In The
Court of Appeals
Seventh District of Texas at Amarillo

Nos. 07-15-00091-CR
07-15-00106-CR
07-15-00107-CR

EX PARTE DANIEL LEE AINSWORTH

Nos. 07-15-00205-CR
07-15-00206-CR
07-15-00207-CR

DANIEL LEE AINSWORTH, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

On Appeal from the County Court at Law No. 1
Potter County, Texas
Trial Court Nos. 141066, 141094, 141118; Honorable W. F. (Corky) Roberts, Presiding

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February 3, 2016

MEMORANDUM OPINION

Before CAMPBELL and HANCOCK and PIRTLE, JJ.

Appellant Daniel Lee Ainsworth was convicted by Potter County Court at Law Number One for the offenses of terroristic threat-family violence,[1] assault,[2] and interference with an emergency telephone call.[3] The court sentenced appellant in each case to 365 days' confinement in the county jail and a fine of $4,000. Prior to trial appellant sought habeas corpus relief in the trial court. His applications were denied.[4] Appellant filed notice of appeal from the denial of his habeas corpus application in each case and, after his convictions, appealed each judgment. We will address all six appeals in this opinion.[5] We will dismiss the three habeas corpus appeals as moot and affirm the three judgments of conviction.

[1] Appellant threatened to kill his live-in girlfriend, Patricia Peek in violation of Penal Code section 22.07(a)(2). TEX. PENAL CODE ANN. § 22.07(a)(2) (West 2011). The case carried trial court cause number 141,066.

[2] Appellant assaulted Peek "a member of the defendant's family or a member of the defendant's household or a person with whom the defendant had or had had a dating relationship," in violation of Penal Code section 22.01(a)(1). TEX. PENAL CODE ANN. § 22.01(a)(1) (West Supp. 2015). The case carried trial court cause number 141,094.

[3] Appellant destroyed Peek's cellphone that she otherwise would have used to call 9-1-1 for help, in violation of Penal Code section 42.062(a). TEX. PENAL CODE ANN. § 42.062(a) (West Supp. 2015). The case carried trial court cause number 141,118.

[4] At the February 3, 2015 habeas hearing, appellant appeared *pro se* with the assistance of stand-by counsel. The trial court signed written orders denying relief on March 23.

[5] *Ex parte Ainsworth,* Nos. 07-15-00091-CR, 07-15-00106-CR, 07-15-00107-CR (Tex. App.—Amarillo); *Ainsworth v. State,* Nos. 07-15-00205-CR, 07-15-00206-CR, and 07-15-00207-CR (Tex. App.—Amarillo).

Background

The merits of the three cases were jointly tried to the bench on April 27, 2015. Appellant refused court-appointed counsel and represented himself.

At trial, Peek's neighbor testified that on the night of February 27, 2014, she heard "bloodcurdling screams" and looked out her apartment window. She saw Peek sitting on the sidewalk. Appellant was "beating her over the head" with a "stick object." She called 9-1-1. The neighbor told police she wanted to remain anonymous because, "I really didn't want to get involved. I saw what I saw. I saw a woman getting beat." On cross-examination, when asked by appellant if she saw him strike Peek three or four times in the head with a stick, the neighbor responded, "I sure did. Several times." She further testified that she called 9-1-1 because appellant was using a weapon that could harm someone.

A disk containing the recording of a 9-1-1 call and a nonemergency call was admitted in evidence and played for the court. The calls were received on February 27, 2014, at 7:43 p.m. and 7:58 p.m., respectively. In the 9-1-1 call a female caller, who asked to remain anonymous, described the emergency as involving "her neighbors. It's a domestic disturbance. He's like beating the crap out of her. . . . Came up, hit her with a bat." The nonemergency call was made by a convenience store clerk, who described a female at the store with blood on her hands. The operator dispatched police and an ambulance to the store.

Three police officers testified to their investigation of the events. One testified he was dispatched to the convenience store. On arrival, he found Peek speaking with two paramedics near an ambulance. He described Peek as "visibly upset," with a "haggard appearance" and "very emotional." But according to the officer she did not appear intoxicated. Peek told the officer appellant was her live-in boyfriend and he assaulted her. When he drove Peek back to her apartment, he noticed a weed eater and small wooden stool lying on the ground outside her apartment's patio. On cross-examination, the officer testified that Peek told him appellant struck her head with a "long wooden pole."

Another officer said he spoke with Peek at her apartment. She told him the events began with an argument over an electric bill that escalated into a physical altercation in which appellant "punched and hit her with several items." The first officer testified Peek was emotional and distraught. It appeared to him that she had been crying. He observed "a small mark on her nose and a mark under her left eye." Responding to a cross-examination question concerning whether Peek was intoxicated, the first officer expressed the opinion that Peek, "recalled the events of that night repetitively, so I believe her to not be intoxicated."

