TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-14-00353-CR

Kelly Kita Sheffield, Appellant

v.

The State of Texas, Appellee

FROM THE DISTRICT COURT OF COMAL COUNTY, 207TH JUDICIAL DISTRICT, NO. CR2011-475, HONORABLE R. BRUCE BOYER, JUDGE PRESIDING

M E M O R A N D U M O P I N I O N

The State charged appellant Kelly Kita Sheffield with tampering with physical evidence, evading arrest with a vehicle, and endangering a child. *See* Tex. Penal Code §§ 22.041, 37.09, 38.04. A jury found appellant guilty of evading arrest with a vehicle and endangering a child and acquitted her of tampering with physical evidence. The trial court assessed punishment for each offense at two years' confinement and a $1,000 fine and ordered that the sentences run consecutively. The trial court then suspended imposition of the sentences and placed appellant on community supervision for five years. *See id.* § 12.35.

In two issues, appellant challenges the sufficiency of the evidence to support each of her convictions. We will affirm the trial court's judgments.

BACKGROUND

The evidence in the record shows that, on March 17, 2011, Child Protective Services ("CPS") obtained a court order to remove appellant's ten-month-old daughter, L.S., from appellant's custody. CPS Investigator Gina Bushey testified that she obtained the order after she conducted an investigation in which she substantiated allegations "concerning drug use by the parents, domestic violence, mental instability, and threats of harm to self and to the child." Bushey testified that she requested assistance from the New Braunfels Police Department before she went to appellant's apartment to serve her with the court order and remove L.S., and Sergeant David Cantu arrived to assist. Cantu testified that he was not in uniform but was wearing a shirt with police-department insignia on the front and his badge hanging around his neck. He testified that he was driving an unmarked police-department-issued vehicle.

Bushey testified that upon arriving at the apartment complex, she observed appellant's car in the parking lot. Bushey then knocked on appellant's door several times without receiving a response. She testified that "it was very obvious that somebody was inside the apartment" because she could hear someone moving around inside. She then called appellant on the phone to tell her why she was there, and appellant told her she was at work in San Antonio and was not able to speak to her. Bushey testified that after multiple phone calls in which she explained to appellant that CPS had a court order to take L.S. into custody, appellant provided the name and address of her workplace, and Bushey sent police officers to that location. The officers went to the stated location and reported back to Bushey that the address and business did not exist. Bushey continued knocking on the door of appellant's apartment and calling appellant on the phone, but appellant would not

open the door or admit that she was home. While this ensued, Cantu remained standing outside of his car in the parking lot observing the front door of the apartment.

After at least an hour passed, Bushey and Cantu went to the apartment office to attempt to speak to an apartment manager. As they spoke to an apartment-maintenance employee, Bushey saw appellant leaving the parking lot in her car. She saw L.S.'s car seat in the back seat of the car as appellant left and assumed L.S. was in it. Bushey got into her car and began following appellant, while Cantu got into his car and followed Bushey. At that point, Cantu called for back up. Bushey testified that appellant eventually pulled into a campground, where she turned around and drove quickly back toward the exit. Cantu testified that he passed her as she turned around, and he then turned around and got directly behind her, activating the siren and emergency lights in his vehicle. Appellant continued driving back to her apartment while Cantu followed her with his lights and siren still activated. Back in the apartment complex parking lot, another officer arrived and drove directly behind Cantu. Cantu testified that he could see appellant putting items into her mouth and drinking water as she drove through the parking lot. The other officer used the loudspeaker in his patrol car to call out to appellant, stating, "New Braunfels Police Department, stop the vehicle." After he called out to her three times, she pulled into a parking space and stopped her car.

Officers found L.S. buckled into her car seat in the back of the car, and CPS took custody of her. Cantu testified that appellant's car smelled of marijuana and that he saw "sprinkles" of marijuana on her clothes and in her car. He also testified that the inside of her mouth looked green as he spoke with her, and she refused to spit out the substance in her mouth. Bushey and one of the police officers at the scene also testified that they saw loose pieces of marijuana on the

floorboard, driver's seat, and center console in appellant's car. One of the officers further testified that appellant smelled like marijuana and that he observed her tongue and the roof and sides of her mouth "caked" with what he believed to be marijuana. He testified that he tried to get appellant to spit out the substance, but she would not. The officer also testified that he found a prescription bottle for Xanax in the car that contained two different types of pills. He believed that both types of pills were Xanax but were different sizes. Another officer testified that he found a vitamin bottle in the car containing crumbs that tested positive for marijuana in a field test.

