In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-10-00367-CR

TIMOTHY WAYNE SHERBER, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 359th District Court
Montgomery County, Texas
Trial Cause No. 09-07-07258 CR

MEMORANDUM OPINION

A jury convicted Timothy Wayne Sherber of possession of a controlled substance with intent to deliver, sentenced Sherber to ten years in prison, and assessed a $10,000 fine, but recommended a suspended sentence and community supervision. The jury also convicted Sherber of aggravated assault of a public servant and sentenced Sherber to eight years in prison. Sherber challenges (1) the legal sufficiency of the evidence to support his conviction for aggravated assault against a public servant; (2) the jury charge on aggravated assault against a public servant; (3) the jury charge on possession with

intent to deliver; and (4) the disqualification of a defense witness. We affirm the trial court's judgment.

Factual Background

On February 11, 2008, law enforcement officers arranged a "buy/bust" in Conroe, Texas to arrest alleged drug dealers. J.H., a confidential informant, testified that he contacted Sherber about buying methamphetamine. J.H. had previously purchased illegal drugs from Sherber and a man named Rodney Anderson. J.H. testified that he reached an agreement with Sherber to purchase two ounces of methamphetamine.

Sherber testified that he traveled to Conroe for a business trip and that Anderson accompanied him, but the trip was unrelated to illegal drugs. Sherber testified that he, Anderson, and J.H. had previously used methamphetamine together. Sherber denied selling methamphetamine to J.H., but testified that he and J.H. had purchased methamphetamine from Anderson. Sherber was aware of an agreement between Anderson and J.H. that J.H. would buy methamphetamine from Anderson on February 11. Sherber testified that he never discussed illegal drugs with J.H. and was unaware that Anderson was in possession of methamphetamine on February 11.

On February 11, Sherber drove Anderson to meet J.H. in Conroe. Sherber drove a diesel pick-up truck. It was daylight and the pavement was wet from rain. Sherber parked in a handicap parking space to drop off Anderson. Sherber planned to go visit a friend. J.H. approached the passenger's side door of the truck, but Sherber testified that

J.H. "took off" when Anderson produced the methamphetamine. J.H. testified that he signaled law enforcement officers. Sergeant David Womack testified that he then signaled other law enforcement officers to move in.

J.H. believed that Sherber and Anderson were afraid and he assumed that Sherber saw the police approaching. J.H. testified that Sherber put the truck in reverse and hit the gas "full throttle." Sherber testified that he put the truck in reverse to back out of the handicap space and park in a regular space. Sherber saw a green truck driving towards him and he initially thought the driver was not paying attention. When the two trucks made contact, Sherber knew something was wrong. Sherber heard Anderson yell, "go, go go, go[,]" "[t]hey got guns[,]" and "[g]et out of here." Anderson ducked and Sherber pressed the truck's accelerator. Sherber testified that he ducked to get away and to avoid bullets or being killed.

Detective Don Likens testified that he ran toward Sherber's truck, approached the driver's side window, displayed his gun, and shouted, "police, get out of the vehicle." Special Agent Marco Saltarelli testified that he heard tires squealing and saw officers running towards Sherber's truck, yelling "police, stop." Likens testified that he made eye contact with Sherber and told Sherber to stop the truck, but Likens heard "full acceleration on the vehicle."

Detective Stewart Hightower testified that he and another officer approached Sherber's truck in an unmarked vehicle. Hightower testified that the engine of Sherber's

truck sounded like a "jet engine" and that Sherber's truck struck Hightower's vehicle as Hightower was stepping out of the vehicle. Likens, Womack, and Saltarelli saw the collision. Likens testified that Sherber's truck slid and began fishtailing. Saltarelli testified that the tires on Sherber's truck began screeching and spinning, which indicated to him that Sherber was attempting to pick up speed. Hightower testified that his vehicle moved backward with the other officer behind the steering wheel. Hightower testified that he feared for his life. When Hightower saw Likens disappear near the window of Sherber's truck, he believed that Likens had been run over, so he discharged his gun at Sherber's truck. Likens and Womack both heard the gunfire. Hightower testified that Sherber's truck revved past him.

