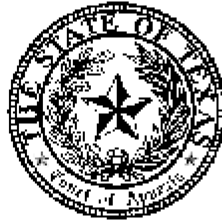
Affirmed and Opinion filed July 19, 2001.



In The

Fourteenth Court of Appeals

NO. 14-00-00550-CR

DONALD L. PRATER, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 337th District Court
Harris County, Texas
Trial Court Cause No. 837,886

O P I N I O N

A jury found appellant guilty of aggravated robbery and assessed punishment at fifty-two years' confinement and a fine of $10,000.00. On appeal, appellant raises three point of error. In points of error one and two, appellant asserts that the evidence was legally and factually insufficient to sustain his conviction. In his third point of error, appellant argues that the trial court erred in failing to grant his motion for mistrial when the State was unable to connect him to the commission of an extraneous robbery. We affirm.

On July 26, 1999, appellant entered a convenience store, held a gun to the clerk's head and demanded money. The clerk, fearing for his life, complied with appellant's demand. As

appellant was exiting the store, the store owner automatically locked the doors, and a store employee and a customer tackled appellant. During the struggle, appellant placed the gun to the customer's head and threatened to shoot him, at which time the doors were unlocked and appellant fled the store. An off duty Houston police officer, Paul Ogden, noticed appellant leaving the area and gave chase. After appellant's vehicle stopped, Officer Ogden placed appellant under arrest, and found the gun used in the robbery. Officer Ogden determined that the gun was a CO_2 powered air pistol.

In his first and second points of error, appellant argues that the evidence was legally and factually insufficient to support his conviction for aggravated robbery. Specifically, appellant contends that the evidence was insufficient to show the air pistol he used in the robbery was a deadly weapon. We disagree.

In reviewing legal sufficiency challenges, appellate courts are to view the evidence in the light most favorable to the prosecution, overturning the lower court's verdict only if a rational trier of fact could not have found all elements of the offense beyond a reasonable doubt. *Lacour v. State*, 8 S.W.3d 670, 671 (Tex. Crim. App. 2000); *Santellan v. State*, 939 S.W.2d 155, 160 (Tex. Crim. App. 1997) (citing *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2871, 2879, 61 L.Ed.2d 560 (1979)). "[I]f any evidence establishes guilt beyond a reasonable doubt, the appellate court may not reverse the fact finder's verdict on grounds of legal insufficiency." *Arthur v. State*, 11 S.W.3d 386, 389 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd).

In reviewing factual sufficiency challenges, appellate courts must determine "whether a neutral review of all the evidence, both for and against the finding, demonstrates that the proof of guilt is so obviously weak as to undermine confidence in the jury's determination, or the proof of guilt, although adequate if taken alone, is greatly outweighed by contrary proof." *Johnson v. State*, 23 S.W.3d 1, 11 (Tex. Crim. App. 2000). Evidence is factually insufficient if, 1) it is so weak as to be clearly wrong and manifestly unjust; or 2) the adverse finding is against the great weight and preponderance of the available evidence. *Id*. The *Johnson* court

reaffirmed the requirement that "due deference must be accorded the fact finder's determinations, particularly those determinations concerning the weight and credibility of the evidence." *Id*. at 9.

Texas Penal Code section 1.07(a)(17) defines a deadly weapon as: "(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) (Vernon Supp. 2001). "However, '[t]he 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 that statute to cover conduct that threatens deadly force, even if the actor has no intention of actually using deadly force.'" *Shugart v. State*, 32 S.W.3d 355, 361 (Tex. App.—Waco 2000, pet. ref'd) (quoting *McCain v. State*, 22 S.W.3d 497, 503 (Tex. Crim. App. 2000)).

It is undisputed that appellant placed the gun to the head of two different individuals and threatened to take their lives. Moreover, the testimony is clear that when a pellet gun is placed at close range to a person's temple, or face, it is capable of causing serious bodily injury or death. Appellant, however, pointing to evidence that the pellet gun he used was unloaded at the time he was apprehended, argues that it was not capable of causing serious bodily injury or death. A similar argument was advanced in *Adame v. State*, where the court found that because no evidence was adduced at trial that demonstrated that the BB gun was loaded, and an unloaded BB gun is incapable of causing death or serious bodily injury, the evidence was legally insufficient to support the deadly weapon finding. 37 S.W.3d 141, 143–44 (Tex. App.—Waco 2001, no pet. h.). We find this case distinguishable from our present case. The State in *Adame* not only failed to put on direct evidence that the BB gun was loaded, the State also failed to put on any evidence that would allow the jury to infer from the circumstances that the BB gun was loaded. *Id*. at 144. We, however, have evidence in our case that would allow the jury to infer that the pellet gun was loaded when appellant was robbing the convenience store.

