Affirmed and Memorandum Opinion filed February 15, 2011.

In The

Fourteenth Court of Appeals

NO. 14-08-00614-CR

TONY DARRELL BROWN, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 3rd District Court
Henderson County, Texas
Trial Court Cause No. C-15,252

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

A jury convicted appellant, Tony Darrell Brown, of aggravated assault on a public servant. He elected to have the trial court assess punishment and pleaded "true" to an enhancement paragraph in which the State alleged a prior felony conviction. The court sentenced appellant to thirty years' confinement and entered a deadly weapon finding in the judgment. In seven issues, appellant contends he was not arraigned and entered no plea outside the jury's presence, the jury made no deadly weapon finding, the evidence is legally and factually insufficient to prove he used or exhibited a deadly weapon, the trial court never admonished him on the range of punishment if the enhancement allegation

were found "true," the court made no oral finding on the enhancement paragraph, and the court considered an incorrect range of punishment. We affirm.[1]

ARRAIGNMENT AND PLEA

In his first issue, appellant contends we must reverse his conviction because he was not arraigned and entered no plea on guilt or innocence outside the jury's presence. *See* Tex. Code Crim. Proc. Ann. art. 26.01 (West 2009) (requiring arraignment after indictment in all felony cases); Tex. Code Crim. Proc. Ann. art. 26.02 (West 2009) (stating purpose of arraignment is "fixing" defendant's identity and hearing his plea). However, an entry in the trial court's docket sheet indicates appellant was arraigned and pleaded not guilty approximately a year before trial. Even if this entry were insufficient to establish such proceeding occurred, we must presume a defendant was arraigned and pleaded to the indictment unless these matters were disputed in the trial court or the record affirmatively shows the contrary. Tex. R. App. P. 44.2(c)(3), (4). Appellant does not cite any portion of the record reflecting a dispute in the trial court on whether he was arraigned and entered a plea, and the record contains no affirmative showing he was neither arraigned nor entered a plea. Accordingly, we overrule his first issue.

DEADLY WEAPON FINDING

Appellant's second, third, and fourth issues concern the allegation that he used or exhibited a deadly weapon during commission of the offense.

In his second issue, appellant argues the trial court improperly entered a deadly weapon finding in the judgment because the jury made no such finding. Appellant suggests there was no such finding because the jury was not presented with any special issue on use or exhibition of a deadly weapon. However, a jury's affirmative answer to a special issue is not the only basis on which a trial court may enter a deadly weapon finding. *See Polk v. State*, 693 S.W.2d 391, 396 (Tex. Crim. App. 1985); *Sanders v.*

[1] This case was transferred to our court from the Tyler Court of Appeals; therefore, we must decide the case in accordance with its precedent if our decision would be otherwise inconsistent with its precedent. *See* Tex. R. App. P. 41.3.

State, 25 S.W.3d 854, 856 (Tex. App.—Houston [14th Dist.] 2000), *pet. dism'd, improvidently granted*, 56 S.W.3d 52 (Tex. Crim. App. 2001). In a jury trial, a trial court is authorized to enter a deadly weapon affirmative finding, when, among other situations, the jury has found guilt "as charged in the indictment" and the deadly weapon "has been *specifically* pled *as such* (using the nomenclature "deadly weapon") in the indictment." *Polk*, 693 S.W.2d at 396; *see Sanders*, 25 S.W.3d at 856.

In the present case, the jury found appellant guilty of aggravated assault on a public servant "as charged in the indictment," and the motor vehicle was specifically pleaded as a "deadly weapon" in the indictment. Therefore, the trial court properly entered a deadly weapon finding. We overrule appellant's second issue.

In his third and fourth issues, appellant contends the evidence is legally and factually insufficient to support the jury's finding that he used or exhibited a deadly weapon during commission of the offense. While this appeal was pending, five judges on the Texas Court of Criminal Appeals held that only one standard should be employed to evaluate whether the evidence is sufficient to support a criminal conviction beyond a reasonable doubt: legal sufficiency. *See Brooks v. State*, 323 S.W.3d 893, 894–95 (Tex. Crim. App. 2010) (plurality op.); *id.* at 926 (Cochran, J., concurring). Accordingly, we review appellant's challenge to factual sufficiency of the evidence under the legal-sufficiency standard.

