Affirmed and Opinion filed July 12, 2001.

In The

Fourteenth Court of Appeals

NO. 14-99-00844-CR
NO. 14-99-00845-CR
NO. 14-99-00846-CR

JOSEPH LARRY PORTER, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 232nd District Court
Harris County, Texas
Trial Court Cause Nos. 789696, 789697, & 794905

O P I N I O N

Appellant was charged in three separate indictments with two offenses of aggravated robbery and one offense of aggravated sexual assault. The jury convicted appellant of each of the charged offenses and assessed punishment at twenty years for each aggravated robbery and forty years for the offense of aggravated sexual assault. As the alleged offenses arise out of a single criminal episode and because the cases were tried jointly in a single trial, we will consolidate these appeals into a single opinion. In each

case, appellant contends the evidence is legally and/or factually insufficient to establish that the instruments alleged in the indictments were deadly weapons. We affirm.

I. Factual Summary.

The complainants were husband and wife, and the parents of four children. One of their daughters was widowed when her husband died in an industrial accident. As a result of that death, the daughter and her four children moved in with the complainants. The oldest grandchild was sixteen years of age and became friends with another juvenile, Eric Range. The daughter and grandchildren moved from the complainants' home on the morning of August 3, 1998. At 4:30 p.m. that afternoon, Range came to the complainants' home and asked for the granddaughter. The wife told Range the granddaughter was not there and Range left. Approximately thirty minutes later, Range returned to the complainants' home. When the wife opened the door, Range and another male, later identified as appellant, forced their way into the home.

The husband and wife were placed in their recliners in the living room. The two intruders began taking inventory of the property in the home. At one point, Range took the wife from the living room to the sun room and demanded oral sex; she refused. Range returned the wife to the living room and continued exploring the home. Range eventually returned and took the wife to the master bedroom where Range unsuccessfully attempted anal penetration; he then vaginally penetrated the wife. While engaging in intercourse, Range heard appellant knock on the door. Range asked appellant to wait, but appellant, with the husband as captive, kicked down the door, entered the room, threw Range aside, and appellant penetrated the wife anally, orally and vaginally. Range returned to the living room with the husband and a short time later returned him to the master bedroom and forced him to watch as appellant raped the wife.

Range and appellant returned the complainants to the living room and bound them. Range struck both complainants in the face. Range and appellant gathered property,

including two guns, from throughout the home, placed it in the complainants' vehicle, and left the residence.

The complainants later identified appellant from a photo spread. The vehicle was found abandoned three days later. Fingerprints were lifted from the vehicle; a fingerprint from outside the vehicle matched appellant's. Appellant and Range were arrested four days after the home invasion while traveling in a stolen van. Within the van were two guns taken from the complainants' home.

Appellant testified that he had never entered the complainants' home; that the complainants' vehicle and other property were taken solely by Range; and that he (appellant) had not participated in the robbery or sexual assault.

II. Allegations and Application Paragraphs.

The aggravated robbery indictments alleged the offense in two paragraphs. The first alleged the aggravating element was the use and exhibition of a deadly weapon, namely a knife. *See* TEX. PEN. CODE ANN. § 29.03(a)(2). The second paragraph alleged the deadly weapon was a firearm. *See id.* The aggravated sexual assault indictment alleged the offense in four paragraphs. The first, second, and third paragraphs alleged vaginal, anal, and oral penetration aggravated by the use and exhibition of a deadly weapon, namely a knife. *See* TEX. PEN. CODE ANN. § 22.021 (a)(1)(A)(i) and (ii) The fourth paragraph alleged the offense was committed in concert with Range directed toward the same victim and occurring during the course of the same criminal episode. *See* TEX. PEN. CODE ANN. § 22.021 (a)(2)(v).

The application paragraphs in each of the aggravated robbery charges permitted conviction if the jury found beyond a reasonable doubt that appellant either acting alone, or as a party with Range, used or exhibited a deadly weapon in the form of either a knife or a firearm. The application paragraphs in the aggravated sexual assault charge permitted conviction if the jury found beyond a reasonable doubt that appellant either acting alone, or as a party with Range, used or exhibited a deadly weapon, namely a knife while causing

the vaginal, anal, or oral penetration of the complainant, or while acting in concert with Range during the course of the same criminal episode. The jury returned a general verdict of guilty in each of the three cases.

III. Evidentiary Challenges.

A. Standards of Appellate Review.

Each appeal challenges the legal and factual sufficiency of the evidence 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). When we determine whether the evidence is factually sufficient, we employ one of the two factual sufficiency formulations recognized in *Johnson v. State*, 23 S.W.3d 1 (Tex.Crim.App.2000). In cases, such as this, where the appellant attacks the factual sufficiency of an adverse finding on an issue on which he did not bear the burden of proof, the appellant must demonstrate there is insufficient evidence to support the adverse finding. *Id.* at 11. Under a factual sufficiency challenge, the evidence is viewed without the prism of "in the light most favorable to the prosecution" but rather "in a neutral light, favoring neither party." *Id.* at 6. A reversal is necessary only if the evidence, standing alone, is so weak as to be clearly wrong and manifestly unjust. *Id*. at 8. The *Johnson* court reaffirmed the requirement that in conducting a factual sufficiency review the appellate court must employ appropriate deference to avoid substituting its judgment for that of the fact finder. *Id.* at 7. To ensure this level of deference, the court of appeals, before ordering a reversal, should provide a detailed explanation supporting its finding of factual insufficiency by clearly stating why the fact finder's finding is insufficient and the court should state in what regard the evidence is so weak as to be clearly wrong and manifestly unjust. *Id.* at 8.

