In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-19-00261-CR

D'ANDRE JAMAL EDISON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the Criminal District Court
Jefferson County, Texas
Trial Cause No. 15-22437

MEMORANDUM OPINION

D'Andre Jamal Edison appeals from the revocation of his probation for injury to a child. In his sole issue on appeal, Edison argues that the trial court erred when it made an affirmative finding of a deadly weapon in its judgment as there was no evidence that he used a deadly weapon during the offense. We affirm.

Edison's Sole Issue

Edison argues that the evidence is insufficient for the trial court to make a deadly weapon finding in its judgment. Specifically, Edison argues that because the indictment is silent as to the method that he used to kick his child victim, and because there was no testimony as to that method during his revocation hearing, the trial court erred when it made an affirmative finding of a deadly weapon. While the State concedes that the indictment does not state in what method Edison kicked the child, we hold that the omission does not amount to error regarding the trial court's deadly weapon finding.

When there is a challenge to the sufficiency of the evidence, we review the evidence in the light most favorable to the verdict to determine whether any rational factfinder could have found the essential elements of the offense beyond a reasonable doubt. *See Brooks v. State*, 323 S.W.3d 893, 895 (Tex. Crim. App. 2010) (citing *Jackson v. Virginia*, 443 U.S. 307 (1979)) (concluding the *Jackson* standard "is the only standard that a reviewing court should apply" when examining the sufficiency of the evidence); *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007). "[We] must evaluate all of the evidence in the record, both direct and circumstantial, whether admissible or inadmissible." *Dewberry v. State*, 4 S.W.3d 735, 740 (Tex. Crim. App. 1999).

We begin our review with the indictment. The indictment described Edison's crime as follows:

> **DANDRE JAMAL EDISON**, . . . did then and there intentionally and knowingly cause serious bodily injury to [D.E.], a child not older than fourteen years of age, . . . by kicking said [D.E.] off a bed and shaking said [D.E.].[1]

After being charged with injury to a child, Edison signed a plea admonishment that contained the following language: "I have read the charging instrument and my attorney has explained it to me and I committed each and every element alleged." The trial court accepted Edison's guilty plea and entered a deferred adjudication order placing Edison on probation for a term of ten years.

Before the expiration of the probationary term, the State filed a motion to revoke his unadjudicated probation alleging Edison committed multiple violations of the terms of his probation. At Edison's revocation hearing, the child's injuries were described in detail by the State.

> [THE STATE]: He is on probation for an injury to a child causing skull fractures to her, broken ribs and a broken clavicle[.]
>
> THE COURT: How old was the child . . .
>
> [THE STATE]: 7 weeks old.
>
> THE COURT: 7 weeks.

[1] We refer to the victims by their initials to conceal their identity. *See* Tex. Const. art. I, § 30(a)(1) (granting crime victims "the right to be treated with fairness and with respect for the victim's dignity and privacy throughout the criminal justice process[.]").

The State also told the trial court that nearly five years later, the child still suffers from repercussions of the attack by Edison and requires prolonged medical care.

> THE COURT: What's the status of the child right now?
>
> [THE STATE]: I know she continues to see doctors at Texas Children's Hospital because of her previous injuries . . . I know she was a little behind in walking and speaking and things like that, but she does catch up to where she needs to be.

At the revocation hearing, Edison did not deny hurting the child, but insisted he was under the influence of drugs at the time the child was injured.

Finally, when the trial court revoked Edison's probation and sentenced him, it made the following affirmative deadly weapon finding in its pronouncement.

> You are hereby sentenced to confinement in the Institutional Division of the Texas Department of Criminal Justice to serve a term of 20 years. An affirmative finding that a deadly weapon was used in the commission of that crime based upon the defendant's plea of guilty and finding of guilty to the indictment since it expressly states that serious bodily injury was caused which the Court of Criminal Appeals states would necessarily be caused by a deadly weapon and as the allegation states, the defendant kicked and shook the child. So, the deadly weapon in that case by a reading of this indictment is his feet and his hands or arms by shaking the child. That will be an affirmative finding in the judgment.

"The Code of Criminal Procedure was amended in 1991 to permit the entry of an affirmative finding based on a determination that a party to the offense knew that a deadly weapon would be used or exhibited during the commission of the offense." *Lafleur v. State*, 106 S.W.3d 91, 96 n.33 (citing Tex. Code Crim. Proc.

Ann. art. 42.12, § 3g(a)(2); current version at Tex. Code Crim. Proc. Ann. art. 42A.054(b)). A defendant is entitled to notice of the state's intent to seek an affirmative deadly weapon finding. *Brooks v. State*, 847 S.W.2d 247, 248 (Tex. Crim. App. 1993). A deadly weapon is anything that in the manner of its use or intended use is capable of causing death or serious bodily injury. Tex. Penal Code Ann. § 1.07(a)(17)(B); *Sierra v. State*, 280 S.W.3d 250, 255 (Tex. Crim. App. 2009).

