

Affirmed and Opinion filed July 6, 2000.



In The

Fourteenth Court of Appeals

NO. 14-98-01017-CR

CHARLES WILSON, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the 183rd District Court
Harris County, Texas
Trial Court Cause No. 730,572**

OPINION

The State charged Charles Wilson, appellant, with the felony offense of aggravated assault. *See* TEX. PEN. CODE ANN. § 22.02 (Vernon 1994). Appellant pleaded not guilty and the case was tried before a jury. The jury found him guilty of the lesser-included offense of deadly conduct and assessed punishment at nine months in the Harris County Jail and a fine of \$4,000. In two points of error, appellant contends that the trial court did not have jurisdiction to hear the case and that the jury was not authorized to convict him of the lesser-included offense. We affirm the judgment of the trial court.

Background Facts

Appellant and his girlfriend, Jerri Hunter, entered Sammy's Groceries to confront the owner of the store, Sammy Virani. Hunter claimed that Virani made sexual advances toward her earlier in the day. When Hunter told appellant, he became angry and went to the store to confront Virani. Virani denied making sexual advance toward Hunter. He said he saw Hunter earlier that day and would not sell her beer on credit.

When Virani saw appellant, he immediately asked him to leave; Virani claimed that he had problems with appellant. Appellant began cussing at him. Virani pulled out a handgun and placed it on the counter top; he feared that appellant would come behind the counter. He told appellant to leave. Appellant complied and left the store with Hunter.

Virani went to the door to make sure appellant left and to record his license plate number. As he opened the door, he saw appellant running toward him. Virani turned around and went to get the handgun. Virani grabbed the handgun first, but appellant grabbed Virani from behind. The two began an intense struggle for the gun. Virani managed to eject the clip from the gun; but appellant fired the round in the chamber and hit Virani in the leg. Appellant took the handgun and left the store.

Jurisdiction

In his first point of error, appellant contends the district court did not have jurisdiction to hear the case. The indictment contained two counts alleging appellant:

. . . did then and there unlawfully, intentionally and knowingly threaten Sammy Virani with imminent bodily injury by using and exhibiting a deadly weapon, namely, a firearm.

. . . did then and there unlawfully, and recklessly cause bodily injury to Sammy Virani, hereinafter called the Complainant, by struggling with the Complainant over a deadly weapon, namely, a firearm.

After the trial judge concluded his comments to the jury panel, the prosecutor abandoned the first paragraph of the indictment. We learn this from the comments of the prosecutor when she began voir dire. The docket sheet indicates a hearing was held following the seating of the jury; but we cannot find a record

substantiating this entry. Deficient records on appeal, such as this one, cause problems for all parties and the court.

The following morning, appellant orally challenged the jurisdiction of the court. He claimed that since the first paragraph of the indictment, charging the second degree felony offense of aggravated assault, had been dismissed, the district court no longer retained jurisdiction. He contends that the second paragraph charged only the misdemeanor offense of assault. Appellant did not challenge the sufficiency of the second paragraph to charge the offense of recklessly committing the offense of aggravated assault; therefore its sufficiency is not before us.

Appellant specifically argues that the indictment did not allege “use or exhibition” of a deadly weapon in the second count of the indictment; therefore, the indictment alleged the misdemeanor offense of assault. The State is not required, however, to use the exact words of the statute in alleging the elements of the offense. It is sufficient to use other words that convey the same meaning or which include the sense of the statutory words. *See* TEX. CODE CRIM. PROC. ANN. Art. 21.17 (Vernon 1989). The test is whether the indictment alleges an offense under the law. *See Williams v. State*, 848 S.W.2d 777, 780 (Tex. App.–Houston [14th Dist.] 1993, no pet.).

The State was required to show that appellant used or exhibited a deadly weapon during the assault. Use is defined as “to carry out a purpose or action by means of : make instrumental to an end or process : apply to advantage : turn into account.” *See Patterson v. State*, 769 S.W.2d 938, 941 (Tex. Crim. App. 1989); *See* WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY (1993). The indictment indicates that appellant used the firearm to carry out his purpose of causing bodily injury to the complainant. While we do not find the second paragraph to be a model for future use, we find that, absent a contest of sufficiency, the indictment alleged appellant used or exhibited a deadly weapon. We overrule appellant’s first point of error.

Lesser-Included Offense

In his second point of error, appellant contends that the trial court committed reversible error in charging the jury on the lesser-included offense of deadly conduct. Appellant did not preserve error for our review.

The record does not show that appellant objected to the lesser-included offense. In fact, the record does not show which party requested the lesser charge. A defendant must object to claimed errors of commission and omission in the charge before he may be heard to complain on appeal. *See Posey v. State*, 966 S.W.2d 57, 63 (Tex. Crim. App. 1998); *Hernandez v. State*, 10 S.W.3d 812, 821 (Tex. App. – Beaumont 2000, pet. filed). We overrule his second point of error.

We affirm the judgment of the trial court.

/s/ Sam Robertson
Justice

Judgment rendered and Opinion filed July 6, 2000.

Panel consists of Justices Robertson, Sears, and Cannon.*

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* Senior Justices Sam Robertson, Ross A. Sears, and Bill Cannon sitting by assignment.