Additionally, when a general verdict is returned, the reviewing court will examine the record to determine if the evidence is sufficient to support a finding of guilt under any of the allegations submitted. If so, the verdict will be upheld. *See Rabbani v. State*, 847 S.W.2d 555, 558 (Tex. Crim. App. 1992), *cert. denied*, 509 U.S. 926, 113 S.Ct. 3047, 125 L.Ed.2d 731 (1993); *Fuller v. State*, 827 S.W.2d 919, 931 (Tex. Crim. App. 1992), *cert. denied*, 526 U.S. 1133, 119 S.Ct. 1809, 143 L.Ed.2d 1012 (1999). For example, in the instant cases, if the evidence is legally and factually sufficient to establish the alleged knife was a deadly weapon, we need not determine whether a firearm was used or exhibited during the offenses.

B. Knives as Deadly Weapons.

A robbery or sexual assault becomes "aggravated" if the actor "uses or exhibits a deadly weapon." TEX. PEN. CODE ANN. §§ 22.021(a)(2)(A)(iv) and 29.03(a)(2). "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 ANN. § 1.07(a)(17).

In *McCain v. State*, 22 S.W.3d 497 (Tex. Crim. App. 2000), the defendant kicked in the door of the complainant's kitchen and hit her numerous times with his fist. During the attack, the complainant saw a long, dark object partly sticking out of the defendant's back pocket. The complainant believed the object was a knife. However, there was no evidence the defendant touched, brandished, referred to, or overtly displayed the knife in any way other than having it partly sticking out of his pocket. The defendant was later arrested, and the police found a butcher knife with a nine-inch blade on appellant's person. In considering when a knife becomes a deadly weapon under section 1.07(a)(17), the *McCain* court reaffirmed its holding in *Thomas v. State*, 821 S.W.2d 616, 620 (Tex. Crim. App. 1991), that "kitchen knives, utility knives, straight razors, and eating utensils are

manifestly designed for other purposes and, consequently, do not qualify as deadly weapons" under subsection (A). The *McCain* court then concluded: "Butcher knives, having an obvious purpose apart from inflicting death or serious bodily injury, would also appear to be excluded from the subsection (A) category of objects that are deadly weapons due to their physical characteristics." *Id.*, 22 S.W.3d at 503.

Under subsection (B) "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 [subsection (B)] enables the statute to cover conduct that threatens deadly force, even if the actor has no intention of actually using deadly force." *McCain*, 22 S.W.3d at 503. Therefore, the *McCain* court held that in a legal sufficiency analysis "the determining factor is that the deadly weapon was 'used' in facilitating the underlying crime." *Id.*, 22 S.W.3d at 504 (citing *Patterson v. State*, 769 S.W.2d 938, 941 (Tex. Crim. App. 1989)). Applying this standard, the *McCain* court found the evidence sufficient to support a deadly weapon finding because "the knife was partially exposed, and from that exposure, the factfinder could rationally conclude that the knife was exhibited during the criminal transaction, or at least, that its presence was used by appellant to instill in the complainant apprehension, reducing the likelihood of resistance during the encounter." 22 S.W.3d at 503.

In the instant case, the record includes the following testimony regarding the knives allegedly used or exhibited during the commission of the instant offenses. State's exhibit 34 was described as two large butcher knives recovered from the floor of the master bedroom. Officer James Kaye a crime scene investigator with the Homicide Division of the Houston Police Department testified, based upon his training and experience, the knives could be used as deadly weapons. The wife described the knives as a butcher knife and a chef's knife that were a part of her cutlery in the kitchen. The butcher knife was eight inches in length. Additional testimony will be developed in relation to each of the charged offenses.

C. Aggravated Robbery of Wife.

In this appeal, appellant raises four points of error. The first and second points contend the evidence is legally and factually insufficient to prove the knives constituted deadly weapons. The third and fourth points contend the evidence is legally and factually insufficient to prove a firearm was used or exhibited during the offense.

We find the following testimony from the wife persuasive in resolving these points of error:

> Q. Once [Range] came back into the bedroom with the knives what happened next?
>
> A. [Range] takes the knives and runs them from my breast bone down to my pubic hair and came back into my belly button and pushed them in really hard and said I want to know where the guns are or I'm going to push these all the way in and rip you open.

The wife then told Range to look in the closet where Range found the guns.