Sherber testified that he never saw anyone run towards his truck, did not see his truck collide with another vehicle, and could not see where he was driving. Sherber heard gunshots, but denied seeing anyone with a gun or hearing anyone say "police," "cops," or "freeze." The truck's windows were closed and Sherber testified that the truck's engine was loud. Sherber felt afraid and described the situation as "very hectic" and "scary[.]" Officers described the scene as "mass confusion" and "[v]ery, very confusing." Shane Neal, a patron at a restaurant in the area, testified that he could not initially tell "who was good, who was bad[.]"

Deputy Jimmy Kellum testified that he was the "uniform presence" during the buy/bust. Womack explained that Kellum's job was to "show police presence, lights, and

the whole nine yards" and to block Sherber's exit. Kellum testified that his patrol car is labeled "Sheriff" and is equipped with overhead red and blue lights. Kellum testified that as he approached the scene in his patrol car, he heard Sherber's diesel truck engine, which sounded like a "tractor pull." Kellum had not activated the patrol car's overhead lights or siren. Kellum testified that Sherber's truck struck the patrol car, which caused Kellum to hit his head on the patrol car's video screen and feel afraid. Kellum heard Sherber's truck revving and testified that his patrol car was pushed a substantial distance. Kellum could only see the front bumper of Sherber's truck. Likens, Womack, Saltarelli, and Hightower saw Sherber strike the passenger's side of Kellum's marked patrol car and push the patrol car several feet.

Neal testified that Sherber's truck continued spinning its tires and accelerating after striking the patrol car. Hightower testified that the tires on Sherber's truck were spinning and screaming, that the truck appeared to be driving over the patrol car, and that the truck's engine was getting louder. Afraid for Kellum, Hightower discharged his gun at Sherber. Hightower believed it necessary to discharge his gun because he felt that Sherber had killed Likens and had endangered other officers. Afraid that Sherber would kill Kellum, Saltarelli testified that he rammed his vehicle into Sherber's truck to stop the truck.

Sherber testified that he felt a collision, but did not know that he had hit a patrol car until he looked up. Sherber was shot twice and testified that he might have been

killed had he been sitting up in the truck. Saltarelli testified that Sherber was sitting up when he pulled Sherber out of the truck and that Sherber was compliant. Saltarelli did not believe that Sherber was lying down in the front seat at any point. Likens testified that he never saw Sherber duck, close his eyes, or turn away from the windshield. Neal testified that Anderson ducked, but that Sherber leaned towards the driver's side door, accelerated, and did not duck below the dashboard.

Kellum testified that his patrol car was totaled. Womack, Saltarelli, and Kellum each testified that Sherber operated the truck in a manner that could cause serious bodily injury or death. Hightower testified that the truck could be considered a deadly weapon because of the method in which it was used. Saltarelli believed that his actions were necessary to stop Sherber and save the lives of other officers. Kellum believed that Sherber's truck would have eventually run over the patrol car had Saltarelli not stopped it.

Legal Sufficiency

In issue one, Sherber challenges the legal sufficiency of the evidence to support his conviction for aggravated assault against a public servant.

"[T]he *Jackson v. Virginia* legal-sufficiency standard is the only standard that a reviewing court should apply in determining whether the evidence is sufficient to support each element of a criminal offense that the State is required to prove beyond a reasonable doubt." *Brooks v. State*, 323 S.W.3d 893, 895 (Tex. Crim. App. 2010). We assess all the

evidence in the light most favorable to the prosecution to determine whether any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007). We give deference to the jury's responsibility to fairly resolve conflicting testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. *Hooper*, 214 S.W.3d at 13.

The indictment alleges that Sherber committed aggravated assault against a public servant by (1) intentionally or knowingly, (2) threatening Kellum, who Sherber knew was a public servant, (3) with imminent bodily injury, (4) while Kellum was in the lawful discharge of an official duty, and (5) using or exhibiting a deadly weapon, to-wit: a motor vehicle. Tex. Penal Code Ann. §§ 22.01(a)(2), 22.02(a)(2), (b)(2)(B) (West 2011).[1] Sherber challenges the legal sufficiency of the evidence to show that he intentionally or knowingly threatened Kellum or knew that Kellum was a public servant.

