Affirmed and Opinion filed October 4, 2001.

In The

Fourteenth Court of Appeals

NO. 14-00-00400-CR

TRENT WINTERS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 338th District Court
Harris County, Texas
Trial Court Cause No. 829,506

O P I N I O N

Appellant, Trent Winters, challenges his conviction for aggravated assault, alleging the evidence supporting his conviction is legally and factually insufficient. We affirm.

I. BACKGROUND

Appellant confronted his cousin, complainant Troy Nealy, about stealing an automatic teller machine (ATM) card from Mr. Nealy's mother, Pauline Nealy. The two began to scuffle. During the scuffle, appellant beat Mr. Nealy with an instrument described as a stick, walking cane, or baseball bat. Mr. Nealy fell unconscious and required hospital

treatment for his injuries.

For this beating, appellant was charged by indictment with the felony offense of aggravated assault. A jury found him guilty of the offense charged and assessed punishment at four years' confinement in the Texas Department of Criminal Justice – Institutional Division. Appellant raises two points of error, challenging the sufficiency of evidence to support his conviction.

II. LEGAL AND FACTUAL INSUFFICIENCY

In his first and second points of error, appellant complains the evidence was legally and factually insufficient to support his conviction for aggravated assault because the State failed to prove the baseball bat used or exhibited in the scuffle was a "club" as alleged in the indictment[1] and as that term is defined in section 46.01(1) of the Texas Penal Code.[2] *See* TEX. PEN. CODE ANN. § 46.01(1) (Vernon 1994 & Supp. 2001). Specifically, appellant contends, although the record reveals that the instrument allegedly used was some type of bat, walking stick, or "big stick," the record does not reveal that the instrument used against Mr. Nealy had been made, designed, or adapted to strike an individual and cause serious

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[1] The indictment alleged appellant "did then and there unlawfully, INTENTIONALLY, KNOWINGLY, AND RECKLESSLY CAUSE BODILY INJURY TO T. NEALY BY USING A DEADLY WEAPON, NAMELY AN INSTRUMENT USED AS A CLUB." *See* TEX. PEN. CODE ANN. § 22.01(a)(1) (Vernon 1994 & Supp. 2001). The indictment alternatively alleged that appellant committed aggravated assault by threatening Mr. Nealy with a deadly weapon "used as a club." *See id.* § 22.01(a)(2).

Because the jury in this case returned a general guilty verdict on an indictment charging alternative theories of committing the same offense, the verdict will stand if evidence supports either of the theories alleged. *See Kitchens v. State*, 823 S.W.2d 256, 258 (Tex. Crim. App. 1991); *Wheeler v. State*, 35 S.W.3d 126, 133 (Tex. App.—Texarkana 2000, pet. ref'd) ("A conviction may lawfully be had through proof of only one or the other of alternative means alleged for committing the offense, whether they were joined with the conjunctive or the disjunctive. If the State alleges multiple means for the commission of the offense, allegation and proof of any of the means will be sufficient to support the conviction.") (citations omitted).

[2] Section 46.01(a) defines "club" as "an instrument that is specially designed, made, or adapted for the purpose of inflicting serious bodily injury or death by striking a person with the instrument, and includes but is not limited to the following: (A) blackjack; (B) nightstick; (C) mace; (D) tomahawk." (reformatted). TEX. PEN. CODE ANN. § 46.01(1) (Vernon 1994 & Supp. 2001).

bodily injury or death. Appellant argues that "[a]n object does not constitute a 'club' simply because it is capable of inflicting serious bodily injury."

In reviewing a legal insufficiency claim, we view the evidence in the light most favorable to the verdict and decide whether a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Wilson v. State*, 7 S.W.3d 136, 141 (Tex. Crim. App. 1999) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). 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.'" *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.* In our review, we determine only whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *King v. State*, 29 S.W.3d 556, 562 and n.15 (Tex. Crim. App. 2000).

A person commits aggravated assault if he commits the offense of assault, as defined in section 22.01, and uses a deadly weapon.[3] TEX. PEN. CODE ANN. § 22.02 (Vernon 1994). A "deadly weapon," as it applies to this case,[4] is "anything that in the manner of its use or intended use is capable of causing death or serious bodily injury."[5] *Id.* § 1.07(a)(17)(b). Appellant insists the State failed to prove that the deadly weapon used in the encounter at issue was a "club" as alleged in the indictment and as that term is defined in section 46.01 of the Texas Penal Code. *See* TEX. PEN. CODE ANN. § 46.01(1).

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[3] A person commits an assault under section 22.01(a)(1) if he (1) intentionally, knowingly, or recklessly causes bodily injury to another, including the person's spouse. TEX. PEN. CODE ANN. § 22.01(a)(1).

[4] The penal code alternatively defines "deadly weapon" as "a firearm or anything manifestly designed, made, or adapted for the purpose of inflicting death or serious bodily injury." *Id.* § 1.07(a)(17)(A).