When reviewing sufficiency of the evidence, we view all of the evidence in the light most favorable to the verdict to determine whether the jury was rationally justified in finding guilt beyond a reasonable doubt. *Brooks*, 323 S.W.3d at 899 (plurality op.). We may not sit as a thirteenth juror and substitute our judgment for that of the fact finder by reevaluating the weight and credibility of the evidence. *Id.* at 899, 901; *Dewberry v. State*, 4 S.W.3d 735, 740 (Tex. Crim. App. 1999); *see also Sharp v. State*, 707 S.W.2d 611, 614 (Tex. Crim. App. 1986) (expressing that jury may choose to believe or disbelieve any portion of the testimony). We defer to the fact finder's resolution of conflicting evidence unless the resolution is not rational. *See Clayton v. State*, 235

S.W.3d 772, 778 (Tex. Crim. App. 2007). Our duty as reviewing court is to ensure the evidence presented actually supports a conclusion that the defendant committed the crime. *Williams v. State*, 235 S.W.3d 742, 750 (Tex. Crim. App. 2007).

A defendant commits the first degree felony offense of aggravated assault on a public servant if he causes serious bodily injury to a person the defendant knows is a public servant while the public servant is lawfully discharging an official duty and the defendant uses or exhibits a deadly weapon during commission of the assault. Tex. Penal Code Ann. §§ 22.01(a)(1); 22.02(a)(2), (b)(2)(B) (West Supp. 2009). "Deadly weapon" means "(A) a firearm or anything manifestly designed, made, or adapted for the purpose of inflicting death or serious bodily injury; or (B) anything that in the manner of its use or intended use is capable of causing death or serious bodily injury." Tex. Penal Code Ann. § 1.07(a)(17) (West Supp. 2009). Because the State alleged the deadly weapon used in the present case was a motor vehicle, the jury was required to determine whether the vehicle satisfied the second above-cited definition.

A motor vehicle may become a deadly weapon if the manner of its use is capable of causing death or serious bodily injury. *Drichas v. State*, 175 S.W.3d 795, 799 (Tex. Crim. App. 2005). To determine whether the evidence supports a finding that a vehicle was a deadly weapon, we (1) "evaluate the manner in which the defendant used the motor vehicle during the felony," and (2) "consider whether, during the felony, the motor vehicle was capable of causing death or serious bodily injury." *Sierra v. State*, 280 S.W.3d 250, 255 (Tex. Crim. App. 2009). Specific intent to use a motor vehicle as a deadly weapon is not required. *Drichas*, 175 S.W.3d at 798.

At trial, Texas Department of Public Safety Officer Brian Barnhardt testified as follows regarding the incident at issue. On the night of October 8, 2006, he stopped Michael Kirby for speeding. While they were parked on the side of a county road, a Suburban driven by appellant approached from the opposite direction.[2] Appellant's car

[2] Neither Officer Barnhardt nor Kirby could identify appellant as the person involved in the incident, but the State presented other evidence to prove his identity and the other elements of the offense, which we will not outline because appellant challenges only the deadly weapon finding.

radio was very loud, which Officer Barnhardt considered unreasonable at such an hour. Officer Barnhardt flagged down appellant and requested he lower the volume. Officer Barnhardt then noticed appellant was not wearing a seatbelt and had an open container of beer. Officer Barnhardt planned to begin an investigation for driving while intoxicated. Pursuant to his request, appellant exited the vehicle. As they approached the rear of the vehicle, appellant "broke" and "jumped" back in his vehicle. Officer Barnhardt pursued appellant, but he closed the door before Officer Barnhardt could restrain him. Officer Barnhardt then reached into the partially open window attempting to hold appellant. Appellant "revved" the engine and started placing the vehicle "in gear." Officer Barnhardt swung the flashlight at appellant because Officer Barnhardt knew appellant would drive away with Officer Barnhardt still in the vehicle if appellant were able to place the vehicle "in gear." At this point, Officer Barnhardt feared for his safety and "possibly" for his life. Appellant did drive away while Officer Barnhardt was partially inside the vehicle, and his legs and feet were dragged on the road. Officer Barnhardt managed to get loose, fell to the ground, and rolled. Officer Barhardt suffered abrasions to his leg and elbow and a sprained wrist.