Aggravated assault by threat is a conduct-oriented offense as opposed to result oriented. *Landrian v. State*, 268 S.W.3d 532, 540 (Tex. Crim. App. 2008); *Dolkart v. State*, 197 S.W.3d 887, 893 (Tex. App.—Dallas 2006, pet. ref'd). A person acts "intentionally" "with respect to the nature of his conduct . . . when it is his conscious objective or desire to engage in the conduct[.]" Tex. Penal Code Ann. § 6.03(a) (West 2011). A person acts "knowingly" "with respect to the nature of his conduct or to

[1] Because amended sections 22.01 and 22.02 contain no material changes applicable to this case, we cite to the current versions of the statutes.

circumstances surrounding his conduct when he is aware of the nature of his conduct or that the circumstances exist." *Id.* § 6.03(b). Intent or knowledge may be inferred from acts, words, and conduct. *Hart v. State*, 89 S.W.3d 61, 64 (Tex. Crim. App. 2002) (quoting *Manrique v. State*, 994 S.W.2d 640, 649 (Tex. Crim. App. 1999)). An actor is presumed to have known the person assaulted was a public servant if the person was wearing a distinctive uniform or badge indicating the person's employment as a public servant. Tex. Penal Code Ann. § 22.02(c).

Sherber contends that, at most, he acted recklessly because he lost control of his truck on the wet pavement, he was afraid and confused, the scene was chaotic, unknown individuals were firing guns, he ducked to avoid being shot, he did not hear or see any police officers, and he did not see Kellum or Kellum's patrol car. The jury heard evidence that Kellum was in full uniform and driving a marked patrol car. The jury also heard evidence that Sherber had not ducked below the dashboard, was sitting up in the truck, accelerated after hitting the patrol car, pushed the patrol car several feet, appeared to be trying to drive over the patrol car, and operated his truck as a deadly weapon. Kellum testified that he was afraid and even pulled his gun to shoot his attacker. Hightower and Saltarelli feared for Kellum's life. The collision totaled Kellum's patrol car and Kellum believed that Sherber would have run over the patrol car. As trier of fact, the jury could reasonably conclude that Sherber intentionally or knowingly threatened Kellum with imminent bodily injury and could infer that Sherber saw Kellum in his

patrol car and knew that Kellum was a public servant. *See Gokey v. State*, 314 S.W.3d 63, 67 (Tex. App.—San Antonio 2010, pet. dism'd) (Section 22.2(c) applied where officer wore a badge and uniform and drove a marked patrol car, but even absent the presumption, the jury could infer that if Gokey and the officer faced each other, Gokey knew the officer was a public servant); *see also Anderson v. State*, 11 S.W.3d 369, 375-76 (Tex. App.—Houston [1st Dist.] 2000, pet. ref'd) ("Aiming a deadly weapon at a supposed victim is sufficient evidence of a threat to sustain an aggravated assault conviction.").

Viewing the evidence in the light most favorable to the State, the jury could conclude beyond a reasonable doubt that Sherber committed aggravated assault against a public servant. *See Jackson*, 443 U.S. at 319; *Hooper*, 214 S.W.3d at 13; Tex. Penal Code Ann. §§ 22.01(a)(2), 22.02(a)(2), (b)(2)(B). Because the evidence is sufficient to support Sherber's conviction as a principal, we need not address his contention that the evidence was insufficient to establish his guilt as a party or co-conspirator. *See* Tex. R. App. P. 47.1. We overrule issue one.

The Jury Charge

In issues two and three, Sherber complains of the trial court's jury charge on aggravated assault against a public servant and its jury charge on possession with intent to deliver.

