

Opinion issued March 17, 2011



In The
Court of Appeals
For The
First District of Texas

NO. 01-09-00973-CR

DANNY M. SHIPP, Appellant
V.
THE STATE OF TEXAS, Appellee

**On Appeal from the 177th District Court
Harris County, Texas
Trial Court Case No. 1236349**

MEMORANDUM OPINION

A jury found Danny M. Shipp guilty of the second degree felony offense of evading detention directly resulting in death. *See* TEX. PENAL CODE ANN. § 38.04 (West 2003). The trial court found that Shipp had used and exhibited a car as a

deadly weapon, found true one of the two allegations in the State's enhancement paragraphs, and assessed 30 years' confinement as punishment. Shipp argues on appeal that the charge submitted to the jury did not accurately reflect the applicable law and that the trial court erred by making its own deadly weapon finding instead of submitting the issue to the jury. He also contends the trial court erred by allowing the prosecutor and a witness to make statements regarding extraneous criminal activity in the area.

We affirm.

Background

Officer William Woodall noticed a suspicious car while patrolling in a residential neighborhood that had recently reported a series of burglaries. The SUV, driven by Shipp, was circling the neighborhood between 9:30 a.m. and 10:00 a.m. when most people were at work, had only one registration sticker, and had a temporary dealer's license plate instead of permanent metal plates. He followed the car and saw Shipp turn down a dead-end street and park in a driveway. Shipp left the driveway after a few minutes and ran a stop sign while speeding. In response, Officer Woodall turned on his lights and siren, which triggered his dashboard video camera to start recording. Shipp did not stop, but continued to speed through the residential neighborhood, running through speed bumps and several stop signs. Officer Woodall continued to follow him. Shipp made several

turns and ended up on Richmond—a slightly curving, six lane, commercial road with medians and a thirty-five mile per hour speed limit. On Richmond, Shipp continued to speed and pushed between two cars—rear-ending both several times and losing his front bumper in the process—in order to run through a red light.

Wesley Gustafson Jr., driving an SUV of a similar size to Shipp's, pulled out of a commercial parking lot across three lanes and was attempting to turn left onto Richmond. Shipp collided with Gustafson, forcing his SUV onto a median and knocking down a tree. Gustafson sustained extensive injuries and died at the hospital. Woodall arrested Shipp at the scene of the accident. The entire chase covered approximately 3.2 miles.

The State indicted Shipp with evading detention directly resulting in Gustafson's death. The indictment included an allegation that Shipp used and exhibited his car as a deadly weapon during the crime. The indictment also included two enhancement paragraphs alleging that Shipp had prior convictions for cocaine possession and attempted burglary.

At trial, the court limited the admission of statements relating to the prior burglaries in the residential area so as to avoid improperly linking Shipp to those crimes. The trial court allowed the parties to state that burglaries had occurred and that Shipp's car looked suspicious, but nothing that specifically linked Shipp's car to the burglaries. In its opening statement, the State mentioned that Officer

Woodall was on the lookout because of a “rash of burglaries in the area.” Shipp objected that the comment violated the previous ruling by the court. The trial court sustained the objection, instructed the jury to disregard the comment, and denied Shipp’s motion for mistrial.

Several eye-witnesses testified at trial. Officer Woodall testified to the string of robberies without objection by Shipp. He also testified to the reasons he found Shipp’s vehicle suspicious and the events during the course of the chase. The State admitted his dashboard video recording that depicted the entire chase. The drivers of the two cars Shipp pushed through testified as well as a pedestrian eyewitness who testified that he did not hear Shipp use his brakes before the accident or see Gustafson react in any way.

The State presented Officer Douglas Ertons as an accident reconstruction expert and the trial court admitted the reports and data generated in his investigation. Based upon his experience, calculations, and the data he collected at the scene and from the vehicles’ internal computers, he believed Shipp was traveling more than 58 miles per hour at the time of the crash and that he did not use his brakes until .5 seconds before the crash. He also testified that Gustafson failed to yield the right-of-way and could not say whether Gustafson had used his brakes. Officer Ertons identified the ultimate cause of the accident as Shipp’s excessive speed and reckless driving. The medical examiner testified that

Gustafson was 75 years old and had Vicodin in his system, though not enough to indicate impairment. At the close of the State's case in chief, Shipp moved for an instructed verdict arguing the State had not proved that Gustafson's death was a direct result of his flight from police. The trial court denied the motion.