At trial, Kirby confirmed that appellant drove away at a high rate of speed with Office Barnhardt partially inside the vehicle and Officer Barnhardt eventually rolled into a ditch. James Johnson, a relative of appellant, also testified that, on the evening of the incident, appellant drove a Suburban to Johnson's house. Johnson noticed appellant had a bloody nose and blood on his shirt. Appellant said something to the effect that he had "drug" an officer and the officer struck him with a flashlight.

Because the State presented evidence appellant drove the Suburban away at a high rate of speed, dragging Officer Barnhardt who was still partially inside, the jury could have concluded beyond a reasonable doubt that appellant used the vehicle in a manner capable of causing serious bodily injury or death. Accordingly, the evidence is legally sufficient to support the jury's finding that the vehicle was a deadly weapon. We overrule appellant's third and fourth issues.

ENHANCEMENT PARAGRAPH

Appellant's next issues concern the enhancement paragraph.

In his fifth issue, appellant complains that the trial court failed to admonish him on the applicable range of punishment if he pleaded "true" to the enhancement paragraph. However, Texas Code of Criminal Procedure article 26.13, which requires a trial court to admonish a defendant in a felony case on the applicable range of punishment before accepting a "guilty" or "nolo contendere" plea, does not apply to a plea of "true" to an enhancement paragraph. *See* Tex. Code Crim. Proc. Ann. art. 26.13(a)(1) (West Supp. 2009); *Sylvester v. State*, 615 S.W.2d 734, 736–37 (Tex. Crim. App. 1981); *Griffin v. State*, 764 S.W.2d 306, 307 (Tex. App.—Houston [1st Dist.] 1988, no pet.). To support his position, appellant generally cites Texas Code of Criminal Procedure articles 36.01 and 37.07, which prescribe various procedures applicable to the guilt-innocence and punishment phases of trial. *See* Tex. Code Crim. Proc. Ann. arts. 36.01 (West 2007); 37.07 (West Supp. 2009). Neither statute contains any requirement that a trial court admonish a defendant on the applicable range of punishment before accepting a "true" plea to an enhancement paragraph. *See id.* Indeed, such an admonishment is entirely discretionary with the trial court and is not required under Texas law. *Harvey v. State*, 611 S.W.2d 108, 112 (Tex. Crim. App. 1981) (en banc). Therefore, we overrule appellant's fifth issue.

In his sixth issue, appellant complains that the trial court made no finding on the enhancement paragraph "at the conclusion of evidence at the punishment phase of the trial." Appellant apparently refers to the lack of an oral pronouncement because the trial court did recite in the judgment that it found the enhancement paragraph was "true." A trial court does not commit error by failing to announce its enhancement findings in open court prior to sentencing so long as it appears from the record that the court found the enhancement "true" and entered the sentence accordingly. *See Meineke v. State*, 171 S.W.3d 551, 557 (Tex. App.—Houston [14th Dist.] 2005, no pet.) (citing *Garner v. State*,

858 S.W.2d 656, 660 (Tex. App.—Fort Worth 1993, pet. ref'd)). Accordingly, we overrule appellant's sixth issue.

Finally, in his seventh issue, appellant contends the trial court erroneously considered the range of punishment applicable to a felony conviction enhanced by one prior felony conviction. *See* Tex. Penal Code Ann. § 12.42(c)(1) (West Supp. 2009) ("If it is shown on the trial of a first-degree felony that the defendant has been once before convicted of a felony, on conviction he shall be punished by imprisonment in the Texas Department of Criminal Justice for life, or for any term of not more than 99 years or less than 15 years."). However, this contention is contingent on appellant's prevailing on one of his two previous issues. Specifically, he maintains his punishment should not have been enhanced because the trial court failed to admonish him regarding the range of punishment before accepting his plea of "true" and made no oral finding on the enhancement paragraph. Having rejected both of these underlying complaints, we conclude the trial court considered the proper range of punishment and overrule appellant's seventh issue.

We affirm the trial court's judgment.

/s/ Charles W. Seymore
Justice

Panel consists of Justices Anderson, Seymore, and McCally.

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