TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-18-00759-CR

Jessie Lee Brooks, Jr., Appellant

v.

The State of Texas, Appellee

FROM THE 20TH DISTRICT COURT OF MILAM COUNTY
NO. CR25,688, THE HONORABLE JOHN YOUNGBLOOD, JUDGE PRESIDING

O P I N I O N

Jessie Lee Brooks Jr. was convicted by a jury of aggravated assault with a deadly weapon. *See* Tex. Penal Code § 22.02(a)(2). The indictment alleged that Brooks threatened Lisa Grayson, his girlfriend, with imminent bodily injury "by telling her that he was going to end her life" while using or exhibiting a deadly weapon, to wit: a piece of wood. *See id.* §§ 22.01(a)(2), 22.02(a)(2). Arising out of the same set of facts, the State also indicted Brooks for family violence assault by impeding Grayson's breath or circulation, *see id.* § 22.01(a)(2), and the jury found him not guilty of that offense. The trial court entered judgment on the jury's verdict, assessing punishment at 30 years' confinement and requiring Brooks to pay several court costs and fees.

In four issues, Brooks contends that (1) the evidence was insufficient to support the jury's finding that he threatened Grayson, (2) the costs or fees are facially unconstitutional as violations of the separation of powers, (3) we should modify the trial court's Order to Withdraw

Funds from his Inmate Trust Account, and (4) we should modify the judgment to correct two clerical errors.

We reverse Brooks's conviction for aggravated assault and render a judgment of acquittal because there was a material variance between the indictment, which alleged that Brooks threatened Grayson "by telling her that he was going to end her life," and the evidence at trial, which showed a non-verbal threat of displaying a piece of wood, that resulted in insufficient evidence to support his conviction, and because the variance prejudiced his substantial rights.

BACKGROUND

Grayson lived with Brooks, her boyfriend, in Cameron, Texas. According to Grayson, as she was leaving for work one morning, Brooks attacked her. She believed that it started with Brooks feeling jealous over her receiving money from her child's father, so he "jumped on" her, as he had done several times before, and beat her. She testified that when she went to her car that morning, he beat her with "a two-by-four" wooden board that he retrieved from the house. As he "beat [her] with a board," she tried to protect herself with her arms, and he kept hitting her. She testified: he "hit[] me to the point it knocked my tooth—yes—I mean, my tooth came out, the partial on my tooth." And further: "When I fell and like hit—like grabbed both of his hands and he like literally choked me real hard." During her testimony, she said that she "didn't even talk to Brooks that morning" of the assault.

She also described prior assaults where Brooks "jumped" on her and beat her, including a prior assault over her children where he "grabbed me by my neck and slammed me to

the—to the passenger door. And then he like jumped me, and then—and then he like threatened me and just like—and he like jumped on me and cussing me and cussing me."

Grayson also testified that, after the assault that was the subject of this prosecution, she had bruises all over her body and her fingers "were busted." She sought treatment for her injuries at a Rockdale emergency room 15–20 minutes away, in order to hide from Brooks. She told the ER physician "that she was hit by her boyfriend with a two-by-four about the right arm, right forearm, [and] right hand." She also told the physician that she "had been choked the day before for about a minute," "had some chest-wall pain from some trauma," and "was hit the day before."

That night, Brooks reported to the Cameron police that Grayson had returned to his house, broke the house's windows, and went back to Rockdale. Officer James Sherer, of the Cameron Police Department, and a fellow officer offered to issue Grayson a trespass warning not to return to the house. Brooks agreed, so the officers contacted law enforcement in Rockdale to find her.

Law enforcement found Grayson in Rockdale during a traffic stop. She told Officer Sherer, who arrived later, that Brooks "struck [her] with a wooden board" and that she had not broken the windows out of the house. In addition, she told other officers at the traffic stop about being hit with the board. Several officers noticed bruising on her arm and hand, which she attributed to Brooks's attack with the board.

Grayson also told Officer Sherer that during her several-month relationship with Brooks she went to a hospital once in Temple, where, "they had to, like, bring me back to life" because Brooks had "choked the s— out of" her. She expressed that Brooks had a history of telling her that he would stop hitting her, and she believed him, but the abuse continued.

