Affirmed and Opinion filed July 27, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-99-00378-CR

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LARRY WAYNE PEGUES, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 184th District Court
Harris County, Texas
Trial Court Cause No. 789,957

O P I N I O N

Appellant, Larry Wayne Pegues, was convicted by a jury of aggravated assault. After his conviction, appellant pleaded "true" to two enhancement paragraphs and entered into a plea bargain with the State. Pursuant to that agreement, the trial court sentenced appellant to twenty-five years confinement in the Texas Department of Criminal Justice, Institutional Division. In four points of error, appellant challenges his conviction, claiming: (1) the trial court erred by overruling appellant's objection to the State's closing argument; (2) the trial court erred by failing to charge the jury on a lesser included offense, and (3) the evidence is both legally and factually insufficient to support appellant's conviction. We affirm.

I.
Factual Background

The record in this case demonstrates appellant began a verbal altercation with the complainant, and when she responded, he approached her, firing a gun at the ground between her feet. He then tried to hit her, but she blocked his arm. He attempted to fire his gun at the complainant again, but the gun only clicked, as if it were not working. After this altercation, the appellant left, and the complainant called the police.

II.
Jury Argument

In his first point of error, appellant complains that the trial court erred when it overruled his objection to the State's remarks during closing argument. Counsel for the State began his closing argument with the statement, "[h]ow many of y'all have heard of rabbit trails?" At that point, appellant objected and a discussion was held, in front of the jury, as to whether the State was improperly characterizing defense counsel as deceptive, or "less than honorable." The trial judge repeatedly overruled this objection. On appeal, appellant claims the State's "rabbit trails" comment implied defense counsel was dishonest, was an attempt to "strike at appellant over the shoulders of counsel," and was, therefore, improper. We disagree.

Appellant's argument in this appeal is identical to that discussed in *Mosley v. State*, 983 S.W. 2d 249, 258 (Tex. Crim. App. 1998). There, the court characterized the State's argument as mild, "merely indicating that the defense attorneys would attempt to use argument to divert the jury's attention or obscure the issues." *Id*.[1] Here, the State's argument was even milder than that at issue in *Mosely*. Here, the State described rabbit trails as "something that leads you away from the matter at hand." Unlike *Mosely*, State's counsel

[1] The State's argument in *Mosley* included statements such as, "The defense has attempted to take you off the main road, to divert you. They don't want you to stay on the main road because they know where that will take you. They want to take a side road, a series of side roads, rabbit trails, and a rabbit trail that will lead you to a dead end."

did not accuse defense counsel of deceptive conduct or mention defense counsel's intentions. Here, the State, responding to defense counsel's argument, merely described what a rabbit trail is, and then focused the jury's attention on the evidence in the record. Because there was no personal attack in the State's closing argument, we hold there was no error. *See Wilson v. State*, 938 S.W.2d 57, 59 (Tex. Crim. App.1996) (holding jury argument must be confined to four permissible areas: (1) summation of the evidence; (2) reasonable deductions from the evidence; (3) an answer to the argument of opposing counsel; or (4) a plea for law enforcement). Accordingly, we overrule appellant's first point of error.

III.

Jury Charge

In his second point of error, appellant contends the trial court committed error when it failed to submit a jury charge on a lesser included offense. The lesser included offense appellant argues should have been submitted was that of misdemeanor assault. Appellant concedes in his brief that he failed to object to the charge as it was submitted to the jury.

First, a defendant is entitled to a charge on a lesser included offense when: (1) the lesser included offense is within the proof necessary to establish the offense charged, and (2) some evidence exists in the record that would permit a jury rationally to find that if the defendant is guilty at all, he is guilty only of the lesser offense. *See Rousseau v. State*, 855 S.W.2d 666, 672-73 (Tex. Crim. App. 1993). Commission of the offense of assault while brandishing a firearm aggravates the assault, and can be nothing less than a felony. *See* TEX. PENAL CODE ANN. §22.02(b) (Vernon 1994).

According to the record, the trial judge made a finding of the use of a firearm in the commission of the offense. This finding, as discussed below, is supported by the evidence. Because the record demonstrates that the appellant used a firearm when assaulting the complainant, he is not eligible for a misdemeanor assault charge. Therefore, the trial judge did not commit error by failing to include the lesser charge.

Second, if no proper objection were made at trial and the accused must claim that the error was "fundamental," he will obtain a reversal only if the error is so egregious and created such harm that he "has not had a fair and impartial trial"--in short "egregious harm." *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1984). Under the "egregious harm" standard, the error must be examined in light of the entire jury charge, the state of the evidence, including the contested issues and weight of probative evidence, the argument of counsel and any other relevant information revealed by the record of the trial as a whole. *See id.*

Here, because the trial judge committed no error, we do not reach the "egregious harm" analysis under *Almanza*. Moreover, even if the judge had erred, appellant cannot show egregious harm. Accordingly, appellant's first point of error challenging the jury charge is overruled.

IV.

Sufficiency of the Evidence

In his final points of error, appellant challenges both the legal and factual sufficiency of the evidence in this appeal. We will address the legal sufficiency challenge first because the factual sufficiency review begins with an assumption that the evidence is legally sufficient under the test set out in *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979); *see also Santellan v. State*, 939 S.W.2d 155, 164 (Tex. Crim. App. 1997).

A. Legal Sufficiency

In his third point of error, appellant asserts that the evidence is legally insufficient to support his conviction. In reviewing a legal sufficiency point, we view the evidence in light most favorable to the verdict, and ask whether any rational trier of fact could have found beyond a reasonable doubt all of the elements of the offense. *See Jackson*, 443 U.S. at 319, 99 S.Ct. at 2789; *see also Santellan*, 939 S.W.2d at 164.

A person commits assault by intentionally or knowingly threatening another with imminent bodily injury. *See* TEX. PENAL CODE ANN. §22.01(a)(2) (Vernon 1994). A person commits aggravated assault if, in the course of committing assault, the person uses or exhibits a deadly weapon during the commission of the assault. *See* TEX. PENAL CODE ANN. §22.02(a)(2) (Vernon 1994). According to the record, the State's witnesses testified that appellant fired at the complainant's feet, tried to hit her in the face, and attempted to fire the gun at her again. Viewing this evidence in the light most favorable to the verdict, a rational trier of fact could have found beyond a reasonable doubt that appellant, while exhibiting a deadly weapon, intentionally or knowingly threatened the complainant with imminent bodily injury. *See Santellan*, 939 S.W.2d at 160. Therefore, the evidence was legally sufficient to sustain appellant's conviction.

B. Factual Sufficiency

In his final point of error, appellant asserts that the evidence is factually insufficient to support his conviction. In reviewing a factual sufficiency challenge, the court of appeals "views all the evidence without the prism of 'in the light most favorable to the prosecution' and sets a side the verdict only if it is contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust." *See Clewis v. State*, 922 S.W.2d 126, 129 (Tex. Crim. App.1996). According to the record, the defense offered no evidence to contradict the testimony of the State's witnesses. For this reason, and in light of the State's evidence discussed above, we disagree that the verdict was so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *See Clewis*, 922 S.W.2d at 129. Because, the evidence was factually sufficient to sustain the appellant's conviction, we overrule appellant's final point of error.

Accordingly, we affirm the judgment of the trial court.

/s/ John S. Anderson
Justice

Judgment rendered and Opinion filed July 27, 2000.

Panel consists of Justices Anderson, Frost, and Lee.[2]

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

[2] Senior Justice Norman R. Lee sitting by assignment.