At the charge conference, both Shipp and the State asked to include various portions of the Transportation Code relating to right-of-way and the duty of reasonable and prudent operation of a car. The trial court denied these requests. The State also requested that the deadly weapon allegation in the indictment be included in the charge because the jury could find the lesser-included offense of evading detention, without directly resulting in death, which in this instance would require use of a car. The trial court denied the request stating that the deadly weapon finding was a separate punishment paragraph like the prior conviction enhancement paragraphs. The charge submitted to the jury reads in relevant part:

A person commits the offense of evading detention if he intentionally flees from a person he knows is a peace officer attempting lawfully to detain him. It is a felony offense if:

- (1) the defendant uses a vehicle while the defendant is in flight; or
- (2) another suffers death as a direct result of an attempt by the officer from whom the defendant is fleeing to apprehend the defendant while the defendant is in flight.

The charge also defined the term "vehicle" with an included reference to the Occupations Code.

At closing argument, the State again referred to the prior burglaries in the area to explain why Officer Woodall considered Shipp's car suspicious. Shipp argued that the lesser-included offense of evading detention applied because Gustafson failed to yield the right-of-way and, therefore, his death was not the direct result of Shipp's flight. The jury found Shipp guilty of evading detention causing death.

The parties presented punishment evidence to the trial court with the State re-offering all of the evidence from the guilt stage of trial. Several law enforcement officers and a burglary complainant testified to the prior burglaries in the neighborhood and to evidence linking Shipp to those burglaries. Gustafson's son testified as to the effect of the crime on his family. The trial court then granted an instructed verdict as to one of the allegations in one of the two enhancement paragraphs. The trial court assessed thirty years' confinement as punishment. Shipp objected on double jeopardy grounds to the trial court's making an additional deadly weapon finding, arguing that the evading arrest statute already encompassed the use of a vehicle to enhance the crime to a second degree felony. The trial court overruled the objection and made the deadly weapon finding.

Jury Charge Error

In his third issue, Shipp argues the trial court submitted a fatally defective jury charge because the question and instruction involving a "vehicle" did not

follow the statutory provision charged in the indictment and, therefore, he was never indicted for the lesser offense of evading arrest by use of a vehicle.¹ The State responds that the trial court may include a lesser-included offense in the jury charge and evading detention by use of a vehicle, without directly resulting in death, constitutes a lesser-included offense of evading detention directly resulting in death.

I. Standard of Review

In determining whether there is reversible error in the jury charge, we first consider whether error exists, and if error exists, we then determine whether the defendant was harmed. *Middleton v. State*, 125 S.W.3d 450, 453 (Tex. Crim. App. 2003); *Abdnor v. State*, 871 S.W.2d 726, 731–32 (Tex. Crim. App. 1994). If appellant did not make a proper objection at trial, appellant “will obtain a reversal only if the error was so egregiously harmful that he has not had a fair and impartial trial.” *See Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1984). Under an egregious harm analysis, a reviewing court examines “the entire jury charge, the

¹ Shipp also asserts that the definition of “vehicle” included in the charge improperly referred to the Occupations Code instead of the Transportation Code. Section 38.04(c) of the Penal Code states the term “vehicle” has the same definition as under section 541.201 of the Transportation Code. *See* TEX PENAL CODE ANN. § 38.04(c). The definition of “vehicle” in the jury charge matches the definition in the Transportation Code, in effect since 2003, including the reference to the Occupations Code as providing the definition for manufactured housing included within the term “vehicle.” *See* TEX. TRANSP. CODE ANN. § 541.201(23) (West Supp. 2010). The definition therefore tracks the relevant statute.

state of the evidence, including the contested issues and weight of the probative evidence, the arguments of counsel, and any other relevant information revealed by the record of the trial as a whole.” *Warner v. State*, 245 S.W.3d 458, 461 (Tex. Crim. App. 2008). “Errors that result in egregious harm are those that affect the very basis of the case, deprive the defendant of a valuable right, or vitally affect a defensive theory.” *Id.* at 461–62.

Shipp asserts this issue should not have been included in the charge because Shipp was not indicted for this offense. The State responds that the charge was not in error for including the term “vehicle” because that term relates to the lesser-included offense of evading arrest by use of a vehicle, without directly resulting in death, and a court may include a lesser-included offense in the jury charge.

II. Egregious Harm

Assuming without deciding the trial court erred in including the lesser offense of evading arrest by use of a vehicle, Shipp did not object to the inclusion, and, therefore, we must determine whether the error constitutes egregious harm. *See Almanza*, 686 S.W.2d at 171. We examine the entire jury charge, the state of the evidence, the arguments of counsel, and any other relevant information in the record to determine if the error affects the very basis of the case, deprived Shipp of a valuable right or vitally affected a defensive theory. *Warner*, 245 S.W.3d at 461–62.

