Affirmed and Memorandum Opinion filed February 4, 2010.

In The

Fourteenth Court of Appeals

NO. 14-08-00154-CR

RYAN CLAY, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Criminal Court at Law No. 4
Harris County, Texas
Trial Court Cause No. 1487007

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

Appellant, Ryan Clay, appeals his conviction for evading detention. In five issues, he contends the evidence was legally and factually insufficient to support the conviction and the trial court erred by denying his motion for directed verdict, excluding certain testimony, and denying his motion for new trial. Because all dispositive issues are settled in law, we issue this memorandum opinion and affirm. *See* Tex. R. App. P. 47.4.

I. BACKGROUND

Houston Police Officers Brian Chebret, James Racus, and William Bearden testified at appellant's trial. According to their testimony, on the night of October 19, 2007, Officer Chebret was dispatched to a call concerning the robbery of a restaurant. As he drove toward the restaurant, the dispatcher reported that the "suspect" was male and left in a brown, four-door Ford Taurus but no license-plate information was available. When Officer Chebret approached the area of the restaurant, several witnesses flagged him down, told him some males had robbed the restaurant, and indicated the direction in which the suspects fled. Officer Chebret drove toward the area indicated by the witnesses and saw the suspects' car.

Officer Chebret pulled behind the car and activated his lights and siren. The driver refused to pull over, weaved through traffic, and ran some red lights. Officer Racus, who was off duty but in uniform and driving a police vehicle, learned of the robbery from Officer Chebret and joined the chase. After a three-to-four mile pursuit, the driver went into a ditch, disabling the car. The driver and appellant, who was in the passenger seat, both immediately exited the car and ran in opposite directions. On foot, Officer Chebret chased and eventually caught the driver. When appellant exited the car, Officer Racus tried to cut off appellant's path of escape, using his police vehicle, but appellant leaped over the hood of the vehicle.

On foot, Officer Racus chased appellant through a dark, grassy field. After dropping his flash light, Officer Racus depended on the LED light on his taser which projected illumination for only a few feet. Although Officer Racus did not identify himself as a police officer during the chase, he yelled three times for appellant to stop, and appellant looked back several times. Officer Racus ultimately lost sight of appellant. Officer Racus then established a "perimeter," which involved summoning other officers to block appellant's escape, and awaited arrival of a K-9 unit. Officer Bearden of the K-9 unit arrived and went to the last place appellant was seen. The dog followed the scent trail to a house with a pond in the yard where appellant was found and arrested.

At trial, Officer Chebret identified appellant as the person who exited the vehicle from the passenger side. Officer Bearden identified appellant as the person pulled from the pond and arrested. Officer Racus could not remember the passenger's physical features or identify him in court but was sure the person pulled from the pond was the man he chased that night. The officers later learned that appellant was not involved in the robbery of the restaurant.

A jury convicted appellant of evading detention, and the trial court sentenced him to 180 days' confinement. Appellant subsequently filed a motion for new trial which the trial court denied.

II. SUFFICIENCY OF THE EVIDENCE

We will consider together appellant's first, second, and third issues, in which he challenges legal and factual sufficiency of the evidence to support his conviction and the trial court's denial of his motion for directed verdict.

A. Standard of Review

We treat an appeal from the denial of a motion for directed verdict as a challenge to legal sufficiency of the evidence to convict. *Bargas v. State*, 252 S.W.3d 876, 886 (Tex. App.—Houston [14th Dist.] 2008, no pet.) (citing *Williams v. State*, 937 S.W.2d 479, 482 (Tex. Crim. App. 1996)). In considering a legal-sufficiency challenge, we review all evidence in the light most favorable to the verdict to determine whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Salinas v. State*, 163 S.W.3d 734, 737 (Tex. Crim. App. 2005). The jury is the sole judge of the credibility of witnesses and is free to believe or disbelieve all or part of a witness's testimony. *Sharp v. State*, 707 S.W.2d 611, 614 (Tex. Crim. App. 1986). We ensure only that the jury reached a rational decision and do not reevaluate the weight and credibility of the evidence. *Muniz v. State*, 851 S.W.2d 238, 246 (Tex. Crim. App. 1993).