In *Delgado v. State*, the court held that the jury could infer that an unloaded BB pistol was loaded at the time of the offense because the defendant brandished the pistol, threatened to kill the victims, and pointed the pistol at their heads. 986 S.W.2d 306, 308 (Tex. App.— Austin 1999, no pet.). The same rationale is also true in our present case. It is undisputed that appellant brandished the pellet gun, pointed it at the heads of two people in the convenience store, and threatened to kill them if his demands were not met. From this, the jury could infer that the pellet gun was in fact loaded at the time of the commission of the offense. Moreover, since a loaded pellet gun is capable of causing death or serious bodily injury in the manner used by appellant, we find that the evidence was legally sufficient to support the deadly weapon finding. We overrule appellant's first point of error.

With regard to appellant's factual sufficiency challenge, the evidence unequivocally established that in the manner of appellant's use, a loaded pellet gun would have been capable of causing death or serious bodily injury. Appellant presents evidence that when the weapon was found, it was unloaded, and therefore incapable of causing death or serious bodily injury. However, as discussed under the legal sufficiency review, a jury could have inferred from the manner of appellant's use that the pellet gun was in fact loaded during the commission of the offense. Moreover, the testimony at trial revealed that the pellet gun was a single shot pellet gun that could have been unloaded with a single pull of the trigger as the appellant fled the scene. We find that the evidence establishing that the pellet gun was a deadly weapon was not so weak as to be clearly wrong and manifestly unjust, or against the great weight and preponderance of the available evidence. Accordingly, we overrule appellant's second point of error.

In appellant's third point of error, he argues that the trial court erred in failing to grant a mistrial when the State failed to prove, during the punishment phase, that he committed an extraneous offense of robbery. Specifically, appellant argues that the trial court erred in failing to grant his mistrial when testimony of an extraneous offense was presented to the jury, but the witness failed to identify appellant as the person who committed the offense. We disagree.

A trial court's order denying a mistrial is reviewed for abuse of discretion. *Bledsoe v. State*, 21 S.W.3d 615, 624 (Tex. App.—Tyler 2000, no pet.); *Cano v. State*, 3 S.W.3d 99, 109 (Tex. App.—Corpus Christi 1999, pet. ref'd). "Testimony referring to or implying that extraneous offenses had been committed by the defendant can be rendered harmless by an instruction to disregard by the trial court, unless it appears that the evidence was so clearly calculated to inflame the mind of the jury, or was of such damning character as to suggest it would be impossible to remove the harmful impression from the jury's mind." *Kemp v. State*, 846 S.W.2d 289, 308 (Tex. Crim. App. 1992); *Bledsoe*, 21 S.W.3d at 624.

The State called as a witness, Syed Ullah, a victim of a robbery allegedly committed by appellant. During the course of his testimony in the presence of the jury, it became clear that Mr. Ullah could not identify appellant as the individual who had robbed him. The following exchange took place:

> Q. Do you see the same person who did that, the white guy who had the gun?
>
> A. Yes.
>
> Q. Do you see him in the courtroom?
>
> A. Uh-huh.
>
> Q. Okay. What I need you to do is to point to him and to show the jury who that is. Can you show the jury who the white guy is with the gun?
>
> A. Yeah.
>
> Q. Okay. Go ahead and do that?
>
> A. Oh. Show how the guy come inside?
>
> Q. No. I want you to show me who the guy is, the white guy with the gun, do you see him here?

A. Yeah.

Q. Okay.

THE COURT: Walk over to him.

THE WITNESS: Yeah.

THE COURT: Do you understand?

THE WITNESS: No, I'm not understanding.

THE COURT: Well.

Q. Okay. Where is he?

A. Where is he?

Q. Right?

A. I have no idea.

After this exchange, the trial court recessed the jury and questioned the witness. During questioning by the trial court, the witness stated that he did not see the person who robbed him in the courtroom. The trial court then brought the jury back in and instructed them to disregard all of Mr. Ullah's testimony, stating:

> Ladies and gentleman of the jury, I'm striking from the record all of the testimony of the last witness who testified. Do not consider it for any purpose so far as this case is concerned. Put it out of your mind, forget that you ever heard it.

We find this instruction to disregard sufficient to alleviate any harm caused by Mr. Ullah's testimony. Even from a cold reading of the record, it is painfully clear that Mr. Ullah could not identify appellant as the individual who robbed him. Accordingly, under these circumstances, we find that the trial court did not abuse its discretion in denying appellant's motion for mistrial. Appellant's third point of error is overruled.

Having overruled all of appellant's points of error, we affirm the judgment of the trial court.

/s/

Paul C. Murphy
Senior Chief Justice

Judgment rendered and Opinion filed July 19, 2001.

Panel consists of Justices Edelman, Frost, and Murphy.[*]

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

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[*] Senior Chief Justice Paul C. Murphy sitting by assignment.