The charge defined evading arrest and then distinguished that the crime is a felony offense under two circumstances, “(1) the defendant uses a vehicle while the defendant is in flight; or (2) another suffers death as a direct result.” The questions submitted to the jury gave the jury three choices in disposing of the case: find Shipp not guilty, find him guilty of evading detention and another suffered death as a direct result, or find him guilty simply of evading detention. The lesser offense of evading detention by use of a vehicle without directly resulting in death provided the jury with a middle ground between not guilty and guilty of evading causing death. The jury ultimately found the greater offense, but the lesser offense gave them an option other than finding Shipp not guilty.

The inclusion of the lesser offense comports with Shipp’s defensive theory at trial. The State admitted into evidence the video of the entire chase—clearly showing Shipp did not stop for Officer Woodall—and the testimony of several eye-witnesses who testified about Shipp’s driving immediately before and at the time of the accident. The majority of the defensive evidence presented and counsel’s argument advanced the position that Shipp did not stop, but Gustafson’s death was caused by an unrelated traffic accident. On cross-examination by Shipp’s counsel, witnesses admitted that drivers often sped on Richmond, that the road curved slightly and trees blocked a clear view of the road, that Gustafson did not appear to use his brakes, and that traffic on Richmond had the right-of-way

over traffic turning onto the road from private drives. Shipp also emphasized through the medical examiner that Gustafson was 75 years old and had Vicodin in his system.

During argument, Shipp's counsel continued to assert the theory that Shipp's evading arrest did not cause the traffic accident. He stated, "And one of the most dangerous things you ever do is make a left-hand turn across three lanes of traffic," referring to Gustafson's left turn onto Richmond. He told the jury that anyone in the court room could have been driving Shipp's car and had the same accident. He expressly asked the jury to hold Shipp responsible under the lesser offense of evading arrest by saying:

He's guilty of evading arrest. Is this a simple evading arrest case? No. It's an evading arrest case where someone died. But it's not as a direct result of him evading arrest . . . and I think when you look at this carefully you're going to understand that you have to find him guilty, but only of the offense of evading detention because that's the only just verdict in this case. I know that the intention that you want is to hold him responsible, and you are holding him responsible when you find him guilty of the lesser offense. And he is going to have to answer for the fact that his actions brought about a circumstance where a person died. But he didn't cause that circumstance.

Given the state of the evidence and Shipp's defensive theories, the inclusion of the lesser offense would have helped him rather than caused egregious harm. Shipp's counsel incorporated the lesser offense into his theory of the case through witnesses and argument focused on separating Shipp's evading detention from the cause of the accident. We cannot say, based on the entire record, that the inclusion

of the jury question and instruction on evading arrest by use of a vehicle caused Shipp egregious harm.

We overrule Shipp's third issue.

Deadly Weapon Finding

In his fourth and fifth issues, Shipp argues that the trial court erred in making a finding and entering judgment on the deadly weapon allegation. Shipp asserts that a deadly weapon question should have been submitted to the jury, who in their verdict had already enhanced the felony offense to a second degree felony offense.

The trial court instructed the jury on two offenses, the second degree felony of evading arrest directly resulting in death and the third degree felony of evading arrest by use of a vehicle. The offense the jury found Shipp guilty of committing, the second degree felony, does not require the use of a vehicle or any deadly weapon. A second degree felony could occur, for example, if the officer was hit by a car and killed while pursuing a suspect on foot running from the scene. For the crime that the jury found Shipp guilty of committing, the jury did not need an instruction on the use of a deadly weapon. The use of a deadly weapon was not a necessary element of the offense.

When the trial court is the trier of fact at punishment, "and he has heard evidence on the issue, he has the authority to make an affirmative finding as to the

use or exhibition of a deadly weapon if the jury has not decided the matter.” *Fann v. State*, 702 S.W.2d 602, 603 (Tex. Crim. App. 1985) (op. on reh’g); *Sullivan v. State*, 248 S.W.3d 746, 752 (Tex. App.—Houston [1st Dist.] 2008, no pet.) (holding “deadly weapon affirmative finding by the trial court was legally permissible,” where trial court was fact finder at punishment phase and jury did not decide deadly weapon issue). Here, Shipp elected to have the trial court assess punishment and the jury made no finding with regard to Shipp’s use of his car as a deadly weapon. The trial court heard evidence on Shipp’s reckless driving, including video and eye-witness accounts of excessive speeding and ramming through two cars in order to run a red light at an intersection. The trial court, therefore, was entitled to make a deadly weapon finding and enter judgment on that finding. *See Sullivan*, 248 S.W.3d at 752.²