In examining a factual-sufficiency challenge, we review all evidence in a neutral light and set aside the verdict only if (1) the evidence is so weak that the verdict seems clearly wrong or manifestly unjust or (2) the verdict is against the great weight and preponderance of the evidence. *See Marshall v. State*, 210 S.W.3d 618, 625 (Tex. Crim. App. 2006); *Watson v. State*, 204 S.W.3d 404, 414–15 (Tex. Crim. App. 2006); *Cain v. State*, 958 S.W.2d 404, 407 (Tex. Crim. App. 1997). Although we may substitute our judgment for the jury's when considering credibility and weight determinations, we may do so only to a very limited degree and must still afford due deference to the jury's determinations. *See Marshall*, 210 S.W.3d at 625.

B. Analysis

A person commits the offense of evading arrest or detention "if he intentionally flees from a person he knows is a peace officer attempting lawfully to arrest or detain him." Tex. Penal Code Ann. § 38.04 (Vernon 2003).

Initially, we note that appellant suggests no arrest or detention had occurred when he evaded the officers. However, the elements of the offense do not require that an actual arrest or detention have occurred when the defendant flees from the peace officer, but only that the officer is *attempting* an arrest or detention. *See id.* In this case, the entire gist of the officers' testimony was that an officer was *attempting* to detain appellant.

Appellant also argues the attempted detention was not lawful. *See id.* He cites *Davis v. State* in which the court stated that "a stop is justified if the officer, based upon specific and articulable facts, reasonably surmises the detained person may be associated with a crime." 829 S.W.2d 218, 219 (Tex. Crim. App. 1992) (citing *Terry v. Ohio*, 392 U.S. 1 (1968)). Appellant emphasizes Officer Racus's testimony that, during the chase, he did not have information regarding appellant's involvement, if any, in the robbery, but had to assume "whether right or wrong" he was involved and detain him to obtain further information. However, as the officers' testimony also reflected, appellant was an occupant of the car which, according to witnesses, contained the robbery suspects, the

driver led the police on a chase, and appellant then fled on foot. Moreover, Officer Racus testified that, when appellant "bailed" out of the car, Officer Racus thought he was a "lookout," getaway driver, or some form of accomplice. Accordingly, the jury could have rationally concluded that, at least when Officer Racus chased appellant on foot, he reasonably surmised appellant may have been associated with the robbery.

Appellant also suggests the evidence was insufficient to prove he knew Racus was a police officer and was attempting to detain him. Appellant emphasizes Officer Racus's testimony that he did not identify himself as a police officer and the light on his taser provided limited illumination. However, the jury could have rationally concluded appellant knew Racus was a police officer and was attempting to detain him based on the following: the officers were in two marked police vehicles, at least one of which had lights and siren activated, when they chased the suspects' car; when appellant exited the car, Officer Racus tried to cut off his escape path using a marked vehicle; appellant jumped over this marked vehicle to flee on foot; while chasing appellant, Officer Racus was in uniform and yelled three times for him to stop; and appellant looked back several times.

In sum, viewing the evidence in the light most favorable to the verdict, we conclude a rational jury could have found beyond a reasonable doubt that appellant committed the offense of evading detention. Additionally, viewed in a neutral light, the evidence that appellant evaded detention is not so weak that the verdict seems clearly wrong or manifestly unjust and the verdict is not contrary to the great weight and preponderance of the evidence. Accordingly, we overrule appellant's first, second, and third issues.

III. MOTION FOR NEW TRIAL AND EXCLUSION OF EVIDENCE

In his fourth and fifth issues, appellant contends the trial court erred by denying his motion for new trial and excluding Houston Police Officer Troy Triplett's testimony regarding a statement made by appellant.

During trial, appellant called Officer Triplett as a witness. Appellant first informed the trial court Officer Triplett would testify he obtained appellant's statement the day after the incident and appellant claimed he did not run from the police officers but from a man with a gun who had earlier entered the car. The State objected that the statement was hearsay and a manner to "back door" appellant's exculpatory testimony without his actually testifying. At that point, appellant first argued the statement was admissible as "res gestae." Then, he made a more specific argument that it was admissible to show appellant's state of mind and thus was not hearsay or qualified as an exception to the hearsay rule. The trial court excluded the statement as both a method to "back door" appellant's testimony and "pure hearsay."

Appellant then presented Officer Triplett's testimony through a question-and-answer offer of proof. Officer Triplett confirmed that appellant stated he did not run from the officers but was "running for his life" because the other person had a gun and ordered appellant to exit the car and run. Appellant then reurged his earlier positions and also argued the purpose of the statement was not self-serving and "it's protected under the guidelines of Miranda." The trial court reiterated its ruling excluding any testimony regarding the contents of appellant's statement.