After the traffic stop ended, Grayson went to a Cameron police station and provided a voluntary handwritten statement, which was admitted into evidence at trial. She described the attack:

> The night went to car to get a Advil so Jessie lock me out the house I was tryin to come get back in house. he grad my neck start choching me so hard I couldn't Breath the he grad A Board start hitting me with it so hard I told Jessie that he was hurting me so he told me I need to Hit. So he kept Hittin me with the Board the After tha he start hittin my fingurs till they Stard Bleeding

Officer Clayton Domel of the Cameron Police Department reviewed the statement and later interviewed Grayson. She told him that there was an argument with Brooks during which Brooks "began to choke her." She said that she did not lose consciousness but "that she couldn't breathe and told him to stop." According to Officer Domel's description of Grayson's account, "at that point, [Brooks] quit choking her[,] and that's when he grabbed a piece of board, the two-by-four[,] from what she described[,] and began to strike her with it."

The State charged Brooks with two counts of assault in two separate indictments filed in two separate cause numbers. One charged him with intentionally or knowingly causing bodily injury to Grayson "by impeding the normal breathing or circulation of the blood . . . by applying pressure with hands to [her] throat and neck." The other charged him with intentionally or knowingly threatening her with imminent bodily injury "by telling her that he was going to end her life, and [he] did use or exhibit a deadly weapon during the commission of the assault, to wit: a piece of wood."

The cases proceeded to trial. A jury was empaneled; the State read both indictments to the jury verbatim; and Brooks pleaded not guilty to both offenses. The following day, before opening statements, the court addressed an issue "with regard to an amendment of

the indictment." The record reflects that about two and a half months before trial, the State filed a Notice of Intention to Amend the Indictment, in which it sought to amend the assault-by-threat indictment by, among other things, deleting the phrase "by telling her that he was going to end her life." The parties disputed whether the indictment had been amended by the notice, which had not been acted upon by the court. Ultimately, the trial court explained that trial would proceed on the original indictment as presented to the jury, implicitly denying the State's request to amend the indictment. While the judge seemed to agree with the State's argument that the phrase that it sought to delete was superfluous—remarking, "Well, I—frankly, I don't understand why it's in there but I think it's superfluous"—he stated that "the State's burden is to prove the elements of the offense as charged and that's my ruling."

The jury charge for aggravated assault by threat contained no instructions relating to the verbal threat contained in the indictment. In the abstract portion of the charge, the court defined "intentionally threaten another with imminent bodily injury" and "knowingly threaten another with imminent bodily injury" without reference to whether the threatening conduct was verbal or non-verbal. And, over Brooks's objection, the application paragraphs omitted the phrase "by telling her that he was going to end her life."[1] The court simply instructed the jury to find Brooks guilty if the State had proved beyond a reasonable doubt the three elements that

1. the defendant . . . threatened imminent bodily injury to [Grayson];
2. the defendant did this –
   a. intentionally; or
   b. knowingly; and

[1] In response to Brooks's objection that the phrase was "descriptive of the threat" and should be in the jury charge because it had been read to the jury, the trial court said, "And as I was saying, I find that language to be superfluous. The State is required to prove up the elements of the offense charged, and so I will overrule the objection at this time."

3. the defendant, during the alleged assault, used or exhibited a deadly weapon, to wit: a piece of wood.

The jury acquitted Brooks of family violence assault by strangulation but found him guilty of aggravated assault by threat. This appeal followed.

DISCUSSION

I. Material Variance Between Indictment's Allegation of Verbal Threat and Lack of Proof at Trial of Any Verbal Threat

In his first issue, Brooks contends that the evidence was insufficient because the State failed to prove the "threatens" element of assault as it was charged in the indictment. *See* Tex. Penal Code §§ 22.01(a)(2), 22.02(a).

