Opinion filed August 25, 2017

In The

Eleventh Court of Appeals

No. 11-15-00134-CR

WADE DWANE WOODS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 70th District Court
Ector County, Texas
Trial Court Cause No. A-42,774

MEMORANDUM OPINION

The jury convicted Wade Dwane Woods of aggravated assault with a deadly weapon in Count One[1] and of felony deadly conduct[2] in Counts Two and Three. Each count arose from the same incident but involved separate victims. The jury assessed punishment at confinement for eight years on each count, and the trial court

[1] *See* TEX. PENAL CODE ANN. §§ 22.01(a), 22.02(a)(2) (West 2011 & Supp. 2016).

[2] *See id.* § 22.05(b).

sentenced Appellant accordingly. Appellant presents six issues on appeal. We affirm in part and reverse in part.

I. *Evidence at Trial*

On the evening of August 25, 2013, Appellant's niece, Marisa Johnson, went to his trailer house, which was located on her mother's property, to post an eviction notice. Their family relationship was tumultuous for various reasons, mainly due to Appellant's failure to pay rent and to keep the trailer and surrounding area clean.

Johnson's friend, Abbie Griffis, along with Griffis's young son, A.H., accompanied Johnson to the trailer to help her post the eviction notices. Johnson placed a notice on the back door of the trailer and then went around the trailer to post a notice on the front door. Griffis thought that the front porch looked unstable so she and A.H. waited while Johnson went to the front door. The trailer had both a glass storm door and an interior door. The interior door had warnings written on it that included, among others, "Push this door in—see what happens LOL!" Johnson moved a propane tank blocking the glass door and then opened the glass door to affix a notice to the interior door. When Johnson opened the glass door, she heard a loud noise. The glass door shattered, and there was a hold in the interior door. Johnson noticed that her hand was cut and bleeding from the shattered glass. The blast narrowly missed Griffis and her son.

Johnson called the police. Inside the trailer, the police discovered that someone had rigged a twelve-gauge shotgun booby trap to discharge at the door if anyone opened it, and the police also found evidence that someone had recently occupied the trailer. Authorities found a cup of ice inside the trailer and a package addressed to Appellant. Based on the evidence collected, law enforcement searched for Appellant.

Later that night, authorities found Appellant's van at a local motel. Police officers knocked on Appellant's motel door, but there was no answer. The police officers then deployed some pepper spray outside the room where the air conditioner vent was. Appellant opened the door, saw the officers, and fled back into the room toward a pistol lying on a bed. Appellant fell as he retreated. Appellant resisted arrest, but after a small struggle, officers eventually subdued him. When informed of the reason for his arrest, Appellant smiled and responded, "I didn't shoot anyone," with emphasis on the word "I."

While in custody, Appellant gave a voluntary statement to police officers and denied that he had installed the booby trap but that, if he had set one up, he would have used rubber buckshot. He admitted that he used Facebook to comment on a news story related to the incident. He also admitted that he posted some "talk" relating to home self-defense on his Facebook page, which he maintained under the name "Star Lynx."

II. *Analysis*

In Appellant's first issue on appeal, he asserts that the trial court violated the Double Jeopardy Clause when it punished him twice on Counts Two and Three. In his second issue, he asserts that the trial court should have instructed the jury on the lesser included offense of misdemeanor deadly conduct[3] in Counts Two and Three. He contends in his third issue that the court should have instructed the jury on the lesser included offense of felony deadly conduct in Count One. In his fourth and fifth issues, Appellant contends that the trial court erred when it admitted certain posts from Appellant's Facebook account and the testimony of Deputy Richard Dickson. Finally, he asserts in his sixth issue that the trial court erred when it denied his motions for a directed verdict. We address Appellant's six issues sequentially.

[3] *See id.* § 22.05(a).

A. Issue One: Appellant's multiple convictions for felony deadly conduct violated the Double Jeopardy Clause.

In his first issue on appeal, Appellant argues, and the State concedes, that the two punishments assessed against him for felony deadly conduct constituted a double jeopardy violation under the constitutions of the United States and the state of Texas. U.S. CONST. amend. V; TEX. CONST. art. I, § 14. Appellant argues that, since the booby trap shotgun only fired once, he can only be convicted and punished for one offense of felony deadly conduct. We agree and, therefore, sustain Appellant's first issue.