A third officer testified that in the courtyard outside of Peek's apartment he also saw a weed eater and bar stool lying on the ground. Inside the apartment, the officer found appellant hiding in a closet.

Several photographs made by police were admitted. One depicted a cut on Peek's thumb. Another showed a cut on Peek's nose and a red mark beneath her left

eye. Still another showed a weed eater and small wooden stool lying on the ground near an apartment patio railing.

The State subpoenaed Peek for trial. On the stand, she gave a different version of the events of February 27. She testified she had "been with [appellant] for 16 years . . . . [P]retty much straight." She claimed limited recollection of the events, and alluded to alcoholism and intoxication as the cause of her hazy memory. But when asked directly by the court, she responded appellant had "never ever hit [her] before," and if he did "push" her it was because she struck him with a piece of lumber. She said any physical injuries shown in the photographs resulted from a fight with her daughter earlier on February 27. According to Peek, her cellphone was broken while fighting with her daughter. When the court asked why she told police a different story Peek answered that she was angry and added, "When I drink I don't know what I say." Without objection, Peek's written statement to police of February 27 was admitted into evidence. In it she stated:

> He came in and I was (sic) tried to explain my elec. bill was way too high and he said just paid it. I told him to leave and try to help him get things out and he started hitting me. He hit me in head hip head several times and chest with weed eater, bamboo stick and plyers (sic). He hit me in the back of the head with a wooden stick and it hurt. It knocked me down. He hit me with a pair of pliers and it hurt. I tried to run out of my patio door and jump the rail. He threw a stool and weed eater at me and it hit my hip and it caused me more pain. I tried to use my cell phone to call 911 and he took it and broke it. I went outside to try and scream for help. Daniel Lee Ainsworth is the man that did this to me. I ran to [a convenience store] without shoes to try and get help. He also hit me in the nose. He stated we would kill me.

The court found appellant guilty in each case. It assessed punishment and pronounced the noted sentences. The court appointed W. Brooks Barfield, Jr. to represent appellant on direct appeal in each case and notices of appeal were timely filed.

Meanwhile, appellant did not file a brief in his three habeas appeals. On our own motion, we abated the proceedings and remanded them for the trial court to determine whether appellant was entitled to court-appointed appellate counsel. The trial court appointed Mr. Barfield to represent appellant in the habeas appeals also.

Analysis

Mootness of Claim for Relief by Habeas Corpus

Appellant challenged the lawfulness of his pre-trial detention by habeas corpus. But his confinement is no longer based on the ground supporting his original detention. Rather he is confined under the judgments of conviction and sentences rendered in trial court case numbers 141,066, 141,094, and 141,118. We therefore find the legal issues raised in appellant's pretrial applications for writ of habeas corpus are moot. *Saucedo v. State,* 795 S.W.2d 8, 9 (Tex. App.—Houston [14th Dist.] 1990, no pet.). *See also Martinez v. State,* 826 S.W.2d 620, 620 (Tex. Crim. App. 1992) (an appeal challenging the denial of a pretrial application for writ of habeas corpus becomes moot when the appellant is convicted of the underlying offense before the appellate court rules on the writ). Appellant was free to raise any remaining issue that was not rendered moot in his direct appeals of the judgments. *See Hubbard v. State,* 841 S.W.2d 33, 33 (Tex. App.—Houston [14th Dist.] 1992, no pet.); *Saucedo,* 795 S.W.2d at 9. An application

for writ of habeas corpus is not a substitute for an appeal and will ordinarily "not be entertained where there is an adequate remedy at law." *Saucedo,* 795 S.W.2d at 9; *Ex parte J.I.L.,* No. 05-14-01490-CV, 2015 Tex. App. LEXIS 6400, at *4 (Tex. App.—Dallas June 24, 2015, pet. denied) (mem. op.). We dismiss appellate case numbers 07-15-00091-CR; 07-15-00106-CR; and 07-15-00107-CR as moot.

Direct Appeal of the Convictions

Sufficiency of the Evidence

By his first issue appellant argues the evidence was insufficient to support his three convictions.