Police arrested appellant, and the State charged her with tampering with physical evidence, evading arrest with a vehicle, and endangering a child. A jury convicted her of evading arrest with a vehicle and endangering a child but acquitted her of tampering with physical evidence. The trial court assessed punishment for each offense at two years' confinement and a $1,000 fine and ordered that the sentences run consecutively. The trial court then suspended imposition of the sentences and placed appellant on community supervision for five years. This appeal followed.

DISCUSSION

In two issues, appellant argues that the evidence is insufficient to support her convictions. Specifically, regarding her conviction for evading arrest, she contends that the evidence is insufficient to prove that she knew Cantu was a law-enforcement officer. Regarding her conviction for endangering a child, she contends that the evidence is insufficient to prove that her conduct placed L.S. in imminent danger of death, bodily injury, or physical or mental impairment. We will address each issue below.

Standard of Review

When reviewing the sufficiency of the evidence to support a conviction, we consider all the evidence in the light most favorable to the verdict to determine whether, based on that evidence and the reasonable inferences that can be drawn from it, any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Temple v. State*, 390 S.W.3d 341, 360 (Tex. Crim. App. 2013). In our analysis, we assume that the trier of fact resolved conflicts in the testimony, weighed the evidence, and drew reasonable inferences in a manner that supports the verdict. *Jackson*, 443 U.S. at 319; *Isassi v. State*, 330 S.W.3d 633, 638 (Tex. Crim. App. 2010). We consider only whether the jury reached a rational decision. *See Isassi*, 330 S.W.3d at 638 ("Our role on appeal is restricted to guarding against the rare occurrence when a factfinder does not act rationally." (quoting *Laster v. State*, 275 S.W.3d 512, 517 (Tex. Crim. App. 2009))).

Legal sufficiency of the evidence is measured by the elements of the offense as defined by a hypothetically correct jury charge. *See Thomas v. State*, 444 S.W.3d 4, 8 (Tex. Crim. App. 2014) (citing *Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997)). "A hypothetically correct jury charge is one that 'accurately sets out the law, is authorized by the indictment, does not unnecessarily increase the State's burden of proof or unnecessarily restrict the State's theories of liability, and adequately describes the particular offense for which the defendant was tried.'" *Id.* (quoting *Malik*, 953 S.W.2d at 240). The law as authorized by the indictment means the statutory elements of the charged offense as modified by the factual details and legal theories contained in the indictment. *See Daugherty v. State*, 387 S.W.3d 654, 665 (Tex. Crim. App. 2013).

Evading Arrest

A person commits the offense of evading arrest if she "intentionally flees from a person [s]he knows is a peace officer or federal special investigator attempting lawfully to arrest or detain h[er]." Tex. Penal Code § 38.04(a). The indictment in this case alleged that:

> on or about the 17th day of March, 2011, [appellant] did then and there intentionally flee from Detective David Cantu, a person [appellant] knew to be a peace officer attempting to lawfully arrest or detain her, and [appellant] used a vehicle while she was in flight.

Appellant contends that the evidence is insufficient to prove that she knew Cantu was a peace officer. Specifically, she asserts that she did not come into contact with Cantu before he began following her, that he was not wearing a uniform, that he was in an unmarked police vehicle, and that he was not wearing a badge around his neck while he was following her.

However, considering all of the evidence in the record, we conclude that there is sufficient evidence to support the jury's conclusion that appellant knew Cantu was a police officer. The evidence shows that even before Cantu became involved in the situation, appellant was already aware of and actively disobeying a court order. A rational jury could have inferred from this evidence that appellant would expect the involvement of law enforcement as a consequence of her actions. *See Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007) (jurors may draw reasonable inferences from basic facts to ultimate facts). Specifically, Bushey testified that she knocked on appellant's door and called her on the phone multiple times over at least an hour-long time period, during which she informed appellant that she had a court order to take custody of L.S. Bushey further testified that appellant continually stated that she was at work in San Antonio, which was

confirmed as a fabrication when San Antonio police officers reported that the name and address of the workplace provided by appellant were non-existent and when appellant later drove out of the parking lot of her apartment complex after Bushey walked away from her apartment to go to the main office.

