Affirmed and Memorandum Opinion filed December 1, 2016.

In The

Fourteenth Court of Appeals

NO. 14-15-00696-CV

IN THE MATTER OF J.C., A JUVENILE

On Appeal from the County Court at Law #4
Fort Bend County, Texas
Trial Court Cause No. 14-CJV-018909

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

J.C., a juvenile, appeals from an order adjudicating him delinquent for committing aggravated robbery. *See* Tex. Penal Code § 29.03(a)(2) (West 2015). Appellant presents two issues on appeal: (1) the evidence was legally insufficient to support his adjudication; and (2) the juvenile court abused its discretion when it denied his motion to suppress the evidence. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

The Riverside Drive-In was robbed at gunpoint on Friday, May 2, 2014. Mr. Matthew, the complainant and part-owner of the Riverside Drive-In, testified that the

robber was a male, wearing a long-sleeved T-shirt, black pants or jeans, and his face was covered with a white cloth and a "red thing on the head."[1] Complainant also testified that the robber pointed a black gun at his head, directed him to the register, and handed him a grocery bag. Complainant gave the robber all the paper money in the register, about $260 to $270. The robbery took less than a minute and occurred around 8:45 in the evening. The Riverside Drive-In's surveillance video confirmed this testimony.

On the same evening, an individual parked a truck in front of Mr. and Mrs. Macha's house. Mr. Macha testified that the individual's face was covered "with a kind of reddish hat and some kind of light-colored face mask." The individual ran in the direction of the Riverside Drive-In located a third of a mile away. Thinking this behavior odd, Mr. Macha recorded the truck's license plate number and provided it to the police. The police later confirmed that the plates were registered to appellant's father.

Appellant, a 16-year-old juvenile at the time of the offense, lived in East Bernard with D.C., his legal guardian and paternal grandmother. Around 7:40 p.m., D.C. told appellant to walk the dogs and take the trash to their burn pit. D.C. generally allowed appellant to use a truck, which belonged to his father, to take the trash. Appellant left to complete his chores and returned in time to watch a 9:00 p.m. television show. The next morning, Saturday, May 3, 2014, D. C. noticed that both appellant and the truck were missing. Appellant did not have D.C.'s permission to leave home or take the truck.

D.C. tried contacting appellant, but he did not answer her calls. On Sunday,

[1] Complainant initially thought the robber was a black male. Complainant testified that when he later watched the surveillance video, he could see the robber's hand and determined he was white.

May 4, D.C. reported appellant as a missing runaway. Later on May 4, appellant contacted D.C. and told her he was with his girlfriend and on the river in New Braunfels. D.C. told appellant that he needed to come home with the truck. Appellant did not comply.

On May 5, Officer Bettice and Corporal Spence of the New Braunfels Police Department saw appellant sitting on the street curb wearing a white T-shirt wrapped around his head. Corporal Spence identified appellant and ran his name through dispatch. Corporal Spence learned that appellant was listed on the National Crime Information Center (NCIC) as a runaway child. The NCIC database described appellant as endangered because he was bipolar and off his medicine. Appellant was in possession of his father's truck. After officers made contact with appellant, they attempted to contact an adult responsible for him. After about forty minutes, officers decided to transfer appellant to the Juvenile Probation Office. Pursuant to a pat-down, the officers seized a black BB gun from appellant and testified that it looked like a realistic handgun. Detective White testified that the BB gun could be a deadly weapon and cause serious bodily injury if it discharged into a person's eye.

A jury found that appellant engaged in delinquent conduct by committing the offense of aggravated robbery. The trial court assessed appellant's sentence at eleven years' confinement in the Texas Juvenile Justice Department with the possibility of transfer to the Institutional Division of the Texas Department of Criminal Justice.

II. ANALYSIS

A successful challenge to the legal sufficiency of the evidence results in an acquittal, not a new trial. *See Tibbs v. Florida*, 457 U.S. 31, 41–42 (1982). Accordingly, we begin by addressing appellant's second issue because it affords the greatest relief. *See* Tex. R. App. P. 43.3; *Campbell v. State*, 125 S.W.3d 1, 4 n.1 (Tex. App.—Houston [14th Dist.] 2002, no pet.) (stating that reviewing court should first

address complaints that would afford the greatest relief).