In evaluating the sufficiency of the evidence supporting a conviction, our inquiry is "whether, after viewing the evidence in a light most favorable to the verdict, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Garcia v. State,* 367 S.W.3d 683, 686-87 (Tex. Crim. App. 2012) (citing *Jackson v. Virginia,* 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)). It is the role of the trier of fact to resolve conflicts in testimony, weigh evidence, and draw reasonable inferences from that evidence. *Hooper v. State,* 214 S.W.3d 9, 13 (Tex. Crim. App. 2007) (citing *Jackson,* 443 U.S. at 318-19 (1979)). The trier of fact is the sole judge of the credibility of witnesses and the weight, if any, to be given to their testimony. *Garcia,* 367 S.W.3d at 686-87; *Brooks v. State,* 323 S.W.3d 893, 899 (Tex. Crim. App. 2010).

A person commits the offense of terroristic threat "if he threatens to commit any offense involving violence to any person or property with intent to: . . . place any person

in fear of imminent serious bodily injury." TEX. PENAL CODE ANN. § 22.07(a)(2). The offense is a Class A misdemeanor if committed against "a member of the person's family, or household or otherwise constitutes family violence." *Id.* at § 22.07(c)(1).

A person commits the offense of assault if the person "intentionally, knowingly, or recklessly causes bodily injury to another . . ." TEX. PENAL CODE ANN. § 22.01(a)(1). The offense is a Class A misdemeanor. *Id.* at § 22.01(b).

A person commits the offense of interference with an emergency telephone call if he "knowingly prevents or interferes with another individual's ability to place an emergency telephone call or to request assistance in an emergency from a law enforcement agency, medical facility, or other agency or entity the primary purpose of which is to provide for the safety of individuals." TEX. PENAL CODE ANN. § 42.062(a). "Emergency" in the present context means "a condition or circumstance in which any individual is or is reasonably believed by the individual making a call or requesting assistance to be in fear of imminent assault . . . ." *Id.* at § 42.062(d). As charged here, the offense is a Class A misdemeanor. *Id.* at § 42.062(c).

The trial court heard Peek's neighbor testify she watched appellant strike Peek with a stick. The testifying police officers who encountered Peek on February 27 did not believe she was intoxicated. Peek's injuries were documented in photographs and described in testimony. Evidence that appellant assaulted Peek was corroborated by the recorded calls played for the court. Peek told the court she and appellant had been together for some sixteen years. In her written statement of February 27 Peek said appellant struck her with a wooden stick, broke her cellphone when she attempted to

call 9-1-1, and threatened to kill her. In its role as factfinder the trial court was free to believe some, all, or none of a witness's testimony. *Luera v. State,* No. 07-14-00111-CR, 2015 Tex. App. LEXIS 9732, at *5 (Tex. App.—Amarillo Sept. 16, 2015, pet. filed) (mem. op., not designated for publication) (citing *Lancon v. State,* 253 S.W.3d 699, 707 (Tex. Crim. App. 2008)). Thus it was not required to accept Peek's in-court testimony denying appellant committed any unlawful act. Despite Peek's testimony, we find a rational trier of fact could have found beyond a reasonable doubt that appellant committed each of the three charged offenses. Appellant's first issue is overruled.

Denial of Confrontation Right

Appellant's second issue arises from the testimony of Peek's neighbor. The record shows the neighbor testified for the State and was thoroughly cross-examined by appellant. After appellant completed his cross-examination the following colloquy occurred:

Appellant:	I have no more questions for her, Your Honor.
The Prosecutor:	No further questions from myself, Your Honor.
The Court:	May she be excused?
The Prosecutor:	She may, Your Honor.
The Court:	All right. Thank you, ma'am. You are excused. Let's take about a five-minute break.

When court reconvened after the break, appellant asked to recall the neighbor for further cross-examination. The court pointed out the witness had been excused. It nevertheless asked the prosecutor to see if the witness was outside the courtroom. The prosecutor did not locate the witness and trial resumed with the State's next witness.

In his second issue, appellant argues he was not able to completely cross-examine the neighbor. Thus, he continues, the trial court denied him "due process of law pursuant to the Sixth Amendment U.S. Constitution; Article 1 Section 10 Texas Constitution, and Article 1.05 Texas Code of Criminal Procedure." We overrule the issue.

Appellant told the court he had no further questions for the neighbor, and stood by mutely when the court asked if she could be excused. Moreover, he neither raised an objection nor made a further request when the court's effort to locate the witness failed. Appellant did not present to the trial court his contention his right of cross-examination was being hindered and obtain an adverse ruling. The complaint is thus not preserved for our review. TEX. R. APP. P. 33.1(a); *Wright v. State*, 28 S.W.3d 526, 536 (Tex. Crim. App. 2000) (Confrontation Clause argument waived by failing to object on that basis).

Conclusion

Having dismissed appellant's three habeas corpus appeals, and having overruled his two issues on the merits appeals, we affirm the judgments of the trial court.

James T. Campbell
Justice

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