A. Applicable law and standard of review

A person commits aggravated assault if the person "commits assault as defined in Sec. 22.01 and the person: . . . uses or exhibits a deadly weapon during the commission of the assault." *Id.* § 22.02(a)(2). A person commits assault if the person "intentionally or knowingly threatens another with imminent bodily injury." *Id.* § 22.01(a)(2). "Assault by threat requires only fear of imminent bodily injury and does not require a finding of actual bodily injury." *Dolkart v. State*, 197 S.W.3d 887, 893 (Tex. App.—Dallas 2006, pet. ref'd). The offense "is conduct-oriented, focusing upon the act of making a threat, regardless of any result that threat might cause." *Landrian v. State*, 268 S.W.3d 532, 536 (Tex. Crim. App. 2008). It is thus a "nature of conduct" offense, not a "result of conduct" offense. *See id.*; *see also id.* at 543 (Price, J., concurring) ("[T]here are the 'bodily injury' and 'physical contact' theories of simple assault, which are result-of-conduct theories of the offense, and then there is the 'threat-of-imminent-bodily injury' theory, which is a nature-of-conduct theory of the offense.").

A threat need not be verbal; a person may communicate a threat by action or conduct. *McGowan v. State*, 664 S.W.2d 355, 347 (Tex. Crim. App. 1984); *Donoho v. State*, 39 S.W.3d 324, 329 (Tex. App.—Fort Worth 2001, pet. ref'd). The "display of a deadly weapon of and within itself constitutes a threat of the required imminent harm." *Robinson v. State*, 596 S.W.2d 130, 133 n.7 (Tex. Crim. App. 1980); *Mitchell v. State*, 546 S.W.3d 780, 787 (Tex. App.—Houston [1st Dist.] 2018, no pet.).

When reviewing the sufficiency of the evidence, "evidence is considered sufficient to support a conviction when, after considering all of the evidence in the light most favorable to the prosecution, a reviewing court concludes that any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt." *Hernandez v. State*, 556 S.W.3d 308, 315 (Tex. Crim. App. 2017).[2] The "essential elements of the offense" are "the elements of the offense as defined by the hypothetically correct jury charge *for the case*." *Id.* at 315 (quoting *Johnson v. State*, 364 S.W.3d 292, 294 (Tex. Crim. App. 2012)). "[A] hypothetically correct jury charge reflects the governing law, the indictment, the State's burden of proof and theories of liability, and an adequate description of the offense for the particular case." *Id.* It includes the statutory elements of the offense as modified by the indictment. *See id.* at 312–13; *Johnson*, 364 S.W.3d at 294.

There are sometimes "variances between allegations in the indictment and the State's proof at trial." *Hernandez*, 556 S.W.3d at 312. "[O]nly material variances will affect the hypothetically correct jury charge." *Id.* "[A]llegations that give rise to immaterial variances"

[2] All citations to *Hernandez* are to the Court's opinion on original submission, which the Court affirmed on rehearing. *See Hernandez v. State*, 556 S.W.3d 308, 331 (Tex. Crim. App. 2018) (op. on reh'g) ("We affirm our original opinion reversing the judgment of the court of appeals, and we reject Hernandez's arguments on rehearing for the reasons stated herein.").

need not be "incorporate[d]" into the hypothetically correct jury charge for the case. *Johnson*, 364 S.W.3d at 294.

Two types of variances can be material. *See Hernandez*, 556 S.W.3d at 313–14; *Johnson*, 364 S.W.3d at 294–95. "The first type of variance occurs when the State's proof deviates from the *statutory* theory of the offense as alleged in the indictment; the State may not plead one specific statutory theory but then prove another." *Hernandez*, 556 S.W.3d at 313 (citing *Johnson*, 364 S.W.3d at 294). This type of variance is always material. *Id.* The second type of variance is a "non-statutory allegation that is descriptive of the offense in some way." *Id.* at 313–14 (citing *Johnson*, 364 S.W.3d at 294). Whether this type is material "depend[s] upon whether it would result in conviction for a different offense than what the State alleged." *Id.* at 314. If the variance "converts the offense proven at trial into a different offense than what was pled in the charging instrument," then it is material. *Id.* at 316.

The key to identifying different offenses is pinpointing the "allowable unit of prosecution" for each offense. *See id.*; *Johnson*, 364 S.W.3d at 295–96. A statute's allowable unit of prosecution is the "distinguishable discrete act that is a separate violation of the statute." *Harris v. State*, 359 S.W.3d 625, 629 (Tex. Crim. App. 2011) (quoting *Ex parte Cavazos*, 203 S.W.3d 333, 336 (Tex. Crim. App. 2006)). "Absent an explicit statement that 'the allowable unit of prosecution shall be such-and-such,' the best indicator of legislative intent regarding the unit of prosecution is the gravamen or focus of the offense." *Id.* at 630 (quoting *Jones v. State*, 323 S.W.3d 885, 889 (Tex. Crim. App. 2010)).