The Fifth Amendment offers protection against multiple punishments for the same offense. *Ex parte Cavazos*, 203 S.W.3d 333, 336 (Tex. Crim. App. 2006) (citing *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969)). A person commits the offense of deadly conduct if he "knowingly discharges a firearm at or in the direction of: (1) one or more individuals." PENAL § 22.05(b)(1). Deadly conduct is an assaultive offense, but unlike other assaultive offenses, deadly conduct is a conduct-oriented offense, not a result-oriented offense. *Ford v. State*, 38 S.W.3d 836, 845 (Tex. App.—Houston [14th Dist.] 2001, pet. ref'd). The "allowable unit of prosecution" for a charge of deadly conduct is each discharge of the firearm. *See Miles v. State*, 259 S.W.3d 240, 248–49 (Tex. App.—Texarkana 2008, pet. ref'd). Thus, Appellant can be punished for this felony deadly conduct only once because the shotgun fired only once.

When a trial court erroneously punishes a defendant multiple times for a single crime, the proper remedy is to reform the judgment and vacate the offense with the least serious punishment. *See Cavazos*, 203 S.W.3d at 337–38. The most serious offense is "the offense of conviction for which the greatest sentence was assessed." *Id.* at 338. When, as is the case here, the two felony deadly conduct sentences are equal, the proper remedy is to affirm the first offense named in the first verdict form.

Id. at 339 n.8 (citing *Ex parte Cravens*, 805 S.W.2d 790 (Tex. Crim. App. 1991) ("Some of our case law suggests that, all other factors being equal, the conviction that should be affirmed is the offense named in the first verdict form.")). In the present case, this requires that we vacate Count Three.

B. Issue Two: The trial court did not abuse its discretion when it refused to instruct the jury on the lesser included offense of misdemeanor deadly conduct for Counts Two and Three because Appellant failed to specifically request this lesser included charge.

In his second issue, Appellant contends that the trial court abused its discretion when it denied his request to instruct the jury on the lesser included offense of misdemeanor deadly conduct under Counts Two and Three of the indictment. As we have vacated Count Three, we need only address Count Two. The discussion at trial went as follows:

> [DEFENSE COUNSEL]: And then, Your Honor, we would - - we have requested in all three counts a lesser included offense of deadly conduct.
>
> THE COURT: That's - - you've been afforded that in Counts 2 and 3. It's denied as to Count 1.
>
> [DEFENSE COUNSEL]: Thank you, Your Honor. And we have no further objection.
>
> THE COURT: Very well. Thank you.

As the trial court noted, the jury received felony deadly conduct instructions for Counts Two and Three. Appellant made no request for a lesser included charge of misdemeanor deadly conduct. The failure of defense counsel to request a charge on the offense or to properly object to its omission constitutes waiver. *Kinnamon v. State*, 791 S.W.2d 84, 96 (Tex. Crim. App. 1990), *overruled on other grounds by Cook v. State*, 884 S.W.2d 485 (Tex. Crim. App 1994). Appellant did not put the trial court on notice that he wanted a charge on misdemeanor deadly conduct, in

addition to or instead of felony deadly conduct. As such, Appellant failed to preserve this complaint for review. We overrule Appellant's second issue on appeal.

C. Issue Three: The trial court did not abuse its discretion when it denied Appellant's request for a lesser included instruction on the offense of deadly conduct in Count One.

In his third issue, Appellant argues that the trial court abused its discretion when it refused to instruct the jury on the lesser included offenses of both felony and misdemeanor deadly conduct in Count One. We disagree.