A. Sufficiency of the Evidence

When engaging in a review of the legal sufficiency of the evidence supporting a conviction, we "examine all of the evidence in the light most favorable to the verdict and determine whether a 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); *Price v. State*, 456 S.W.3d 342, 347 (Tex. App.—Houston [14th Dist.] 2015, pet. ref'd). "Although we consider everything presented at trial, we do not reevaluate the weight and credibility of the evidence or substitute our judgment for that of the fact finder." *Price*, 456 S.W.3d at 347. "We defer to the jury's finding when the record provides a conflict in the evidence." *Marshall v. State*, 479 S.W.3d 840, 845 (Tex. Crim. App. 2016).

A person commits the offense of aggravated robbery "if he commits robbery as defined in Section 29.02, and he . . . uses or exhibits a deadly weapon." Tex. Penal Code § 29.03(a)(2). A person commits the offense of robbery if:

> in the course of committing theft . . . and with intent to obtain or maintain control of the property, he: (1) intentionally, knowingly, or recklessly causes bodily injury to another; or (2) intentionally or knowingly threatens or places another in fear of imminent bodily injury or death.

Tex. Penal Code § 29.02 (West 2015).

Having considered all record evidence in the light most favorable to the verdict, we conclude that a reasonable jury properly could have found that appellant committed aggravated robbery.

Appellant complains that no witness identified appellant as the robber, complainant gave conflicting testimony about the color of the robber's skin, no witness described the vehicle the robber used, and no money was found on appellant

or in his wallet. Appellant essentially argues there was insufficient evidence to identify him as the perpetrator.

The State presented no direct evidence identifying the man who robbed complainant; however, there was sufficient circumstantial evidence to prove identity of the perpetrator here. *See Earls v. State*, 707 S.W.2d 82, 85 (Tex. Crim. App. 1986) (identity of a perpetrator may be proven by either direct or circumstantial evidence). Appellant left the house to complete his chores around the time the robbery occurred. The evidence indicated that the green truck—of which appellant had possession—was connected to the robbery. On the night the robbery occurred, the truck registered to appellant's father was parked near the Riverside Drive-In. There was testimony that the truck's driver wore a white cloth to conceal his face, like the robber concealed his face, and like appellant concealed his face three days later when police located him. The robber used a black gun and appellant was in possession of a black BB gun. Appellant's complaint about the inconsistency in complainant's testimony about the color of the robber's skin does not undermine legal sufficiency here. *See id.* ("Any discrepancies in the description of appellant's clothing or appearance go to the weight and credibility of the witnesses and were before the jury for their consideration.").

The jury could reasonably infer that it was appellant who robbed complainant at the Riverside Drive-In with a deadly weapon, and any rational trier of fact could find the elements of an aggravated robbery beyond a reasonable doubt. We overrule appellant's second point of error.

B. Motion to Suppress the BB Gun

In his first point of error, appellant contends that the trial court erred in denying his motion to suppress the evidence, specifically appellant's BB gun that police seized following the pat-down.

We review a motion to suppress for abuse of discretion. *Lollie v. State*, 465 S.W.3d 312, 314 (Tex. App.—Houston [14th Dist.] 2015, no pet.) (citing *Lujan v. State*, 331 S.W.3d 768, 771 (Tex. Crim. App. 2011) (per curiam)). In conducting this review, we employ a bifurcated standard. *State v. Kerwick*, 393 S.W.3d 270, 273 (Tex. Crim. App. 2013). We give almost total deference to the trial court's determination of historical facts and mixed questions of law and fact that rely on credibility or demeanor. *Id.* We review *de novo* pure questions of law and mixed questions of law and fact that do not rely on the trial court's credibility determinations. *Martinez v. State*, 348 S.W.3d 919, 923 (Tex. Crim. App. 2011). The scenario here is a mixed question of law and fact, the resolution of which turns on an evaluation of credibility and demeanor. The proper standard of review is therefore the first category, "almost total deference" to the trial ruling.

Juvenile adjudication hearings proceed under Chapter 38 of the Code of Criminal Procedure and the Texas Rules of Evidence applicable to criminal cases. Tex. Fam. Code Ann. § 54.03(d) (West 2014). Evidence obtained by an officer in violation of the Constitution or laws of the State of Texas is inadmissible at trial. Tex. Crim. Proc. Code art. 38.23 (West 2015).

