



**COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH**

NO. 02-15-00395-CR

JOSE HERNANDEZ

APPELLANT

V.

THE STATE OF TEXAS

STATE

FROM THE 396TH DISTRICT COURT OF TARRANT COUNTY
TRIAL COURT NO. 1402245D

DISSENTING OPINION

I. INTRODUCTION

The majority states that Appellant Jose Hernandez “does not challenge . . . the jury’s implicit finding that the putty knife qualified as a deadly weapon under the penal code.” Because I believe that Hernandez raised this issue—particularly when considering our duty to liberally construe his brief—and because the majority does not address it, I respectfully dissent.

II. DID HERNANDEZ RAISE THE DEADLY-WEAPON ISSUE?

A. Hernandez's Brief

Hernandez raised the following sole point of error in his brief: "Was the evidence at trial sufficient to sustain the conviction for aggravated robbery?" In the argument section of his brief, Hernandez noted that the State is required to prove each element of an offense beyond a reasonable doubt, and he argued that "there is insufficient evidence for the jury to have found beyond a reasonable doubt that [he] committed the offense of aggravated robbery." Hernandez specifically complained that "[t]he State failed to prove that [he] committed the offense of aggravated robbery because there is no evidence to support the jury's finding that he used or exhibited a deadly weapon - a knife."

The State treated Hernandez's brief as if it had raised the deadly-weapon issue. The State framed Hernandez's appeal as a challenge to "the sufficiency of evidence proving he used or exhibited a deadly weapon." Noting that "[a]n item is a deadly weapon if the manner of its use or intended use is capable of causing death or serious bodily injury," the State argued that the subject putty knife was "capable of causing serious bodily injury." Thus, according to the State, "the evidence legally sufficed to prove [Hernandez] used or exhibited a deadly weapon during the robbery."

Despite both Hernandez and the State making arguments as to whether Hernandez used or exhibited a deadly weapon, the majority does not address whether the subject putty knife was in fact a deadly weapon. Instead, the

majority declares that Hernandez did not challenge whether the putty knife was a deadly weapon, and as such, the majority simply concludes that “a rational jury could have found beyond a reasonable doubt that appellant used or exhibited *the putty knife*” (i.e., not “the deadly weapon”). [Emphasis added.]

B. Sufficiency of the Evidence in Aggravated Robbery Cases

In reviewing whether the evidence is sufficient to support a conviction, we are to view the evidence in the light most favorable to the verdict to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979). One of the essential elements of the offense of aggravated robbery—the offense at issue here—is whether the defendant used or exhibited a deadly weapon in the course of committing a robbery. See *Williams v. State*, 240 S.W.3d 293, 298 (Tex. App.—Austin 2007, pet. ref’d) (holding that the use or exhibition of a deadly weapon is an essential element of aggravated robbery); *Brown v. State*, 212 S.W.3d 851, 859 (Tex. App.—Houston [1st Dist.] 2006, pet. ref’d) (op. on reh’g) (same), *cert. denied*, 552 U.S. 1151 (2008).

Knives—like the putty knife at issue here—are not deadly weapons per se. *Clark v. State*, 444 S.W.3d 671, 678 (Tex. App.—Houston [14th Dist.] 2014, pet. ref’d); *Stewart v. State*, 198 S.W.3d 60, 63 (Tex. App.—Fort Worth 2006, no pet.). An item is a deadly weapon if 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) (West Supp. 2016). To determine whether a knife is a deadly weapon, we may consider: (1) the size, shape, and sharpness of the knife; (2) the manner of its use or intended use; (3) any evidence of the knife's life-threatening capabilities; (4) the nature or existence of any inflicted wounds; (5) threats or gestures used by the defendant; and (6) the physical proximity between the victim and the knife. *Martinez v. State*, No. 02-11-00100-CR, 2012 WL 1059465, at *3 (Tex. App.—Fort Worth Mar. 29, 2012, no pet.) (mem. op., not designated for publication) (citing *Victor v. State*, 874 S.W.2d 748, 751–52 (Tex. App.—Houston [1st Dist.] 1994, pet. ref'd)).

C. Our Duty to Liberally Construe a Brief

We are to construe briefs liberally. See Tex. R. App. P. 38.9; *Goyzueta v. State*, 266 S.W.3d 126, 133 (Tex. App.—Fort Worth 2008, no pet.). We do this to avoid waiver and to obtain a just, fair, and equitable adjudication of litigants' rights. *Rivera v. State*, 130 S.W.3d 454, 459 (Tex. App.—Corpus Christi 2004, no pet.); *Marroquin v. State*, 112 S.W.3d 295, 303 (Tex. App.—El Paso 2003, no pet.). We are to address every subsidiary question that is fairly included within a particular point or issue. *Ramsey v. State*, 249 S.W.3d 568, 577 n.5 (Tex. App.—Waco 2008, no pet.); see Tex. R. App. P. 38.1(f) ("The statement of an issue or point will be treated as covering every subsidiary question that is fairly included."). If we are able to ascertain the nature of the complaint from the argument, the issue will be preserved for appellate review. *Sanchez v. State*, 98 S.W.3d 349, 355 (Tex. App.—Houston [1st Dist.] 2003, pet. ref'd).

D. Hernandez Raised the Deadly-Weapon Issue

Hernandez's sole point of error is that the evidence was insufficient to support his conviction for aggravated robbery. As an essential element of that offense is whether Hernandez used or exhibited a deadly weapon in the course of committing the robbery, the majority should have addressed whether the subject putty knife was a deadly weapon. See *Williams*, 240 S.W.3d at 298; *Brown*, 212 S.W.3d at 859; see also *Ramsey*, 249 S.W.3d at 577 n.5 (we are to address "every subsidiary question that is fairly included" within a particular point or issue). Nothing about how Hernandez framed his issue would indicate that he was limiting his argument to only some of the elements of the offense. Hernandez specifically argued that "there is no evidence to support the jury's finding that he used or exhibited a deadly weapon," and the State addressed whether the putty knife was a deadly weapon when it stated that the subject putty knife was "capable of causing serious bodily injury."

Thus, I believe—particularly when construing Hernandez's brief liberally in his favor—that Hernandez raised the issue of whether the subject putty knife constituted a deadly weapon. See Tex. R. App. P. 38.9; *Goyzueta*, 266 S.W.3d at 133.

III. CONCLUSION

For the reasons set forth above, I believe the majority should have addressed whether the putty knife at issue constituted a deadly weapon. Because the majority did not, I dissent.

/s/ Sue Walker

SUE WALKER
JUSTICE

PUBLISH

DELIVERED: August 31, 2016