When this testimony is considered in conjunction with the general descriptions of the knifes in part III. B, *supra*, of this opinion, we find the knife and/or knives were used to facilitate the underlying crime of robbery and were exposed for that purpose. *See McCain*, 22 S.W.3d at 503-4. Therefore, when this evidence is viewed in the light most favorable to the prosecution, we find any rational trier of fact could have found the knife and/or knives as used and exhibited were deadly weapons beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. at 319. The first point of error is overruled.

Furthermore, when the same evidence is viewed in a neutral light, favoring neither party, we do not find the evidence was so weak a deadly weapon finding was clearly wrong and manifestly unjust. *See Johnson*, 23 S.W.3d at 8. The second point of error is overruled.

Having found the evidence both legally and factually sufficient to establish that either knife used and exhibited in the instant offense was a deadly weapon, we need not

reach the merits of the third and fourth points of error. *See Fuller*, 827 S.W.2d at 931. They are, therefore, overruled.

D. Aggravated Robbery of Husband.

In this appeal, appellant raises six points of error. The first and second points contend the evidence is legally and factually insufficient to prove the knives constituted deadly weapons. The third and fourth points contend the evidence is legally and factually insufficient to prove a firearm was used or exhibited during the offense. The fifth and sixth points contend the evidence is legally and factually insufficient to prove a knife was used or exhibited during the offense.

Appellant held one of the knives as he forced the husband to show him (appellant) what property was located in the home. Appellant was holding the husband at knife point when they entered the master bedroom. When appellant began sexually assaulting the wife, Range escorted the husband back to the living room. After a short time, Range put the knife to the husband's throat and marched him back to the bedroom and forced the husband to watch appellant sexually assault the wife. Eventually the husband was returned to the living room. While there Range returned with both knives and demanded the guns. State's exhibit 27 was a photograph showing an injury to the husband's neck caused by the knife held by Range.

When this testimony is considered in conjunction with the general descriptions of the knife in part III B, *supra*, of this opinion, we find the knife and/or knives were used to facilitate the underlying crime of robbery and were exposed for that purpose. *See McCain*, 22 S.W.3d at 503-4. Therefore, when this evidence is viewed in the light most favorable to the prosecution, we find any rational trier of fact could have found the knife and/or knives as used and exhibited were deadly weapons beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. at 319. The first and fifth points of error are overruled.

Furthermore, when the same evidence is viewed in a neutral light, favoring neither party, we do not find the evidence that the knife or knives were used in the commission of the instant offense and further that as used and exhibited was so weak that either constituted a deadly weapon was clearly wrong and manifestly unjust. *See Johnson*, 23 S.W.3d at 8. The second and sixth points of error are overruled.

Having found the evidence both legally and factually sufficient to establish that either knife or knives were used and that the alleged knife or knives exhibited in the instant offense were deadly weapons, we need not reach the merits of the third and fourth points of error. *See Fuller*, 827 S.W.2d at 931. They are, therefore, overruled.

E. Aggravated Sexual Assault of Wife.

In this appeal, appellant raises seven points of error. Points one through six contend the evidence is legally and factually insufficient to prove the knives constituted deadly weapons. The seventh point of error contends the evidence is legally insufficient to show appellant used force or violence against the wife.

Immediately prior to Range's sexual assault of the wife, Range went into the kitchen and pulled two knives from the knife rack. These were the knives described in State's exhibit 34. Range then escorted the wife to the master bedroom where the sexual assault occurred. The wife testified to seeing a knife when Range took her into the bedroom. She closed her eyes waiting for the sexual assault by appellant to end. When the wife opened her eyes, she saw Range with the knives in State's exhibit 34.

When this testimony is considered in conjunction with the general descriptions of the knifes in part III B, *supra*, of this opinion, we find the knife and/or knives were used to facilitate the underlying crime of sexual assault and were exposed for that purpose. *See McCain*, 22 S.W.3d at 503-4. Therefore, when this evidence is viewed in the light most favorable to the prosecution, we find any rational trier of fact could have found the knife and/or knives as used and exhibited were deadly weapons beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. at 319. The first, third and fifth points of error are overruled.

Furthermore, when the same evidence is viewed in a neutral light, favoring neither party, we do not find the evidence that the knives as used and exhibited was so weak that a finding that either constituted a deadly weapon was clearly wrong and manifestly unjust. *See Johnson*, 23 S.W.3d at 8. The second, fourth and sixth points of error are overruled.

Having found the evidence both legally and factually sufficient to establish that either knife used and exhibited in the instant offense was a deadly weapon, we need not reach the merits of the seventh point of error. *See Fuller*, 827 S.W.2d at 931. It is, therefore, overruled.

IV. Conclusion

Having overruled the four points of error in cause no. 14-99-0844-CR, the six points of error in cause no. 14-99-0845-CR, and the seven points of error in cause no. 14-99-0846-CR, the judgments in cause nos. 789696, 794905 and 789697 in the 232nd Judicial District Court of Harris County are affirmed.

/s/ Charles F. Baird[1]
Justice

Judgment rendered and Opinion filed July 12, 2001.
Panel consists of Justices Yates, Frost and Baird.
Do Not Publish — TEX. R. APP. P. 47.3(b).

[1] Former Justice Charles F. Baird sitting by assignment.