A child may be taken into custody by a law-enforcement officer if there is probable cause to believe that the child has engaged in conduct indicating a need for supervision. Tex. Fam. Code Ann. § 52.01(a)(3)(B) (West 2014).[2] Conduct indicating a need for supervision includes the voluntary absence of a child from the child's

[2] The State argues that the police were also authorized to take appellant into custody because he was a "missing child" pursuant to the Missing Children and Missing Persons statute. *See* Tex. Crim. Proc. Code art. 63.001 (West 2015); Tex. Penal Code § 31.07 (West 2015). However, the State presented no evidence to establish that appellant was a missing child under the statutory definition; i.e., that appellant "left without the custodian's consent *and without intent to return*." Tex. Crim. Proc. Code art. 63.001(3)(B) (emphasis added).

home without the consent of the child's parent or guardian for a substantial length of time. Tex. Fam. Code Ann. § 51.03(b)(3) (West 2014). Probable cause "ripens at the moment facts and circumstances within the officer's knowledge . . . are sufficient to warrant a prudent man in believing the suspect has committed or is committing an offense." *Johnson v. State*, 171 S.W.3d 643, 649 (Tex. App.—Houston [14th Dist.] 2005, pet. ref'd) (citing *Beck v. Ohio*, 379 U.S. 89, 91 (1964)).

In its ruling on appellant's motion to suppress, the trial court stated: "I find the stop proper. I find that they had information that this young man was a runaway. I do find that their taking the . . . air pistol into custody, was lawful." Appellant asserts that the police officers had no probable cause to take appellant into custody, and therefore no authority to conduct the pat-down, because based on their knowledge appellant was not absent from his home for a substantial length of time. *See* Tex. Fam. Code Ann. § 51.03(b)(2) (West 2014).

We have found no cases construing the term "substantial length of time" in the context of Section 51.03(b)(2) of the Texas Family Code. However, the Penal Code contains the same term. *Compare* Tex. Penal Code § 25.06(a)(2) (West 2015) ("[A runaway child] is voluntarily absent from the child's home without the consent of the child's parent or guardian for a substantial length of time or without the intent to return.") *with* Tex. Fam. Code Ann. § 51.03(b)(2) (West 2014) (defining conduct indicating a need for supervision as "the voluntary absence of a child from the child's home without the consent of the child's parent or guardian for a substantial length of time or without intent to return"). We find the cases construing the term in the Penal Code instructive. The cases support the conclusion that the term could include a juvenile's absence for less than 24 hours. *See Barrow v. State*, 973 S.W.2d 764, 768 (Tex. App.—Amarillo 1998, no pet.) (5 hours); *accord Urbanski v. State*, 993 S.W.2d 789, 794–95 (Tex. App.—Dallas 1999, no pet.) (17 hours).

We adopt the reasoning as set forth in *Urbanski* to determine what period of absence is "substantial." The court in *Urbanski* reasoned that because the legislature did not assign a fixed number to the meaning of "substantial length of time," it left the issue to the fact finder to determine on a case-by-case basis. 993 S.W.2d at 794–95. To make this determination, the *Urbanski* court considered these factors: the child's duration of absence; time of day; the intent of the child in returning; authorization to leave; child's age; child's motive for running away; the child's activity during the absence; the child's distance from home; and the number, age, maturity, and experience of the persons, if any, accompanying or assisting the child during the absence.

Here, the police officers who seized appellant testified during the suppression hearing that they were made aware that appellant: was age 16; left his grandmother's home without her permission; took the truck without permission; was absent for at least one night; was located roughly 150 miles away from home; and, during his absence, was "off his meds and using drugs," and covered his face and head with a shirt or towel on a hot day. The police officers also knew appellant was in the NCIC runaway database.

Considering the evidence, we hold that the trial court would not have abused its discretion in finding that appellant was missing for a substantial length of time and that the police officers had probable cause to take appellant into custody under Section 52.01 of the Texas Family Code. The pat-down was therefore lawful and the BB gun was admissible. The trial court did not abuse its discretion in denying appellant's motion to suppress the BB gun.

(1) Evidentiary Rule 403

Appellant argues in his first sub-issue that the trial court erred when it permitted any reference to the BB gun because the BB gun was irrelevant and

unfairly prejudicial under Rules 402 and 403 of the Texas Rules of Evidence, respectively.