We apply the *Aguilar/Rousseau* test to determine whether the trial court should give an instruction to the jury on a lesser included offense. *Cavazos v. State*, 382 S.W.3d 377, 382 (Tex. Crim. App. 2012) (citing *Rousseau v. State*, 855 S.W.2d 666, 672 (Tex. Crim. App. 1993); *Aguilar v. State*, 682 S.W.2d 556, 561 (Tex. Crim. App. 1985) (Teague, J., dissenting)); *see* TEX. CODE CRIM. PROC. ANN. art. 37.09(1) (West 2016). This is a two-prong test. The first prong is a question of law to determine "if the proof necessary to establish [the elements of] the charged offense also includes the lesser offense." *Cavazos*, 382 S.W.3d at 382. This step requires us to "compare the elements of the charged offense . . . with the elements of the lesser offense that might be added to the jury charge," and to do so without reference to the evidence offered or admitted at trial. *Guzman v. State*, 188 S.W.3d 185, 188 (Tex. Crim. App. 2006). If this threshold is met, then we must decide whether there is some evidence "in the record *that would permit a jury rationally to find* that if the defendant is guilty, he is guilty only of the lesser offense." *Rousseau*, 855 S.W.2d at 673; *see Hayward v. State*, 158 S.W.3d 476, 478 (Tex. Crim. App. 2005). If both requirements are satisfied, the trial court must instruct the jury on the lesser included offense. *Guzman*, 188 S.W.3d at 189.

Deadly conduct can be a lesser included offense of aggravated assault. *See Ford*, 38 S.W.3d at 846. As relevant to Count One, in which Johnson was the victim,

a person commits the offense of aggravated assault if he "intentionally, knowingly, or recklessly causes bodily injury to another" and uses or exhibits a deadly weapon during the commission of the offense. *Id.* §§ 22.01(a)(1), 22.02(a)(2). A person commits misdemeanor deadly conduct if he recklessly engages in conduct that places another person in imminent danger of serious bodily injury. *Id.* § 22.05(a), (e). A person commits felony deadly conduct if he "knowingly discharges a firearm at or in the direction" of one or more individuals. *Id.* § 22.05(b)(1), (e).

1. Misdemeanor Deadly Conduct

Because both aggravated assault and misdemeanor deadly conduct employ the culpable mental state of recklessness and because the use of a deadly weapon in an assault places the victim in imminent danger of serious bodily injury, the same facts that support a misdemeanor deadly conduct conviction can support a conviction for aggravated assault. *Guzman*, 188 S.W.3d at 190; *Whitfield v. State*, 408 S.W.3d 709, 718 (Tex. App.—Eastland 2013, pet. ref'd); *Ford*, 38 S.W.3d at 845. We conclude, as we did in *Whitfield*, that the offense of misdemeanor deadly conduct satisfies the first step.

We now examine whether there is some evidence that, if guilty, Appellant is guilty only of the misdemeanor deadly conduct charge. To do so, we review all of the evidence presented at trial; anything more than a scintilla of evidence is sufficient to entitle a defendant to a lesser charge. *Bignall v. State*, 887 S.W.2d 21, 23 (Tex. Crim. App. 1994). The evidence may come from any source, and this court cannot consider "whether the evidence is credible, controverted, or in conflict with other evidence." *Hall v. State*, 158 S.W.3d 470, 473 (Tex. Crim. App. 2005). There must be some evidence directly germane to a lesser included offense that the factfinder can consider before a court can give an instruction on a lesser included offense. *Hampton v. State*, 109 S.W.3d 437, 440 (Tex. Crim. App. 2003).

Appellant argues that he is entitled to the instruction because he did not intend for Johnson or anyone else to come to the trailer on August 25 or any other date. Appellant further argues that no evidence established that he knew or should have known that anyone would try to open the glass door on any date. Appellant argues, incorrectly, that misdemeanor deadly conduct differs from aggravated assault in that misdemeanor deadly conduct requires a less culpable mental state: recklessness. We find these arguments unpersuasive.

Aggravated assault as charged in Count One included recklessness as a culpable mental state. *See* PENAL §§ 22.01(a)(1), 22.02(a)(2). The facts relied upon by Appellant to support his request for the lesser included offense of misdemeanor deadly conduct also proved the offense of reckless aggravated assault. *See Guzman*, 188 S.W.3d at 194; *Darkins v. State*, 430 S.W.3d 559, 568–69 (Tex. App.—Houston [14th Dist.] 2014, pet. ref'd) (stating that the trial court properly denied the defendant's request for a deadly conduct charge because his reckless act of driving his car into a crowd of people constituted aggravated assault). We find no evidence in the record that, if Appellant is guilty, he is guilty only of misdemeanor deadly conduct and not aggravated assault. *See Guzman*, 188 S.W.3d at 194. Accordingly, the trial court did not abuse its discretion when it denied Appellant's request for a lesser included jury charge on misdemeanor deadly conduct in Count One.

