IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. PD-1056-16

HAROLD MICHAEL MOORE, Appellant

v.

THE STATE OF TEXAS

ON APPELLANT'S PETITION FOR DISCRETIONARY REVIEW FROM THE SECOND COURT OF APPEALS TARRANT COUNTY

WALKER, J., filed a dissenting opinion

DISSENTING OPINION

The Court finds today that the rear-end collision by Appellant constitutes the use of a deadly weapon in the commission of felony DWI. Because I disagree with the Court's decision, because I believe the Court of Appeals correctly analyzed Appellant's argument, and because I would affirm the lower Court's decision, I must dissent.

The majority's analysis begins by disapproving of the Court of Appeals's opinion by stating: "We think that the court of appeals in this case focused too acutely on what was *not* in evidence and

not enough on the reasonable inferences a fact-finder could have drawn from what *was*." Frankly, the majority does precisely what it scolds the Court of Appeals for doing. In doing so, the majority acknowledges that "there are many things that the record in this case does not reveal," including how fast Appellant was driving, in what manner he was driving seconds before the collision, whether Appellant applied his brakes before the collision, or how many other cars were in the vicinity. Nevertheless, the majority finds that "[a] fact finder could readily find that there was an actual danger that the white SUV would be broadsided" and that "the danger of such a dire collision is evident." The majority surmises: "It does not amount to speculation for us to conclude that there was more than 'a hypothetical potential for danger if others had been present.'"

With all due respect, I must point out that the majority is engaging in exactly that: speculation about a hypothetical danger if, and supposing, others had been present. Undoubtedly, there were two other vehicles present: the white SUV and the BMW driven by the witness. Yet, the majority finds additional "others" to be present in order to find a danger of a broadside collision–namely, cross-traffic on Dove Road–although there is no mention anywhere in the record about any cross-traffic.[1] Even so, the majority finds that the rear-end collision placed the white SUV in "substantial danger." How could the white SUV be in "substantial danger" if there was not any cross-traffic, and there is certainly no evidence in the record establishing that there was cross-traffic.

This is totally speculative. The majority focuses "too acutely" on a danger of broadsiding that

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[1] There may have even been more vehicles present: in response to a question on cross-examination about if there were other cars, the driver of the BMW responded "Uh-huh." But this response is ambiguous at best. Assuming that it does not include the white SUV, the BMW, and Appellant's vehicle, it does not indicate anything about the other cars, such as how many there were, where they were located, or what direction they were headed, much less establish that the other cars were cross-traffic on Dove Road.

is not in evidence. It assumes, without pointing to *anything* in the record, that there was cross-traffic on Dove Road at the time of the collision. No witnesses testified about cross-traffic on Dove Road. The testimony, from the only fact witness, *only* revealed that she was stopped at a red light behind a white SUV and was struck from behind by Appellant's vehicle. She was pushed into the white SUV, which itself was pushed into the intersection. The white SUV then proceeded across the intersection and pulled over on the other side with its flashers on. Why would the driver of the white SUV choose to proceed across the intersection if, indeed, there had been cross-traffic? There was no testimony about exactly how far the white SUV was pushed into the intersection. It could have been six feet. It could have been six inches. There was no testimony about cross-traffic, no testimony about the honking of horns, and no testimony about other cars swerving out of the way of the white SUV. The record is silent. The testimony was that two vehicles were stopped. A third, Appellant's, hit the second. There are no others. While this does not prove that the majority's supposed broadside danger did not exist, neither does it prove that there *was* a broadside danger. Dove Road could have had no cross-traffic or it could have been closed to traffic on that date, at that time, for all we know.

What the evidence actually showed was that there was a rear-end collision. In addition, no one was seriously hurt, aside from bruises, scratches, soreness, and emotional problems. All that remains, and all that the majority seizes upon, is a hypothetical "substantial danger." The majority considers the facts of this case as showing more evidence of a deadly weapon than in *Mann v. State*, 13 S.W.3d 89 (Tex. Crim. App. 2000), but they ignore an important fact about *Mann*. In *Mann*, an officer actually testified about the potential for danger. *Id.* at 91. He stated that, given the circumstances of that case, the defendant's vehicle could have caused serious injury or death. *Id.* This opinion testimony was dispositive in the Court's decision when the Court found that the

testimony showed a collision under the circumstances of that case was capable of causing death or serious bodily injury. *Id.* at 92. There is no such testimony here from an officer, from the driver of the white SUV, or the only fact witness, the driver of the BMW. The majority assumes a "substantial danger," without any supporting evidence, that there was cross-traffic.

Finally, I note that the Court's decision today turns the burden of proving a deadly weapon on its head. Instead of requiring the State to put forth evidence that the white SUV really was in danger of being broadsided, perhaps by having the white SUV's driver come to testify, by having one of the responding officers testify about traffic conditions, or by simply asking the BMW driver herself what cross-traffic was like, the majority's approach here is tantamount to requiring Appellant to *disprove* the existence of any broadside danger. A deadly weapon must be proved, and that burden rests upon the State. We cannot require a defendant to disprove one.

In conclusion, the Court of Appeals correctly found no support in the record for the deadly weapon finding, and I would affirm the lower Court's decision. Because the Court does not do so, I respectfully dissent.

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