Appellant contends that the BB gun was irrelevant because it was not properly authenticated, was not admitted as substantive evidence, and the State did not establish its chain of custody. Appellant did not object on the basis of relevance at trial. Instead, appellant argued that references to the BB gun were substantially more prejudicial than probative. Therefore, appellant did not preserve the relevance issue for appellate review. *See* Tex. R. App. P. 33.1(a); *see also Allridge v. State*, 762 S.W.2d 146, 157 (Tex. Crim. App. 1988), *cert. denied*, 489 U.S. 1040 (1989) (an error presented on appeal must be the same as the objection raised at trial or nothing is preserved for appellate review).

Appellant next argues that the BB gun references were inadmissible under Rule 403 of the Texas Rules of Evidence. *See* Tex. R. Evid. 403. Rule 403 provides five distinct grounds for excluding otherwise relevant evidence. *See id.* At trial, appellant objected on one distinct ground: that the probative value of the demonstrative photograph and testimony about the BB gun was substantially outweighed by the danger of unfair prejudice. Therefore, we will consider only the unfair prejudice ground on the merits. *See* Tex. R. App. P. 33.1(a); *see also Allridge*, 762 S.W.2d at 157 (an error presented on appeal must be the same as the objection raised at trial or nothing is preserved for appellate review).

We review the trial court's Rule 403 ruling under an abuse-of-discretion standard. *See Young v. State*, 283 S.W.3d 854, 874 (Tex. Crim. App. 2009). The ruling may be disturbed on appeal "only when the trial court's decision falls outside the zone of reasonable disagreement." *Id.* "We presume that the probative value of evidence substantially outweighs the danger of unfair prejudice from admission of that evidence." *Grant v. State*, 475 S.W.3d 409, 420 (Tex. App.—Houston [14th

Dist.] 2015, pet. ref'd).

Probative value refers to the item's inherent probative force; "that is, how strongly it serves to make more or less probable the existence of a fact of consequence to the litigation—coupled with the proponent's need for that item of evidence." *Gigliobianco v. State*, 210 S.W.3d 637, 641 (Tex. Crim. App. 2006). Unfair prejudice "refers to a tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one. Evidence might be unfairly prejudicial if, for example, it arouses the jury's hostility or sympathy for one side without regard to the logical probative force of the evidence." *Id.* Demonstrative evidence is admissible if it tends to solve some issue in the case and is relevant, *Simmons v. State*, 622 S.W.2d 111, 113 (Tex. Crim. App. 1981), unless the prejudicial effect clearly outweighs its probative value, *Posey v. State*, 763 S.W.2d 872, 875 (Tex. App.—Houston [14th Dist.] 1988, pet. ref'd).

Probative Value. Using or exhibiting a deadly weapon is a key element of the charged offense. *See* Tex. Pen. Code Ann. § 29.03 (West 2015) (Aggravated Robbery). Appellant possessed a BB gun three days after the Riverside Drive-In was robbed. The trial court here could have reasonably found the evidence probative of whether appellant had access to and used a BB gun when he committed the charged offense and whether a BB gun, if used during the robbery, could be a deadly weapon.

Furthermore, the trial court could have found that no other compelling evidence was available to establish appellant's identity and possession of the gun because nobody saw the robber's face, and witnesses to the robbery could only describe the gun's color. For instance, complainant testified that the gun was black and looked like a real gun. Mr. Byas, a customer at the Riverside Drive-In, testified that he saw the robber had a gun in his hand and cocked it. By contrast, Officer Bettice and Corporal Spence saw appellant with and without the white cloth covering

his face and seized appellant's BB gun.

Unfair Prejudice. A gun was used to commit the robbery and appellant possessed a similar-looking BB gun three days later; this evidence forms a proper basis upon which the jury could decide, by inference, that the guns were the same. Additionally, Corporal Spence testified that owning a BB gun is not illegal. Appellant's ownership of the BB gun would not have a tendency to arouse the jury's hostility without regard to the logical probative force of the evidence. *See Gigliobianco*, 210 S.W.3d at 641. The trial court could have reasonably concluded that the BB gun did not have a tendency to suggest decision on an improper basis.

The trial court could have reasonably concluded that the probative value of presenting testimony and demonstrative evidence regarding appellant's BB gun was not substantially outweighed by unfair prejudice. The trial court did not abuse its discretion.

We overrule appellant's first issue.

III. CONCLUSION

We affirm the judgment of the trial court.

Marc W. Brown
Justice

Panel consists of Justices Busby, Donovan, and Brown.