2. Felony Deadly Conduct

For similar reasons, Appellant was not entitled to an instruction on felony deadly conduct in Count One. The first step of the *Aguilar/Rousseau* test is satisfied because the proof necessary to establish the elements of aggravated assault causing bodily injury, as charged in Count One, includes the elements of the lesser offense of felony deadly conduct by knowingly discharging a firearm. *See Barrios v. State*, 389 S.W.3d 382, 399 (Tex. App.—Texarkana 2012, pet. ref'd). However, our

review of the record reveals that there was no evidence from which a jury could conclude that Appellant knowingly discharged a firearm at or in the direction of Johnson but that he did not intentionally, knowingly, or recklessly cause bodily injury to Johnson when he did so. *See Luper v. State*, No. 05-13-01259-CR, 2014 WL 5500088, at *5 (Tex. App.—Dallas Oct. 31, 2014, no pet.) (mem. op., not designated for publication); *Jones v. State*, No. 03-04-00428-CR, 2005 WL 2673677, at *3–4 (Tex. App.—Austin Oct. 20, 2005, pet. dism'd) (mem. op., not designated for publication). We overrule Appellant's third issue.

D. <u>Issue Four</u>: The trial court did not abuse its discretion when it admitted Facebook posts attributed to Appellant.

In his fourth issue, Appellant argues that the trial court abused its discretion when it admitted the Facebook posts attributed to Appellant. Appellant objected at trial to the introduction of the Facebook posts because the State did not properly authenticate them and because they did not meet the best evidence rule. The test for determining whether a trial court properly admitted evidence is abuse of discretion. *Montgomery v. State*, 810 S.W.2d 372, 391 (Tex. Crim. App. 1991). Under that standard, a trial court's ruling will not be disturbed unless the ruling was outside the zone of reasonable disagreement. *Id.* at 391. We examine Appellant's authentication and best evidence objections in turn.

1. Evidence at trial properly authenticated Appellant's Facebook posts.

Because evidence has no value if it is not what its proponent claims it to be, the proponent must put forth sufficient evidence to prove that "the item is what the proponent claims it is." TEX. R. EVID. 901(a); *see Tienda v. State*, 358 S.W.3d 633, 638 (Tex. Crim. App. 2012). Evidence that satisfies this requirement includes testimony that an item is authentic and evidence of the "appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken

together with all the circumstances." TEX. R. EVID. 901(b). Ultimately, the finder of fact decides whether sufficient evidence has been put forth to authenticate a piece of evidence. *Tienda*, 358 S.W.3d at 638.

Social media posts present unique authentication issues because accounts can be hacked and falsified to attribute messages to others. *See id.* at 641. The *Tienda* court examined the issue and held that evidence can authenticate such posts with reference to specific details only the purported author would know, messages referring to the alleged incident, and unique photos of the purported author. *Id.* at 645. Since that decision, this court and others have affirmed the use of properly authenticated social media accounts on similar grounds. *See Coe v. State*, No. 09-13-00409-CR, 2015 WL 3898001, at *10 (Tex. App.—Beaumont June 24, 2015, pet. ref'd) (mem. op., not designated for publication) (defendant's Facebook messages); *Miller v. State*, No. 11-11-00350-CR, 2013 WL 5636375, at *2–3 (Tex. App.—Eastland Oct. 10, 2013, pet. ref'd) (mem. op., not designated for publication) (defendant's MySpace profile); *Campbell v. State*, 382 S.W.3d 545, 548 (Tex. App.—Austin 2012, no pet.) (Facebook messages sent by defendant); *Rene v. State*, 376 S.W.3d 302, 304 (Tex. App.—Houston [14th Dist.] 2012, pet. ref'd) (photographs of defendant on his MySpace profile). We have also affirmed a trial court's refusal to admit social media messages because the third parties that purportedly authored the posts did not independently authenticate them and the sponsoring witness did not discuss the contents of the posts with the alleged authors. *See Dering v. State*, 465 S.W.3d 668, 672 (Tex. App.—Eastland 2015, no pet.).