A defendant is on sufficient notice of the state's intent to seek a deadly weapon finding "if the allegation of use of a deadly weapon is clear from the face of the indictment." *Ex parte Huskins*, 176 S.W.3d 818, 821 (Tex. Crim. App. 2005). "Moreover, in a bench trial, a trial judge need not include a deadly-weapon finding in the oral pronouncement of judgment; if the charging instrument alleged a deadly weapon, the finding may be included for the first time in a written judgment." *Guthrie-Nail v. State*, 506 S.W.3d 1, 4 (Tex. Crim. App. 2015). A deadly weapon must be excluded from the judgment if there is a "[f]ailure to give any notice" regarding the use of a deadly weapon. *Patterson v. State*, 138 S.W.3d 643, 647 (Tex. App.—Dallas 2004, no pet.). "The language in the indictment may provide sufficient notice if it alleges use of a deadly weapon." *Huskins*, 176 S.W.3d at 820. As the Texas Court of Criminal Appeals explained in *Whatley v. State*, although the indictment in the case did not allege the use or exhibition of a deadly weapon, the

defendant was provided proper notice because "all felonies are theoretically susceptible to an affirmative finding on the use or exhibition of a deadly weapon." 946 S.W.2d 73, 76 (Tex. Crim. App. 1997) (citing *Patterson v. State*, 769 S.W.2d 938, 940 (Tex. Crim. App. 1989)). In certain cases, the crime itself may provide a defendant with sufficient notice that the charge is susceptible to an affirmative finding on the use or exhibition of a deadly weapon. In *Blount v. State*, the Court of Criminal Appeals explained that the crime of aggravated assault can only be caused in two ways, by serious bodily injury or exhibiting a deadly weapon; therefore, the appellant was on notice of the deadly weapon because the crime "necessarily implies the use of a deadly weapon." 257 S.W.3d 712, 714 (Tex. Crim. App. 2008).

The notice requirement was satisfied in this case by the indictment alleging that "**DANDRE JAMAL EDISON**, . . . did then and there intentionally and knowingly cause serious bodily injury to [D.E.], a child not older than fourteen years of age, . . . by kicking said [D.E.] off a bed and shaking said [D.E.]." Edison was charged with First Degree Injury to a Child under section 22.04(a)(1), (e) of the Texas Penal Code. The Texas Penal Code defines this crime as follows:

> (a) A person commits an offense if he intentionally, knowingly, recklessly, or with criminal negligence, by act or intentionally, knowingly, or recklessly by omission, causes to a child, elderly individual, or disabled individual:
>
> (1) Serious bodily injury[.]

> (e) An offense under Subsection (a)(1) or (2) or (a-1)(1) or (2) is a felony of the first degree when the conduct is committed intentionally or knowingly. When the conduct is engaged in recklessly, the offense is a felony of the second degree.

Tex. Penal Code Ann. § 22.04(a)(1), (e).

The Penal Code defines "deadly weapon" as "anything that in the manner of its use or intended use is capable of causing death or serious bodily injury." *Id*. § 1.07(a)(17)(B). Webster's dictionary defines "kick" as a verb that means "to hit with the foot." WEBSTER'S DICTIONARY FOR STUDENTS: SPECIAL ENCYCLOPEDIC EDITION (5th ed. 2015). "A weapon can be deadly by design or use." *Tucker v. State*, 274 S.W.3d 688, 691 (Tex. Crim. App. 2008) (citing Tex. Penal Code Ann. § 1.07(a)(17)(A), (B)). It is undisputed that a foot can be used as a deadly weapon. *Lane v. State*, 151 S.W.3d 188, 191 (Tex. Crim. App. 2004) (citation omitted) ("We have recognized before that a hand or a foot may be a deadly weapon within the meaning of § 1.07(a)(17) 'depending upon the evidence shown.'"); *Davis v. State*, 533 S.W.3d 498, 508 n.5 (Tex. App.—Corpus Christi 2017, pet. ref'd) ("Texas is in the minority of states allowing body parts to be considered dangerous or deadly weapons."); *Quincy v. State*, 304 S.W.3d 489, 499 (Tex. App.—Amarillo 2009, no pet) ("Body parts, such as hands and knees, may be deadly weapons based on their manner of use or intended use and their capacity to produce death or serious

bodily injury."); *Powell v. State*, 939 S.W.2d 713, 717 (Tex. App. —El Paso 1997, no pet) ("A foot is not a deadly weapon per se, but it can become a deadly weapon if in the manner of use, the foot is capable of causing death or serious bodily injury.").

While the indictment does not allege that Edison used his foot when kicking D.E. and there was not any direct evidence before the trial court regarding the method Edison used when "kicking" D.E. off the bed and causing the child's injuries, to kick denotes a foot and "there can only be so many ways to use a foot as a deadly weapon[,] [and] [t]he term 'kick' itself denotes force." *Moore v. State*, No. 10-08-00211-CR, 2009 WL 1886450, at *2 (Tex. App.—Waco July 1, 2009, pet. ref'd) (mem. op., not designated for publication). Additionally, we have Edison's own testimony that he injured the child in a drug-induced state. *See Clark v. State*, 886 S.W.2d 844, 845 (Tex. App.—Eastland 1994, no pet.) (concluding that the evidence, including appellant's own written statement that he struck and kicked the child, was sufficient for a deadly weapon finding.) Therefore, Edison was on notice of the State's intent to pursue a deadly weapon finding. It was reasonable for the trial court to infer that Edison used a deadly weapon, i.e., his foot, to kick the child, and the use and force of Edison's foot caused serious bodily injuries to the victim, as required under Penal Code section 1.07(a)(17)(B). *See* Tex. Penal Code Ann. §

1.07(a)(17)(B) (defining a deadly weapon as anything that could cause serious bodily injury). We overrule Edison's sole issue and affirm the judgment of the trial court.

AFFIRMED.

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CHARLES KREGER
Justice

Submitted on April 16, 2020
Opinion Delivered June 24, 2020
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Before Kreger, Horton and Johnson, JJ.