In his written motion for new trial, appellant suggested the court erred by excluding this testimony because it was admissible under the rule of optional completeness. *See* Tex. R. Evid. 107. At a hearing on the motion, appellant argued that his statement was admissible under the excited-utterance exception to the hearsay rule and offered further testimony from Officer Triplett to support this contention. *See* Tex. R. Evid. 803(2). The court denied the motion for new trial.

On appeal, appellant argues the statement was admissible under the excited-utterance exception and the rule of optional completeness. It is unclear whether appellant challenges separately the trial court's exclusion of the testimony during trial and its denial of the motion for new trial. To the extent appellant challenges exclusion of the testimony during trial, he failed to preserve error. To preserve an issue for appellate

review, a party must make a timely objection or request to the trial court, sufficiently stating the specific grounds for the requested ruling, unless apparent from the context, and obtain an adverse ruling. *See* Tex. R. App. P. 33.1(a); *Wilson v. State*, 71 S.W.3d 346, 349 (Tex. Crim. App. 2002). Moreover, the objection or request at trial must comport with the complaint presented on appeal. *Wilson*, 71 S.W.3d at 349. With respect to a ruling excluding evidence, the proponent must have made the substance of the evidence known to the trial court through an offer of proof, unless the substance was apparent from the context in which the questions were asked. Tex. R. Evid. 103(a)(2).

During trial, appellant never contended his statement was admissible under the excited-utterance exception or the rule of optional completeness. His "res gestae" argument was not sufficiently specific to preserve error on the excited-utterance contention. *See Fischer v. State*, 252 S.W.3d 375, 379–80 (Tex. Crim. App. 2008) (recognizing "res gestae" is "an imprecise Latin legalese term" which describes several different types of "unreflective statements" which are hearsay exceptions under the Rules of Evidence). Further, appellant's excited-utterance and rule-of-optional-completeness arguments relative to his motion for new trial were not timely with respect to the court's ruling during trial. A party complaining about exclusion of evidence must make his offer of proof "before the court's charge is read to the jury." Tex. R. Evid. 103(b); *see Neal v. State*, No. 14-07-00913-CR, 2009 WL 585965, at *4 (Tex. App.—Houston [14th Dist.] Mar 10, 2009, pet. ref'd) (mem. op., not designated for publication). Accordingly, appellant waived error regarding exclusion of the testimony on these grounds during trial.

Appellant primarily seems to challenge the trial court's denial of his motion for new trial. We review a trial court's denial of a defendant's motion for new trial under an abuse-of-discretion standard. *Webb v. State*, 232 S.W.3d 109, 112 (Tex. Crim. App. 2007).

We need not address appellant's excited-utterance or rule-of-optional-completeness contentions. Even if the statement were admissible on either of these grounds, appellant was not entitled to a new trial. Appellant cites no authority

demonstrating a trial court abuses its discretion by refusing to grant a new trial so that a defendant may establish evidence is admissible on a ground he could have, but did not, raise in his original trial. To the contrary, if a trial court exercises its discretion and *grants* a motion for new trial, the defendant, as prevailing party, need not have preserved, during trial, the error of which he complained in the post-trial motion. *State v. Herndon*, 215 S.W.3d 901, 909 (Tex. Crim. App. 2007). However, if the trial court *denies* a motion for new trial, "the defendant, as the losing party, must have preserved that same error before he may claim it as a basis for reversing the trial judge once he moves into the appellate court." *Id.* Therefore, a trial court may, but need not, grant a motion for new trial on the basis of unpreserved trial error if the error is sufficiently serious that it has affected the defendant's substantial rights. *Id.* at 910.

Accordingly, because appellant failed to preserve error during trial on the excited-utterance and rule-of-optional-completeness complaints, the trial court did not abuse its discretion by denying his motion for new trial. *See Courson v. State*, 160 S.W.3d 125, 129 (Tex. App.—Fort Worth 2005, no pet.) (holding trial court did not abuse its discretion by denying motion for new trial complaining admission of evidence violated confrontation clause because appellant failed to raise contention during trial); *see also Herndon*, 215 S.W.3d at 905 n.4 (recognizing trial court's ruling on a motion for new trial will be upheld if correct on any applicable legal theory). We overrule appellant's fourth and fifth issues.

We affirm the trial court's judgment.

/s/ Charles W. Seymore
Justice

Panel consists of Chief Justice Hedges and Justices Seymore and Sullivan.
Do Not Publish — Tex. R. App. P. 47.2(b).