Because the assault statute establishes separate and distinct assaultive crimes, "[t]he gravamen of the offense of aggravated assault is the specific type of assault defined in Section 22.01." *See Landrian*, 268 S.W.3d at 536–37. Aggravated assault with the underlying

crime of assault causing bodily injury is a "result of conduct" offense; aggravated assault with the underlying crime of assault by threat is a "nature of conduct" offense. *Id.* at 540. For "nature of conduct" offenses, "different types of conduct are considered to be separate offenses." *Gonzales v. State*, 304 S.W.3d 838, 848 (Tex. Crim. App. 2010). The focus is on "the specific criminal act." *See Young v. State*, 341 S.W.3d 417, 424 (Tex. Crim. App. 2011). By contrast, because assault by causing bodily injury is result-oriented, "[h]ow that serious bodily injury was caused does not 'help define the allowable unit of prosecution for this type of aggravated assault offense, so'" a variance relating to how the actor caused the assault injury "cannot be material." *See Hernandez*, 556 S.W.3d at 314 (citing *Johnson*, 364 S.W.3d at 296–98); *cf. Johnson*, 364 S.W.3d at 298 ("'Stabbing with a knife' and 'bludgeoning with a baseball bat' are two possible ways of murdering Dangerous Dan, but they do not constitute separate offenses. These methods of committing murder do describe an element of the offense: the element of causation. But murder is a result-of-conduct crime. What caused the victim's death is not the focus or gravamen of the offense; the focus or gravamen is that the victim was killed. Variances such as this can never be material because such a variance can never show an 'entirely different offense' than what was alleged.").

In addition to materiality, reversal of a conviction for a variance depends on whether the variance prejudices the defendant's "substantial rights." *Santana v. State*, 59 S.W.3d 187, 195 (Tex. Crim. App. 2001) (quoting *Gollihar v. State*, 46 S.W.3d 243, 257 (Tex. Crim. App. 2001)). Prejudice to the defendant's substantial rights turns on "whether the indictment, as written, informed the defendant of the charge against him sufficiently to allow him to prepare an adequate defense at trial, and whether prosecution under the deficiently drafted indictment would subject the defendant to the risk of being prosecuted later for the same crime." *Id.* (quoting

Gollihar, 46 S.W.3d at 257). "[A] conviction that contains a material variance that fails to give the defendant sufficient notice or would not bar a second prosecution for the same [offense] requires reversal, even when the evidence is otherwise legally sufficient to support the conviction." *Byrd v. State*, 336 S.W.3d 242, 248 (Tex. Crim. App. 2011).

B. "Nature of conduct" of a verbal threat differs materially from "nature of conduct" of a non-verbal threat

With these principles in mind, we turn to Brooks's arguments under his first issue. He points out that the indictment charged him with threatening Grayson "by telling her that he was going to end her life, and [he] did use or exhibit a deadly weapon during the commission of the assault, to wit: a piece of wood." He concedes that the State need not have proven the exact words of the verbal threat in the indictment, but he argues that it had to prove "a *verbal* threat" of some kind, instead of only non-verbal threats. He says that "assault (and thus aggravated assault) by threat is a 'conduct-oriented offense', . . . meaning that [he] could be charged with as many instances of aggravated assault by threat as there were types of threats made."

We agree. Assault by threat, because it is a "nature of conduct" offense, centers on the specific criminal act alleged. *See Young*, 341 S.W.3d at 424; *Garfias v. State*, 424 S.W.3d 54, 60–61 (Tex. Crim. App. 2014); *Gillette v. State*, 444 S.W.3d 713, 730 (Tex. App—Corpus Christi–Edinburg 2014, no pet.); *see also Stevenson v. State*, 499 S.W.3d 842, 850 (Tex. Crim. App. 2016) ("A nature-of-conduct crime's focus is the conduct and the different types of conduct are considered separate offenses."). Therefore if Brooks threatened Grayson by displaying the piece of wood and saying nothing, that "of and within itself constitutes a threat of the required imminent harm." *See Robinson*, 596 S.W.2d at 133 n.7; *Mitchell*, 546 S.W.3d at 787. Such a non-verbal threat—an act different from a verbal threat to end Grayson's life—would constitute