² Shipp objected at the time of the trial court’s deadly weapon finding that the statute enhanced the offense with the use of a vehicle so double jeopardy would prevent the trial court from enhancing the offense a second time on the same fact—the use of a car as a deadly weapon. Shipp cited no cases in support of his double enhancement argument and his objection at trial was based on a faulty reading of the evading arrest or detention statute. Shipp’s counsel stated in his objection, “The elements of the offense are driving a vehicle and causing the death,” referring to the second degree offense the jury had already found Shipp guilty of committing. The second degree offense of evading arrest or detention causing death does not require the use of a vehicle, but only requires proof that another suffered death as a direct result of the attempt to apprehend the defendant while in flight. *See* TEX. PENAL CODE ANN. § 38.04(3) (West 2003). The state jail felony requires proof that the defendant used the vehicle and had *not* been previously convicted. *See* TEX. PENAL CODE ANN. § 38.04(b)(1). The third degree felony can be satisfied by the use of a vehicle and the showing of a previous conviction for evading arrest or detention. *See* TEX. PENAL CODE ANN. §

We overrule Shipp's fourth and fifth issues.

Extraneous Burglary Statements

In his first and second issues, Shipp argues the trial court erred by allowing statements and testimony about extraneous burglaries in the area at the time of the offense. Shipp asserts that the trial court should have granted his motion for mistrial after the prosecutor's statement that Officer Woodall, "was on the lookout because there had been a rash of burglaries in the area." Shipp also asserts the trial court erred by allowing Officer Woodall to make similar statements during his testimony.

I. Preservation of Error

To preserve error for appellate review the complaining party must timely and specifically object to the evidence and obtain a ruling. *See* TEX. R. APP. P. 33.1(a); *see also* TEX. R. EVID. 103(a)(1). Error is waived if the complaining party allows the evidence to be introduced without objection. *Griggs v. State*, 213 S.W.3d 923, 927 (Tex. Crim. App. 2007). A motion in limine does not preserve error for appeal. *Martinez v. State*, 98 S.W.3d 189, 193 (Tex. Crim. App. 2003).

Officer Woodall testified that a string of burglaries had been reported in the area and that he was on the lookout for any suspicious vehicles. Shipp did not object to Officer Woodall's trial testimony and his motion in limine did not

38.04(b)(2)(A). Otherwise the use of a vehicle is not required by the statute and the trial court did not enhance the offense twice on the same facts.

preserve error for appeal. *See id.* In fact, the State requested a bench conference before eliciting the testimony in question, which allowed Shipp ample opportunity to object. Without an objection Shipp failed to preserve error on the admission of Officer Woodall's testimony.

We overrule Shipp's second issue.

II. Motion for Mistrial

Shipp preserved error as to the prosecutor's remarks in opening statement by objecting and requesting a mistrial. The trial court denied the motion for mistrial, but instructed the jury to disregard the prosecutor's statements regarding a "rash of burglaries."

We review a trial court's denial of a motion for mistrial for abuse of discretion. *Simpson v. State*, 119 S.W.3d 262, 272 (Tex. Crim. App. 2003). "A mistrial is a device used to halt trial proceedings when error is so prejudicial that expenditure of further time and expense would be wasteful and futile." *Ladd v. State*, 3 S.W.3d 547, 567 (Tex. Crim. App. 1999). We must examine the particular facts of the case to determine whether a given error necessitates a mistrial. *Id.* As a general rule, an instruction by the trial court for the jury to disregard the argument sufficiently cures any error. *Tompkins v. State*, 774 S.W.2d 195, 218 (Tex. Crim. App. 1987), *aff'd* 490 U.S. 754, 754, 109 S. Ct. 2180, 2180 (1989).

The State's reference to prior burglaries in its opening statement was a

passing reference to explain the reason Officer Woodall followed Shipp before attempting to stop him. Nothing in the single statement linked Shipp to the extraneous burglary offenses. The State did not mention that Officer Woodall had been told to lookout for a vehicle matching the description of Shipp's car or that evidence linking Shipp directly to the burglaries was found in his car after the accident. The State also did not address Shipp's statement, admitted during the punishment stage, that "I'm not a murderer, I'm a burglar." Given the brief reference, the lack of connection to Shipp, and the immediate instruction, we cannot say the trial court abused its discretion in denying Shipp's motion for mistrial.

We overrule Shipp's first issue.

Conclusion

We hold that any error in the charge submitted to the jury does not amount to egregious harm. We also hold the trial court did not err in making and entering judgment on a deadly weapon finding or in its conduct with regard to the argument and testimony on the prior burglaries. We affirm the judgment of the trial court.

Harvey Brown
Justice

Panel consists of Justices Jennings, Higley, and Brown.

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