Examination of these factors in the context of the evidence adduced at trial makes it clear that the trial court did not abuse its discretion when it admitted certain posts and pictures from Appellant's Facebook account. Appellant admitted that he had a Facebook account under the name Star Lynx. The Facebook post on the Star

Lynx account relating to the incident revealed information only Appellant could have known. The post in in its entirety read:

> She wasn't serving an "EVICTION["] Notice . . . the so called niece is lying . . They've been breaking into that place for the past several Months robbing electronics to sell for payment to keep up their substance abuse & partying . . . Her Uncle, Matt Woods has been stealing out of it & sending thugs to steal underground copper wire . . since the Feds let him go for making poison Bath salts Nazi Meth & snitching out the very people he was making it to sell to agents . . . . . Lots of Drunken drama going on there . . .

The accusations in the post recount many of the same accusations that Appellant made to police officers after his arrest. No other person would have known Johnson's purpose for being at the trailer that day and would be unlikely to know of the intimate family details. Finally, Johnson testified that she had read the post and that the post was consistent with Appellant's pattern of speech. The same is true for the captioned photos of firearms found on Appellant's Facebook account. Appellant acknowledged under questioning that he posted "talk" on Facebook, which included discussions about firearms and the defense of property. These Facebook posts echo the writing on the front door that Appellant admitted he authored. Finally, Appellant admitted that no one else posts on his Facebook account. Accordingly, we hold that the trial court did not abuse its discretion when it admitted into evidence Facebook posts made by Appellant that related to the underlying incident, firearms, and defense of one's property.

2. The Facebook posts attributed to Appellant satisfied the best evidence rule.

The best evidence rule requires that one produce the original writing, recording, or photograph to prove the content of those items. TEX. R. EVID. 1002. Appellant argues that the best evidence of the Facebook profile page would have been a "printout of the entire Facebook profile page, not just simply screen shots of

selected posts." In the case of electronically stored information, an original of a writing or recording means any printout, if it accurately reflects that information. TEX. R. EVID. 1001(d). However, Appellant has not demonstrated how the admission of the full Facebook page would benefit him or how the admission of the selected posts prejudiced him. *See Hendershot v. State*, No. 13-10-00452-CR, 2012 WL 3242018, at *5 (Tex. App.—Corpus Christi Aug. 9, 2012, pet. ref'd) (mem. op., not designated for publication) (Defendant failed to present any argument as to how or why his "substantial rights" were affected by the alleged best evidence rule violation.); *People v. Hoefling*, No. 303097, 2012 WL 6216859, at *9 (Mich. Ct. App. Dec. 13, 2012) (the defendant's failure to demonstrate how the admission of contested evidence unfairly affected his trial doomed his best evidence argument). Accordingly, we overrule Appellant's fourth issue.

E. Issue Five: The trial court did not abuse its discretion when it admitted the testimony of Deputy Dickson.

In his fifth issue, Appellant contends that the trial court abused its discretion when it admitted the testimony of Deputy Richard Dickson. During cross-examination of Johnson, Appellant asked Johnson if she was aware of the theft reports that had been filed with respect to Appellant's trailer. Johnson answered that Appellant had claimed that Matt Woods had burglarized the trailer. The State later called Deputy Dickson to rebut Appellant's claim. Deputy Dickson essentially testified that his investigation into the case found no evidence to support Appellant's claims and that Appellant did not turn over a surveillance video that he claimed to possess. Appellant objected at trial and argues on appeal that Deputy Dickson's testimony was irrelevant and unduly prejudicial. The trial court overruled Appellant's objections and stated, "It's just classic impeachment, I think. Goes to his credibility, so bring it on."