a "distinguishable discrete act" that would separately violate the assault statute. *See Harris*, 359 S.W.3d at 629 (quoting *Ex parte Cavazos*, 203 S.W.3d at 336). In other words, a verbal threat would be "a different offense" from a non-verbal one—each act is a separate and distinct act of threatening. *See Hernandez*, 556 S.W.3d at 316. Although the verbal or non-verbal character of a threat "is not an element of the offense" proscribed by the assault statute, it is "a non-statutory description of the statutory, gravamen element of" the threatening conduct. *See Johnson*, 364 S.W.3d at 297–98 (citing *Byrd*, 336 S.W.3d at 251–52).

The hypothetically correct jury charge for Brooks's case, because of the indictment's allegation of threatening Grayson "by telling her that he was going to end her life," requires proof of a verbal threat. *See Hernandez*, 556 S.W.3d at 312–13; *Johnson*, 364 S.W.3d at 294. The only evidence suggestive of a verbal threat in this case was Grayson's written statement for the police.[3] In it, she wrote that, during the assault, Brooks "told me I need to [h]it." She never described any other statement that Brooks allegedly made, and the State offered no evidence of any other alleged verbal threat. We conclude that no rational juror could discern a threat in the statement here, "he told me I need to [h]it."

The variance between the verbal threat alleged in the indictment and the proof at trial of a non-verbal threat of displaying a piece of wood constitutes a non-statutory, material variance. *See Hernandez*, 556 S.W.3d at 313–14; *Johnson*, 364 S.W.3d at 294–96. Thus, there was insufficient evidence to support the required finding of the verbal threat alleged. *See Hernandez*, 556 S.W.3d at 315; *see also Byrd*, 336 S.W.3d at 247 ("A variance of this type is

[3] Grayson testified about another instance when Brooks threatened her—she even used the word "threatened" in her testimony—but her testimony made clear that she was referring to an occasion before the one charged in the indictment.

actually a failure of proof because the indictment sets out one distinct offense, but the proof shows an entirely different offense.").

The State counters that the variance here is immaterial, like the ones in *Johnson* and *Marinos v. State*, 186 S.W.3d 167 (Tex. App.—Austin 2006, pet. ref'd). But in *Johnson*, the offense at issue was assault by causing bodily injury, not assault by threat. *See* 364 S.W.3d at 298. For assault by causing bodily injury, "[w]hat caused the victim's injury is not the focus or gravamen of th[e] offense." *Id.* Because that type of assault is a "result of conduct" offense, its gravamen is "the victim and the bodily injury that was inflicted." *Id.* Here, we have a different offense—the "nature of conduct" offense of assault by threat. *See Landrian*, 268 S.W.3d at 536; *id.* at 543 (Price, J., concurring). And in *Marinos*, this Court recognized that the indictment contained no allegation of a verbal threat: "Neither the indictment nor the charge required a finding that appellant verbally threatened the complainant, although there is ample evidence that he did so." 186 S.W.3d at 176 n.4. The opposite is true here. First, Brooks's indictment *did* contain an allegation of a verbal threat and thus required proof of a verbal threat. Second, no evidence demonstrated a verbal threat.

Having concluded that a material variance exists, we next must determine whether the variance between the indictment's allegation of a verbal threat and the evidence of a non-verbal one prejudiced Brooks's substantial rights. It did so if it did not give him sufficient notice of the charge against him and would subject him to further prosecution for this assault against Grayson. *See Byrd*, 336 S.W.3d at 248; *Santana*, 59 S.W.3d at 195.

As for notice, we conclude that the indictment failed to give Brooks sufficient notice of any charge against him of a non-verbal threat. In response to the indictment, Brooks presented a defense centered around the absence of a verbal threat. In opening statement, he

characterized the interaction between Brooks and Grayson as him kicking her out of the house and her getting angry in response, casting doubt about whether Brooks made any threat. His cross-examination of the State's witnesses, including Grayson, emphasized the lack of a verbal threat. During the charge conference, counsel argued that the jury charge needed to include instructions about the indicted verbal threat. He further argued that the charge should direct the jury to acquit because "[t]here have been zero statements with regard to a threat" in evidence. Counsel also moved for a directed verdict on the same basis. Finally, he argued to the jury that "words mean things" and that proof of causing bodily injury to Grayson did not constitute proof of a threat because the words "cause injury" and "threaten" are different.