The evidence further shows that Cantu activated his siren and flashing lights behind appellant and that the other cars on both sides of the road pulled over and stopped in response to the siren and lights, while appellant did not. Cantu testified that the flashing lights in his car were red and blue and were located in the grille, front windshield, back tail lights, and back windshield of his car. A patrol-car video from the car of one of the officers who arrived at the scene as Cantu was turning into the apartment complex behind appellant shows that Cantu was in a large white truck with red and blue flashing lights activated in the front and back of the truck. In addition, the patrol-car video and the testimony of Cantu and the second officer show that appellant passed several open parking spaces as she drove through the parking lot with Cantu and the second officer directly behind her and that she continued passing several open parking spaces even after the second officer used a loudspeaker in his patrol car to command her to stop. The officer made three separate commands for her to stop before she finally pulled into a parking spot and stopped her car.

Further, the testimony of Bushey, Cantu, and other officers at the scene indicated that appellant was consuming marijuana while she drove. Specifically, the evidence includes Cantu's testimony that appellant's car smelled of marijuana, that he saw pieces of marijuana on her clothes and in her car, and that the inside of her mouth looked green; the testimony of Bushey and one of the police officers at the scene that they saw loose pieces of marijuana in appellant's car; the same

officer's testimony that he found a vitamin bottle in the car containing crumbs that tested positive for marijuana in a field test; and another officer's testimony that appellant smelled like marijuana, that he observed her tongue and the roof and sides of her mouth "caked" with what he believed to be marijuana, and that appellant refused to spit the substance out. Although the jury acquitted appellant on the charge of tampering with evidence and therefore concluded that the State did not prove the offense beyond a reasonable doubt, the jury still could have reasonably inferred from the evidence with respect to this evading offense that appellant was trying to consume all of the marijuana before she stopped her car because she knew Cantu was a police officer who could arrest her and charge her with possession of marijuana. *See Hooper*, 214 S.W.3d at 13.

Considering all of the evidence in the light most favorable to the verdict—including evidence that appellant knew CPS had a court order to take custody of L.S., that she lied to the CPS investigator and attempted to escape in a car with L.S., that a car then pulled behind her and activated its siren and flashing lights, that the other cars on both sides of the road pulled over for Cantu's car, that she continued driving past multiple open parking spots in the parking lot even after another officer identified himself and Cantu as police officers and commanded her to stop, and that she had consumed some amount of marijuana during her drive—and considering that jurors may draw reasonable inferences from basic facts to ultimate facts, we conclude that the jury could have rationally found beyond a reasonable doubt that appellant knew Cantu was a peace officer. *See Lide v. State*, No. 11-06-00110-CR, 2007 WL 2505631, at *2–3 (Tex. App.—Eastland Sept. 6, 2007, pet. ref'd) (not designated for publication) (evidence sufficient to prove evading arrest where defendant sped off in car after detectives in unmarked car and wearing plainclothes activated

red and blue flashing lights in car); *Bradden v. State*, Nos. 10-03-00346-CR, 10-03-00347-CR, 2004 WL 2830865, at *3 (Tex. App.—Waco Dec. 8, 2004, pet. ref'd) (mem. op., not designated for publication) (evidence sufficient to prove evading arrest where defendant drove down several streets and into dead-end street, abandoned car, and jumped over fence after officer in unmarked police vehicle activated lights and siren); *see also Hooper*, 214 S.W.3d at 13.

We reach this conclusion regardless of whether Cantu was wearing his badge around his neck while he was following appellant, which is disputed on appeal, and despite the fact that he was not wearing a police uniform because all of the other evidence in the record is sufficient to support the jury's verdict. *See Lide*, 2007 WL 2505631, at *2–3; *Bradden*, 2004 WL 2830865, at *3. Further, although appellant asserts that she pulled over as soon as the police officer made a command over his loudspeaker, the testimony at trial and the video of the stop admitted at trial indicate that appellant did not stop her car until after the officer's third command and after she had passed multiple open parking spaces. Appellant also represents in her brief that she stated on the patrol-car video that she did not know that the person behind her was a police officer. However, the video admitted at trial indicates that appellant stated that she did not stop because she did not know that the car behind her was an emergency vehicle, not that she did not know Cantu was a police officer, and even if she had specifically stated that she did not know he was a police officer, the jury is the sole judge of the credibility and weight of her statement. *See Lancon v. State*, 253 S.W.3d 699, 707 (Tex. Crim. App. 2008).

Because we conclude that the evidence is sufficient to support appellant's conviction for evading arrest with a vehicle, we overrule her first issue.