Appellant's Rule 402 and Rule 403 challenges to Deputy Dickson's testimony lack merit. Rule 402 provides that irrelevant evidence is not admissible at trial. TEX. R. EVID. 402. Evidence is relevant if it "has any tendency to make a fact more or less probable than it would be without the evidence" and if "the fact is of consequence in determining the action." TEX. R. EVID. 401. But a trial court should exclude relevant evidence if its probative value is substantially outweighed by (1) the danger of unfair prejudice, (2) confusion of the issues, (3) misleading the jury, or (4) considerations of undue delay or needless presentation of cumulative evidence. TEX. R. EVID. 403. Deputy Dickson's testimony was relevant to impeach Appellant's claim that someone had been breaking into his trailer and that that person, instead of Appellant, set up the booby trap. Deputy Dickson's testimony undercut Appellant's claim of innocence and was admissible impeachment evidence. *See Appling v. State*, 904 S.W.2d 912, 916–17 (Tex. App.—Corpus Christi 1995, pet. ref'd) (holding that, when defendant offered into evidence his own out-of-court statement, it was hearsay and defendant's credibility was subject to impeachment under Rule 806 of the Texas Rules of Evidence). Likewise, Deputy Dickson's testimony was proper under Rule 403 because the probative value of the evidence was not substantially outweighed by any prejudicial effect. *See Villanueva v. State*, 768 S.W.2d 900, 902 (Tex. App.—San Antonio 1989, pet. ref'd) (impeachment evidence was relevant to undermine the defendant's alibi). Accordingly, the trial court did not abuse its discretion when it admitted Deputy Dickson's testimony. We overrule Appellant's fifth issue.

F. Issue Six: The trial court did not err when it denied Appellant's motions for directed verdict because the State adduced sufficient evidence that Appellant committed the charged offenses.

In his sixth issue on appeal, Appellant argues that the trial court erred when it denied his directed verdict motions because the State did not establish sufficient and

direct evidence of his guilt. A challenge to a trial court's ruling on a motion for directed verdict is the same as a challenge to the sufficiency of the evidence. *Madden v. State*, 799 S.W.2d 683, 686 (Tex. Crim. App. 1990). We apply the sufficiency standard outlined in *Jackson* and its progeny for both of Appellant's sufficiency points. *See Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Brooks v. State*, 323 S.W.3d 893, 894–95 (Tex. Crim. App. 2010). We review all of the evidence in the light most favorable to the jury's verdict and decide whether any rational jury could have found the essential elements of the offense beyond a reasonable doubt. *See Jackson*, 443 U.S. at 319; *Isassi v. State*, 330 S.W.3d 633, 638 (Tex. Crim. App. 2010). The jury exclusively judges the weight and credibility of testimony, and it is free to draw reasonable inferences from basic facts to ultimate ones. *Sanders v. State*, 119 S.W.3d 818, 820 (Tex. Crim. App. 2003); *Jones v. State*, 944 S.W.2d 642, 647 (Tex. Crim. App. 1996). Circumstantial evidence alone can sufficiently establish guilt, as it is just as probative as direct evidence. *Sorrells v. State*, 343 S.W.3d 152, 155 (Tex. Crim. App. 2011).

While Appellant asserts that no direct evidence links him to these crimes, the State presented overwhelming circumstantial evidence that Appellant rigged the booby trap/spring gun. Appellant admitted that he was the only person who occupied the trailer. His use of the boarded-up back door to enter and exit the trailer implied his knowledge of the booby trap. The cup of ice found in the trailer indicated that Appellant had recently been in the trailer. The menacing warnings that he scribbled on the front door also imply the presence of danger. His post on Facebook, which included unique and personal details about the family and the shooting, also implicated him because his post mirrored his complaints to police. Other posts on his Facebook page implied his involvement with the spring gun; one post read, "Breaking in are we? Allow me to play you the song of my people." Finally, he

resisted arrest when apprehended, which evidences a consciousness of guilt. *Fentis v. State*, 582 S.W.2d 779, 781 (Tex. Crim. App. 1976). The jury could infer that Appellant confirmed this suspicion when police told him why he was arrested and he stated, "*I* didn't shoot anyone." In short, the State adduced sufficient circumstantial evidence from which a rational jury could have found beyond a reasonable doubt that Appellant committed the crimes charged. Thus, we hold that the trial court did not err when it denied Appellant's motions for directed verdict. We overrule Appellant's sixth issue.

III. *This Court's Ruling*

With respect to Counts One and Two, we affirm the judgments of the trial court. However, based upon the violation of the Double Jeopardy Clause, we vacate Appellant's conviction in Count Three, and we reverse the trial court's judgment and render a judgment of acquittal as to that count.

MIKE WILLSON
JUSTICE

August 25, 2017

Do not publish. *See* TEX. R. APP. P. 47.2(b).

Panel consists of: Wright, C.J.,
Willson, J., and Bailey, J.