Furthermore, the kind of threat alleged—a verbal threat—differed from a non-verbal threat. The record reflects that Brooks defended against the lack of any verbal threat. We conclude that the notice factor points to prejudice to Brooks's substantial rights. *See Byrd*, 336 S.W.3d at 248; *Santana*, 59 S.W.3d at 195.

Under the second factor, the indictment for a verbal threat leaves open the possibility of a future indictment for a non-verbal one. The two, as we have concluded, constitute different assault-by-threat offenses. *See Hernandez*, 556 S.W.3d at 314. Thus, this factor points to prejudice to Brooks's substantial rights even if "the evidence [wa]s otherwise legally sufficient to support the conviction" for an assault by a non-verbal threat. *See Byrd*, 336 S.W.3d at 248.

For all these reasons, we hold that the variance between the indictment allegation of Brooks's threat "by telling [Grayson] that he was going to end her life" and the evidence at trial of a non-verbal threat of displaying a piece of wood was a material variance that prejudiced Brooks's substantial rights and resulted in insufficient evidence to support his conviction.

See Hernandez, 556 S.W.3d at 315–16. We thus sustain Brooks's first issue and reverse his conviction for aggravated assault.

II. No Potential Lesser Included Offense Necessarily Found by the Jury

Because we hold the evidence insufficient to support Brooks's conviction for aggravated assault by threat as it was charged here, we must "decid[e] whether to reform the judgment to reflect a conviction for a lesser-included offense" before we may render a judgment of acquittal. *Thornton v. State*, 425 S.W.3d 289, 299–300 (Tex. Crim. App. 2014).

Our "authority to reform a judgment of conviction is limited to lesser-included offenses of the offense of conviction." *Lang v. State*, 586 S.W.3d 125, 130 (Tex. App.—Austin 2019, pet. granted). A "necessar[y] part of the analysis" is "whether the offense for which a reformed judgment of conviction is sought is a lesser-included offense of the convicted offense." *Id.* at 130 n.2. This is so because neither this Court nor the trial court has "jurisdiction to convict a defendant of an offense not charged in the charging instrument unless that offense is a lesser-included offense *of the crime charged*." *See id.* (emphasis added). To identify potential lesser included offenses, "[w]e do not consider the evidence that was presented at trial; rather, we consider only the statutory elements of aggravated assault with a deadly weapon as they were modified by the particular allegations in the indictment." *Rice v. State*, 333 S.W.3d 140, 145 (Tex. Crim. App. 2011).

Brooks identifies three potential lesser included offenses: attempted aggravated assault by threat with a deadly weapon, misdemeanor deadly conduct, and simple assault by threat. We have found no other potential lesser included offenses applicable to "the statutory

elements of aggravated assault with a deadly weapon as they were modified by the particular allegations in the indictment" here. *See id.*

In analyzing judgment reformation, we

> must answer two questions: 1) in the course of convicting the appellant of the greater offense, must the jury have necessarily found every element necessary to convict the appellant for the lesser-included offense; and 2) conducting an evidentiary sufficiency analysis as though the appellant had been convicted of the lesser-included offense at trial, is there sufficient evidence to support a conviction for that offense?

Thornton, 425 S.W.3d at 300. If we answer either of these "no," we are "not authorized to reform the judgment" to reflect a conviction for the lesser included offense. *Id.* "But if the answers to both are yes, [we are] authorized—indeed required—to avoid the 'unjust' result of an outright acquittal." *Id.*