When reviewing complaints regarding the jury charge, we must first determine whether there was error in the charge. *Sakil v. State*, 287 S.W.3d 23, 25 (Tex. Crim. App. 2009). If, as here, the appellant did not object to the alleged error, we must reverse if the error is '"so egregious and created such harm'" that the defendant did not receive a fair and impartial trial. *Id*. at 26 (quoting *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985)).[2] We consider (1) the entire jury charge, (2) the state of the evidence, including the contested issues and the weight of the probative evidence, (3) the parties' arguments, and (4) any other relevant information found in the record as a whole. *Allen v. State*, 253 S.W.3d 260, 264 (Tex. Crim. App. 2008).

Jury Charge on Aggravated Assault Against a Public Servant

Sherber contends that the jury charge on aggravated assault against a public servant contains erroneous definitions of "intentionally" and "knowingly." The jury charge included the following definitions:

> A person acts intentionally, or with intent, with respect to a result of his conduct when it is his conscious objective or desire to cause the result.
>
> A person acts knowingly, or with knowledge, with respect to the nature of his conduct when he is aware that his conduct is reasonably certain to cause the result.
>
> A person acts knowingly, or with knowledge, with respect to circumstances surrounding his conduct when he is aware that the circumstances exist.

[2] According to the record, Sherber objected to the two jury charges at trial, but on grounds different from those asserted on appeal.

Although aggravated assault by threat is a nature of conduct offense, the trial court's charge failed to limit the culpable mental states of "intentionally" and "knowingly" as they relate to the applicable conduct element. *See Landrian*, 268 S.W.3d at 540; *see also Cook v. State*, 884 S.W.2d 485, 491 (Tex. Crim. App. 1994). Nevertheless, the parties discussed "intentionally" and "knowingly" in the context of whether Sherber committed aggravated assault by threatening Kellum, a public servant, with imminent bodily injury. As previously discussed, the evidence was sufficient to show that Sherber intentionally or knowingly threatened Kellum with imminent bodily injury. The charge properly instructed the jury on the law of aggravated assault against a public servant and the application paragraph limited the culpable mental states to the nature of Sherber's conduct by instructing the jury to find Sherber guilty if it found beyond a reasonable doubt that Sherber threatened Kellum with imminent bodily injury. The error in the abstract portion of the charge was not egregious. *See Medina v. State*, 7 S.W.3d 633, 640 (Tex. Crim. App. 1999).

Next, Sherber contends that the application paragraph in the charge failed to instruct the jury that, to find him guilty as a party, it must so find beyond a reasonable doubt. The application paragraph states, in pertinent part:

> [I]f you find from the evidence *beyond a reasonable doubt* that on or about February 11, 2008, in Montgomery County, Texas, that . . . Sherber did then and there, while using or exhibiting a deadly weapon, to wit: a motor vehicle, intentionally or knowingly threaten B. Kellum, a public servant acting in the lawful discharge of an official duty, with imminent bodily injury, and that . . . Sherber knew B. Kellum was a public servant, *or*, you

> find that . . . Sherber, with intent to promote or assist . . . Anderson by soliciting, encouraging, directing, aiding, or attempting to aid . . . Anderson in committing the said offense, *or* if you find that . . . Sherber, had entered into and was attempting to carry out a conspiracy with . . . Anderson to commit the felony offense of possession with intent to deliver a controlled substance . . . , and you further find that either . . . Sherber, or . . . Anderson did then and there, while using or exhibiting a deadly weapon . . . , intentionally or knowingly threaten B. Kellum, a public servant acting in the lawful discharge of an official duty, with imminent bodily injury, and . . . Sherber or . . . Anderson knew that B. Kellum was a public servant, . . . , and you further find that such action was committed, if it was, in furtherance of the original unlawful purpose of . . . Sherber, and . . . Anderson to commit the felony offense of possession with intent to deliver a controlled substance . . . , if they did, you will find [Sherber] guilty of Aggravated Assault Against a Public Servant as charged in Count II of the indictment.

