony directly stating that Cauley actually pointed the weapon at Hopkins, the evidence regarding the totality of his actions was clearly sufficient to support a finding that Cauley intentionally and knowingly threatened Hopkins with bodily injury and used a firearm. The evidence was legally sufficient to support the conviction. *See*

Santellan, 939 S.W.2d at 160.

In a subpoint of error, Cauley specifically claims that the evidence was insufficient to support the in-court identification of Cauley by Hopkins. The identification went as follows:

> Q. Do you know a person by the name of James Delton Cauley?
>
> A. Yes, I do.
>
> Q. Would you recognize James Delton Cauley if you were to see him again?
>
> A. Yes, I will.
>
> Q. And is he in this courtroom today?
>
> A. Yes, ma'am.
>
> Q. Is he standing up or sitting down?
>
> A. Sitting down.
>
> Q. And where is he, please?
>
> A. He's sitting over there.
>
> Q. What's he wearing today?
>
> A. He has a suit with a red and blue-gray tie on with a white shirt with a collar.
>
> Q. Thank you.
>
> [PROSECUTOR:] May the record reflect this witness has identified the Defendant in this case?
>
> THE COURT: Yes, ma'am.

Cauley's trial counsel did not object to the court's acceptance of the identification. Officer Meyer also identified Cauley as having been at the scene. He, too, identified Cauley in court by where he was sitting and the clothes he was wearing.

In *Rohlfing v. State*, 612 S.W.2d 598 (Tex. Crim. App. 1981), the Court of Criminal Appeals overruled a challenge to the in-court identification where the identification procedure was unobjected to and the identification was made merely by reference to the clothes the defendant was wearing ("the man in court wearing an orange shirt and a light beige/tan leisure suit"). *Id*. at 601. *See also Hime v. State*, 998 S.W.2d 893, 896 (Tex. App.—Houston [14th Dist.] 1999, pet. ref'd)(citing *Rohlfing* and upholding identification made solely by reference to the clothes worn in court by the defendant). The court in *Rohlfing* also hinted that the better procedure would have been to request that the record be made to reflect that the witness

identified the defendant. As shown above, the prosecutor in the present case did, in fact, request that the court allow the record to reflect Hopkins' identification of Cauley, and the court so agreed. The evidence is legally sufficient to support the in-court identification. We overrule this point of error.

Jury Argument

Cauley next contends that the trial court erred in failing to sustain an objection to the prosecutor's commenting on undisclosed prior misconduct before the jury. During argument, the prosecutor stated: "What you have in front of you, ladies and gentlemen, is a person who's very versatile in the criminal laws of Texas. You have a person who's committed all kinds of crimes. Just in substance abuse, you're talking about alcohol, cocaine, and heroin, according to the evidence." Cauley maintains that the evidence did not support the prosecutor's conclusion that he used heroin.

Contrary to the assertion in Cauley's brief, however, Cauley's trial counsel made no objection to these statements in the prosecutor's closing argument. Trial counsel objected twice during closing, but neither objection was sufficiently close in terms of time or subject matter to the statements complained of on appeal. The failure to make a timely and sufficiently specific objection to allegedly improper jury argument waives the issue on appeal. *See* TEX. R. APP. P. 33.1; *Cockrell v. State*, 933 S.W.2d 73, 89 (Tex. Crim. App. 1996), *cert. denied*, 520 U.S. 1173 (1997). *See also Stiles v. State*, 927 S.W.2d 723, 733 (Tex. App.—Waco 1996, no pet.)(claim that argument went outside evidence is waived absent adverse ruling on objection). Accordingly, we overrule this point of error.

Prior Conviction

Last, Cauley contends that the trial court erred in admitting evidence of a prior conviction. During the punishment phase, the State offered evidence regarding several prior convictions, three of which correspond to the three enhancement paragraphs in the indictment. Cauley apparently complains that the packet offered to prove the first of these convictions, for

driving while intoxicated, did not contain proper certification.[1] He additionally contends that this packet did not contain a judgment or a sentence.

In open court, Cauley plead true to each of the prior convictions alleged in the indictment. When a defendant pleads true to a prior conviction, the State has no further burden of proving the prior conviction. *Harvey v. State*, 611 S.W.2d 108, 111 (Tex. Crim. App. 1981); *Chandler v. State*, 21 S.W.3d 922, 923 (Tex. App.—Houston [14th Dist.] 2000, no pet.). Cauley's challenge to the evidence admitted to prove the prior conviction is, therefore, moot. We overrule this point of error.

The judgment of the trial court is affirmed.

/s/ Bill Cannon
Justice

Judgment rendered and Opinion filed May 3, 2001.
Panel consists of Justices Cannon, Lee, and Amidei.**
Do Not Publish — TEX. R. APP. P. 47.3(b).

[1] The State points out that Cauley identifies this packet as "States Exhibit P1" [sic] even though there was actually no exhibit labeled as such. However, Cauley's challenge is clearly to the first exhibit admitted in the punishment phase, which was actually labeled "State's Exhibit 11."

** Senior Justices Bill Cannon and Norman Lee and Former Justice Maurice Amidei sitting by assignment.