To reform to the lesser included offense of attempted aggravated assault by threat, the evidence must show that Brooks, "with specific intent to commit" aggravated assault by threat with a deadly weapon, "d[id] an act amounting to more than mere preparation that tend[ed] but fail[ed] to effect the commission of" that offense. *See* Tex. Penal Code § 15.01(a). "[T]o be guilty of criminal attempt, it is not necessary that the accused commit every act short of actual commission of the intended offense." *Come v. State,* 82 S.W.3d 486, 489 (Tex. App.—Austin 2002, no pet.). "There is necessarily a gray area between conduct that is clearly no more than mere preparation and conduct that constitutes the last proximate act prior to actual commission of the offense." *Id.* "Whether conduct falling in that gray area amounts to more than mere preparation must be determined on a case-by-case basis." *Id.* No evidence shows conduct by Brooks that tended but failed to effect a verbal threat against Grayson beyond merely preparing to make a verbal threat. The only evidence of a verbal statement by Brooks was Grayson's

written statement that Brooks "told [her] I need to [h]it." We cannot discern from this statement any step beyond mere preparation toward verbally threatening her. No other testimony or exhibit suggests a step toward a verbal threat on the occasion in question. We thus conclude that the evidence is insufficient to support reformation to the lesser included offense of attempted aggravated assault by threat with a deadly weapon.

As for misdemeanor deadly conduct, that offense requires evidence that Brooks recklessly engaged in conduct that placed Grayson in imminent danger of serious bodily injury. *See* Tex. Penal Code § 22.05(a); *Dixon v. State*, 358 S.W.3d 250, 256–57 (Tex. App.—Houston [1st Dist.] 2011, pet. ref'd). When an indictment alleges that the defendant intentionally or knowingly threatened to cause imminent bodily injury while using or exhibiting a deadly weapon, deadly conduct is established by proof of the same or less than all the facts needed to establish aggravated assault. *See Guzman v. State*, 188 S.W.3d 185, 190 n.9 (Tex. Crim. App. 2006); *Dixon*, 358 S.W.3d at 256–57.

We are bound by the indictment's allegations when determining whether misdemeanor deadly conduct is a potential lesser included offense. *See Rice*, 333 S.W.3d at 145 ("We do not consider the evidence that was presented at trial; rather, we consider only the statutory elements of aggravated assault with a deadly weapon as they were modified by the particular allegations in the indictment."); *Lang*, 586 S.W.3d at 130 n.2 (concluding that this Court has no "jurisdiction to convict a defendant of an offense not charged in the charging instrument unless that offense is a lesser-included offense *of the crime charged*" (emphasis added)). The indictment here alleged a verbal threat.

Accordingly, we must answer (1) whether, in convicting Brooks for aggravated assault by threat and with a deadly weapon, the jury must have necessarily found every element

necessary to convict him of misdemeanor deadly conduct and (2) whether sufficient evidence supports the necessary findings. *See Thornton*, 425 S.W.3d at 300. We answer "no" to the second question because only a verbal threat was charged. And as we concluded above, no rational juror could have found a verbal threat from the evidence. Thus, because there is insufficient evidence of the kind of threat charged, no evidence establishes the required combination of a threat plus the use or exhibition of a deadly weapon that would establish misdemeanor deadly conduct's elements. *See Guzman*, 188 S.W.3d at 190 n.9 ("proof of threatening another with imminent bodily injury by the use of a deadly weapon constitutes proof of engaging in conduct that places another in imminent danger of serious bodily injury," for misdemeanor deadly conduct); *Dixon*, 358 S.W.3d at 256–57 (same). Misdemeanor deadly conduct is not a potential lesser included offense of the aggravated assault by threat charged here. *See Thornton*, 425 S.W.3d at 300 ("If the answer to either of these questions is no, the court of appeals is not authorized to reform the judgment.").

As for simple assault by threat, we have already concluded that the evidence of a non-verbal threat is insufficient to support a conviction for a charge based on a verbal threat. Thus, we cannot reform the judgment to simple assault by threat.

We do not have the authority to reform the judgment of conviction here to any lesser included offense. We therefore must reverse the judgment of conviction and render a judgment of acquittal. *See id.* at 299–300; *Lang*, 586 S.W.3d at 136. Because of this disposition, we need not reach Brooks's remaining issues. *See* Tex. R. App. P. 47.1.

CONCLUSION

We reverse the judgment of conviction and render a judgment of acquittal.

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Chari L. Kelly, Justice

Before Justices Goodwin, Baker, and Kelly

Reversed and Acquittal Rendered

Filed: July 3, 2020

Publish