The phrase "beyond a reasonable doubt" modifies each subsequent phrase in the application paragraph. *Villanueva v. State*, 194 S.W.3d 146, 158 (Tex. App.—Houston [1st Dist.] 2006), *rev'd on other grounds*, 227 S.W.3d 744 (Tex. Crim. App. 2007); *Crum v. State*, 946 S.W.2d 349, 362 (Tex. App.—Houston [14th Dist.] 1997). Thus, the charge required the jury to find each element of the offense beyond a reasonable doubt and the trial court did not err by neglecting to repeat the phrase "beyond a reasonable doubt" throughout the application paragraph.

Finally, Sherber complains that the application paragraph failed to include "acquittal language." Towards the end of the jury charge, the trial court instructed the jury, "In the event you have a reasonable doubt as to the defendant's guilt after considering all the evidence before you, and these instructions, you will acquit him and say by your verdict 'Not Guilty.'" Sherber maintains that this instruction should have

been given immediately after the application paragraph. A jury charge must apply the law to the facts of the offense and instruct the jury under what circumstances to convict or acquit. *Turpin v. State*, 606 S.W.2d 907, 910 (Tex. Crim. App. 1980). This charge did exactly that. We presume that the jury followed the trial court's instruction to acquit Sherber if it had a reasonable doubt as to his guilt. *See Resendiz v. State*, 112 S.W.3d 541, 546 (Tex. Crim. App. 2003). We cannot say that the trial court erred by failing to place the acquittal instruction immediately after the application paragraph.

Having found no reversible error in the trial court's jury charge on aggravated assault against a public servant, we overrule issue two.

Jury Charge on Possession with Intent to Deliver

Sherber contends that the trial court's jury charge on possession with intent to deliver improperly applied the conspiracy law. The charge states:

> if you find that . . . Sherber had entered into, and was attempting to carry out a conspiracy with . . . Anderson to commit the felony offense of delivery of a controlled substance, to wit: methamphetamine, and you further find that either . . . Sherber or . . . Anderson did then and there possess with intent to deliver a controlled substance, to wit: methamphetamine, in the amount of 4 grams or more, but less than 200 grams, as charged in the indictment, and you further find that such action was committed, if it was, in furtherance of the original unlawful purpose of . . . Sherber, and . . . Anderson, to commit the felony offense of delivery of a controlled substance, if they did, then you will find [Sherber] guilty of Possession with Intent to Deliver Controlled Substance as charged in Count I of the indictment.

Sherber complains that the application paragraph only alleges one felony, in violation of section 7.02(b) of the Penal Code, which states:

> If, in the attempt to carry out a conspiracy to commit *one felony*, *another felony* is committed by one of the conspirators, all conspirators are guilty of the felony actually committed, though having no intent to commit it, if the offense was committed in furtherance of the unlawful purpose and was one that should have been anticipated as a result of the carrying out of the conspiracy.

Tex. Penal Code Ann. § 7.02(b) (West 2011) (emphasis added).

Assuming, without deciding, that the charge is erroneous, we cannot say that Sherber suffered egregious harm. In the abstract portion of its charge, the trial court gave the jury an instruction that tracked section 7.02(b). In addition to conspiracy, the application paragraph authorized the jury to find Sherber guilty as a principal or a party. During closing, the State argued that Sherber was guilty as a principal, party, or co-conspirator, and mentioned the conspiracy theory of guilt but did not emphasize the theory. The defense argued that Anderson, not Sherber, committed possession with intent to deliver. The jury heard evidence that J.H. arranged the deal through Sherber and had previously purchased methamphetamine from Sherber, Sherber participated in the sale of methamphetamine and was "in business" with Anderson, Sherber had possession of the truck in which the methamphetamine was transported, Sherber attempted to leave the scene, officers seized methamphetamine in excess of 23 grams, and 23 grams of methamphetamine is consistent with the sale of drugs. On appeal, Sherber does not challenge the sufficiency of the evidence to support his conviction for possession with intent to deliver. *See Hinojosa v. State*, 4 S.W.3d 240, 245 (Tex. Crim. App. 1999) (When the appellant does not challenge the legal sufficiency of the evidence, we assume

the evidence is sufficient under *Jackson v. Virginia*). The record as a whole does not demonstrate that the alleged error caused egregious harm. *See Allen*, 253 S.W.3d at 264, 267. We overrule issue three.