[5] "Bodily injury" means physical pain, illness, or any impairment of physical condition. *Id.* § 1.07(a)(8).

However, the section 46.01 definition of "club" does not apply to the aggravated assault charge at issue in this case. The definition in section 46.01 applies only to chapter 46 offenses. *Garrison v. State*, 726 S.W.2d 134, 138–39 (Tex. Crim. App. 1987). Aggravated assault is not a chapter 46 offense. *See* § 22.02. More importantly, the indictment did not, as appellant asserts, identify the weapon used as a "club," but rather as an "instrument *used as a club*." "Club" is not defined in either chapter 22 or in section 1.07 of the Texas Penal Code, which defines terms applicable to the entire penal code. *See* § 1.07(a); *see generally* TEX. PEN. CODE ANN. ch. 22. Thus, we must determine whether appellant caused bodily injury to Mr. Nealy with "an instrument used as a club," as that term is commonly understood.[6] In its ordinary usage, "club" means "a heavy[,] usually tapering staff especially of wood[,] *wielded as a weapon*." *Merriam-Webster OnLine: Collegiate Dictionary* (2000), accessed 12 Sept. 2001, available at http://www.merriam-webster.com/dictionary.htm.

Appellant admitted during trial that he hit Troy Nealy "at least four times" with what he characterized as a "thick walking stick." Appellant testified, "[W]hen I walked up to him, I hit him on the side. He fell back, like everybody testified. And that's what hit the back of his head on the cement, not me hitting him." Appellant acknowledged that he talked to Mr. Nealy after the incident because he "[w]anted to apologize for the whole incident happening." Mr. Nealy characterized the instrument used to beat him as a "big, long stick," "walking stick," "propping stick," and a "thick walking stick." Pauline Nealy witnessed the attack. She described the weapon as a "board" or "stick" and stated appellant "went back

[6] Words, phrases, and terms used in the Penal Code are to be taken and understood in their ordinary meaning in common language, except where specially defined. *Neumuller v. State*, 953 S.W.2d 502, 511 (Tex. App.—El Paso 1997, pet. ref'd); *see* TEX. PEN. CODE ANN. § 1.05(b) (Vernon 1994) ("Unless a different construction is required by the context, Sections 311.011, 311.012, 311.014, 311.015, and 311.021 through 311.032 of Chapter 311, Government Code (Code Construction Act), apply to the construction of this code."); TEX. GOV'T CODE ANN. § 311.011 (Vernon 1998) ("(a) Words and phrases shall be read in context and construed according to the rules of grammar and common usage. (b) Words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly.").

to his car and got his – his stick and came back there and – and where Troy was and hit him." Another witness, neighbor Billy Cooksey, described the weapon as an aluminum baseball bat that made a "pleek" sound when it struck Mr. Nealy's head. Officer David Rodriguez testified that "I believe he [appellant] told me he was hit with a baseball bat." On cross-examination, the State asked appellant, "So you got this club . . . . [a]nd you're capable enough to take this and swing it at him . . . right?" Appellant answered, "[C]orrect." Other evidence adduced at trial reveals that the blows initially knocked Mr. Nealy unconscious, caused him pain, caused him to bleed, and necessitated his transport by ambulance to the hospital. Considering this evidence in the light most favorable to the verdict, we conclude that a rational trier of fact could have found, beyond a reasonable doubt, that appellant struck Mr. Nealy with an instrument wielded as a weapon (a "club"), which, in the manner of its use was, capable of causing death or serious bodily injury to Mr. Nealy (a "deadly weapon"). *See* TEX. PEN. CODE ANN. § 1.07(a)(17)(b).

In arguing the evidence was factually insufficient, appellant incorporates the same arguments and authorities cited for his legal insufficiency claim. Appellant insists that he did not use a baseball bat or aluminum bat to beat Mr. Nealy, but instead used a "walking stick." The weapon used was not recovered and, as appellant points out, Detective Churchill was not able to examine the weapon.

In reviewing evidence for factual sufficiency, we do not view the evidence in the light most favorable to the prosecution. *Clewis*, 922 S.W.2d at 134. Instead, we consider all the evidence 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." *Id.* However, appellate courts "are not free to reweigh the evidence and set aside a jury verdict merely because the judges feel that a different result is more reasonable." *Id.* at 135 (citations omitted). In other words, we will not substitute our judgment for that of the jury. *Id.* at 133. 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.* at 135.

Viewed as a whole, the evidence is factually sufficient to show appellant struck Mr. Nealy with an "instrument used as a club." Accordingly, appellant's second point of error is overruled.

The judgment of the trial court is affirmed.

/s/ Charles Seymore
Justice

Judgment rendered and Opinion filed October 4, 2001.
Panel consists of Chief Justice Brister and Justices Fowler and Seymore.
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