Endangering a Child

A person commits the offense of endangering a child if she "intentionally, knowingly, recklessly, or with criminal negligence, by act or omission, engages in conduct that places a child younger than 15 years in imminent danger of death, bodily injury, or physical or mental impairment." Tex. Penal Code § 22.041(c). The indictment alleged that:

> on or about the 17th day of March, 2011, [appellant] did then and there, intentionally, knowingly, recklessly, or with criminal negligence, by act or omission, engage in conduct that placed [L.S.], a child younger than 15 years, in imminent danger of death, bodily injury, or physical or mental impairment, to-wit: using a vehicle to evade arrest while [L.S.] was inside the vehicle.

"Imminent" means "ready to take place, near at hand, impending, hanging threateningly over one's head, menacingly near." *See Devine v. State*, 786 S.W.2d 268, 270 (Tex. Crim. App. 1989); *Millslagle v. State*, 81 S.W.3d 895, 898 (Tex. App.—Austin 2002, pet. ref'd). Appellant argues that her conviction for endangering a child should be overturned because the evidence is insufficient to prove that her conduct in driving in her car with L.S. placed L.S. in imminent danger of death, bodily injury, or physical or mental impairment. In support of her argument, appellant asserts that there is no evidence showing the exact speed she was driving and that the evidence shows that L.S. was uninjured and properly strapped into her car seat when police discovered her.

However, the evidence supporting the jury's guilty verdict is substantial. Bushey testified that she was driving at the posted speed limit of forty-five miles per hour when she was initially following appellant and that appellant was "pulling away from [her]." Bushey further testified that L.S. was only ten months old at the time of the incident. Cantu testified that, after he

turned on the siren and flashing lights in his car when he was following appellant into the campground, appellant drove off the pavement of a driveway onto a grassy area and then drove on the wrong side of a stop sign to turn into a roadway. He further testified that he was exceeding the posted speed limit of forty-five miles an hour as he followed her on the roadway. He also testified that he could see appellant putting items into her mouth and drinking water as she drove through the parking lot and that once she stopped her car and got out, he smelled marijuana in her car, saw pieces of marijuana on her clothes and in her car, and saw a green color inside her mouth. Bushey and one of the other police officers at the scene also testified that they saw loose pieces of marijuana in appellant's car. The same officer also testified that he found a vitamin bottle in the car containing crumbs that tested positive for marijuana in a field test. Another officer testified that appellant smelled like marijuana and that he observed her tongue and the roof and sides of her mouth "caked" with what he believed to be marijuana. He testified that he tried to get appellant to spit out the substance, but she would not. The officer further testified that he found a prescription bottle for Xanax in the car that contained two different sizes of pills, both of which he believed to be Xanax.

Given the evidence that L.S. was only a ten-month-old baby, that appellant fled from a CPS investigator and was being chased by a law-enforcement officer, that she was at times driving over the posted speed limit, that she drove off of pavement, onto grass, and on the wrong side of a stop sign while driving away from the police officer, that she was chewing and swallowing marijuana while she drove and therefore operating a car under the influence of an illegal drug, and that she was also in possession of pills in a prescription bottle for Xanax, we conclude that the evidence is sufficient to support the jury's verdict that appellant was guilty of endangering L.S.

See Garza v. State, No. 03-10-00451-CR, 2011 WL 3890369, at *2 (Tex. App.—Austin Aug. 31, 2011, no pet.) (mem. op., not designated for publication) (evidence sufficient to support conviction for endangering child where defendant evaded police in car with three-year-old son strapped into car seat and then abandoned car before it came to complete stop); *Head v. State*, No. 09-06-028-CR, 2006 WL 3742800, at *3 (Tex. App.—Beaumont Dec. 20, 2006, no pet.) (mem. op., not designated for publication) (evidence sufficient to prove child endangerment where defendant drove at excessive speed while intoxicated with children in car); *Tems v. State*, No. 06-04-00164-CR, 2005 WL 2076639, at *4 (Tex. App.—Texarkana Aug. 30, 2005, pet. ref'd) (mem. op., not designated for publication) (evidence sufficient to prove child endangerment where defendant drove at high rate of speed while evading police and with unrestrained eighteen-month-old child in car); *Rodriguez v. State*, 137 S.W.3d 758, 760, 761 (Tex. App.—Houston [1st Dist.] 2004, no pet.) (evidence sufficient to support conviction for endangering child even though defendant not at fault in car accident where defendant was driving while intoxicated with children in car).

Having concluded that the evidence is sufficient to support appellant's conviction for endangering a child, we overrule appellant's second issue.

CONCLUSION

Because we have overruled both of appellant's issues, we affirm the trial court's judgments of conviction.

Cindy Olson Bourland, Justice

Before Justices Puryear, Goodwin, and Bourland

Affirmed

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