Disqualification of Defense Witness

In issue four, Sherber argues that the trial court abused its discretion by disqualifying a defense witness.

At the request of a party or on its own motion, the trial court shall order witnesses excluded so they cannot hear the testimony of other witnesses.[3] Tex. R. Evid. 614. This procedure is intended to "prevent the testimony of one witness from influencing the testimony of another, consciously or not." *Russell v. State*, 155 S.W.3d 176, 179 (Tex. Crim. App. 2005). "In determining whether to disqualify a witness who has violated the Rule, the trial court must balance the interests of the State and the accused, consider alternative sanctions, and consider the benefit and detriment arising from a disqualification in light of the nature and weight of the testimony to be offered." *Emenhiser v. State*, 196 S.W.3d 915, 923 (Tex. App.—Fort Worth 2006, pet. ref'd). We review a trial court's decision to disqualify a defense witness under an abuse of discretion standard. *Id*. In doing so, we utilize the following analysis: "(1) if the rule was violated and the witness disqualified, were there particular circumstances, other than the mere fact of the violation, which would tend to show the defendant or his counsel consented, procured or otherwise had knowledge of the witness's presence in the courtroom,

[3] Rule 614's exceptions are inapplicable to this case. *See* Tex. R. Evid. 614(1)-(4).

together with knowledge of the content of that witness's testimony; and (2) if no particular circumstances existed to justify disqualification, was the excluded testimony crucial to the defense." *Webb v. State*, 766 S.W.2d 236, 245 (Tex. Crim. App. 1989).

The defense invoked the Rule before testimony began and the trial court instructed the witnesses to remain outside the courtroom. When Sherber called Tony Atkins as a witness, the State objected on the grounds that Atkins was present in the courtroom for part of Sherber's testimony. The trial court sustained the State's objection and disqualified Atkins. Sherber made a bill of exception, during which Atkins testified that he and Sherber are friends, Sherber performed clean-up work for job sites in the Conroe area, and Sherber often stayed at Atkins's home. Atkins testified that when his homeowner's association complained about Sherber parking his equipment on the street, Sherber stopped staying with Atkins for extended periods, but would sometimes stay the night and did not bring any equipment.

The record does not indicate that the defense consented to, procured, or otherwise had knowledge of Atkins's presence in the courtroom. *See Webb*, 766 S.W.2d at 245. Accordingly, we must determine whether Atkins's testimony was crucial to Sherber's defense. *See id*. Sherber argues that Atkins's testimony was crucial to his defensive theory that he did not travel to Conroe to sell and use illegal drugs, an inference Sherber contends was raised by the testimony of Paula Shedd. Shedd, a former employee of the Baymont Inn & Suites in Conroe, testified that Sherber stayed at the Baymont on

numerous occasions, including February 11. On February 12, when Sherber did not return to the Baymont, Shedd found items in Sherber's hotel room, including a crack pipe.

Atkins could only testify to those occasions of which he had personal knowledge and the record does not indicate that Atkins's testimony was probative of whether Sherber traveled to Conroe on February 11 to effectuate a drug sale or did so on other occasions. *See* Tex. R. Evid. 602. Atkins's testimony was not highly probative of the question of Sherber's guilt; thus, we cannot say that Atkins's testimony was extraordinary in the sense that it was crucial to Sherber's defense. *See Routier v. State*, 112 S.W.3d 554, 591 (Tex. Crim. App. 2003); *see also Webb*, 766 S.W.2d at 245; *Emenhiser v. State*, 196 S.W.3d 915, 924 (Tex. App.—Fort Worth 2006, pet. ref'd). We overrule issue four.

Having overruled Sherber's four issues, we affirm the trial court's judgment.

AFFIRMED.

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STEVE McKEITHEN
Chief Justice

Submitted on September 8, 2011
Opinion Delivered September 21, 2011
Do Not Publish

Before McKeithen, C.J., Kreger and Horton, JJ.