Affirmed and Majority and Dissenting Opinions filed February 22, 2018.

In The

Fourteenth Court of Appeals

NO. 14-16-00304-CR

MICHAEL BELLE, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 405th District Court
Galveston County, Texas
Trial Court Cause No. 15CR0003

M A J O R I T Y O P I N I O N

Appellant Michael Belle brings this appeal, pro se, from his conviction for unlawful possession of a firearm by a felon.[1] Appellant pled true to two enhancement allegations and the jury sentenced him to twenty-eight years in prison. We affirm.

[1] Appellant also represented himself at trial.

Appellant's brief raises a number of issues.[2] We have addressed each issue that we have identified as being fairly included and have used appellant's nomenclature of the issues. *See* Tex. R. App. P. 38.1(f).

SUFFICIENCY OF THE EVIDENCE

In Part B of appellant's second issue he complains of the actions of the district attorney. In doing so, appellant argues the evidence is insufficient to support his conviction. Specifically, appellant argues that the State failed to prove beyond a reasonable doubt that he knowingly or intentionally possessed a firearm. As that is the only identifiable issue in part B upon which this court could grant relief, it is the only claim we address. Because this issue, if sustained, would result in rendition of a judgment of acquittal, we address it first. *See Price v. State*, 502 S.W.3d 278, 281 (Tex. App.—Houston [14th Dist.] 2016, no pet); *see also* Tex. R. App. P. 47.1.

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, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *Price v. State*, 456 S.W.3d 342, 347 (Tex. App.—Houston [14th Dist.] 2015, pet. ref'd). In conducting the review we consider all evidence presented to the jury, whether properly or improperly admitted at trial. *Thomas v. State*, 753 S.W.2d 688, 695 (Tex. Crim. App. 1988).

As the reviewing court, we may not substitute our judgment for that of the fact finder by re-evaluating weight and credibility of evidence. *Isassi v. State*, 330 S.W.3d 633, 638 (Tex. Crim. App. 2010). Rather, we defer to the responsibility of

[2] As to the issues we determine were waived, the dissent does not identify which, if any, present reversible error.

the fact-finder to fairly resolve conflicts in testimony, weigh the evidence, and draw reasonable inferences from basic facts to ultimate facts. *Id.* Our duty as the 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). Therefore, if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, we must affirm. *McDuff v. State*, 939 S.W.2d 607, 614 (Tex. Crim. App. 1997).

Appellant was charged with intentionally and knowingly possessing a firearm more than five years after having been convicted of a felony at any location other than the premises at which he lived. *See* Tex. Penal Code § 46.04 (a)(2). The State introduced evidence the firearm was found in a pocket of the jacket appellant was wearing, while not at the premises at which he lived. Appellant asserts the evidence does not connect him to the actual care, custody, control, or management of the firearm.

In cases involving possession of a firearm by a felon, we analyze the sufficiency of the evidence under the rules adopted for cases involving possession of a controlled substance. *Corpus v. State*, 30 S.W.3d 35, 37 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd). Accordingly, the State was required to prove that appellant knew of the weapon's existence and that he exercised actual care, custody, control, or management over it. *Id*. at 38. If the firearm is not found on the defendant, or if it is not in his exclusive possession, the State must offer additional, independent facts and circumstances affirmatively linking him to the firearm. *Id.*

Officer Vasquez testified that when he began patting appellant down for a safety check, he located a firearm, a Ruger 9-millimeter, in a pocket of appellant's jacket. When Vasquez removed the firearm, appellant advised him "there was one

in the chamber." Appellant explained to Vasquez how to safely remove the bullet in the chamber.

According to appellant, the firearm was put in his jacket by his ex-girlfriend, Tekoa Scott, before he put the jacket on, and he was unaware of the firearm's presence in the jacket pocket. Appellant told the jury he was set-up by the police.

The firearm was found on appellant and he was in exclusive possession of it. The jury was free to disbelieve appellant's version as to how the firearm came to be in his possession. Taking the evidence in the light most favorable to the verdict, we conclude that any rational trier of fact could have found beyond a reasonable doubt all of the essential elements of the offense charged, including knowledge and control over the firearm. We overrule part B of issue two.

Issue One

Part A

Appellant complains of comments made by the trial court when appellant requested self-representation at trial. Appellant's brief contains no references to the record where such comments were made. *See* Tex. R. App. P. 38.1(i). Accordingly the issue is waived.

Part B

Appellant asserts the trial court abused its discretion by failing to remove his court-appointed counsel on August 19, 2015. The record reflects the trial court ultimately conducted a *Spears*[3] hearing, duly admonished appellant, and allowed

[3] *Spears v. McCotter,* 766 F.2d 179 (5th Cir.1985), *overruled on other grounds by Neitzke v. Williams,* 490 U.S. 319, 324, 109 S.Ct. 1827, 1831 (1989).

him to represent himself. The trial court's adherence to the requisites of permitting a defendant to forego counsel does not constitute error. Part B is overruled.

Part C

Appellant argues the trial court abused its discretion in failing to hold a hearing on the following pre-trial motions: (1) to dismiss the indictment; (2) to suppress evidence; and (3) to exclude prior offenses. Appellant cites no authority in support of his argument. *See* Tex. R. App. P. 38.1(i). Accordingly the argument is waived. Appellant also complains the trial court abused its power by imposing co-counsel on him but fails to provide any citations to the record. *See* Tex. R. App. P. 38.1(i). Accordingly, the complaint is waived. Part C is overruled.

Part D

Appellant claims the trial court abused its discretion by giving his copy of the video of his arrest to the State. Appellant's brief contains no references to the record pertinent to his claim.[4] *See* Tex. R. App. P. 38.1(i). The issue is waived.

Part E

Appellant contends the trial court erred in denying his motion to suppress the video of his arrest. Appellant claims the video was altered to delete evidence that would have proved exculpatory. Appellant asserts the complete video would have shown that the officer pointed the firearm at him and tried to pull the trigger but could not release the safety.

"As the movant in a motion to suppress evidence, a defendant must produce evidence that defeats the presumption of proper police conduct and therefore shifts the burden of proof to the State." *Russell v. State*, 717 S.W.2d 7, 9 (Tex. Crim. App.

[4] Appellant's single record reference is to the trial court's "Case Summary."

1986)), *disapproved in part on other grounds by Handy v. State*, 189 S.W.3d 296, 299 n. 2 (Tex. Crim. App. 2006); *see also Ford v. State*, 158 S.W.3d 488, 492 (Tex. Crim. App. 2005) ("To suppress evidence on an alleged Fourth Amendment violation, the defendant bears the initial burden of producing evidence that rebuts the presumption of proper police conduct."). The record reflects appellant presented no evidence to the trial court that the video was altered. There being no evidence of improper or unlawful conduct concerning the video in the context of a motion to suppress, we cannot say the trial court abused its discretion. Part E is overruled.

Part F

Appellant argues the trial court erred in sustaining the State's objection to his attempt to have Officer Brady Alexander read his report while on the stand and by refusing his request to admit the report into evidence. The record reflects appellant asked Alexander if he had a copy of his police report. Alexander answered in the affirmative and appellant then asked Alexander to read the statement. The State objected on the grounds the report was not in evidence and was hearsay. Appellant then sought to enter the statement into evidence to impeach Alexander. The trial court refused to admit the report into evidence on the basis it was hearsay. Appellant contends he had a statutory right for the police report to be entered into evidence as an official document.

"Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Tex. R. Evid. 801(d). Hearsay is not admissible unless it comes within an exception prescribed by statute or the Texas Rules of Evidence. Tex. R. Evid. 802; *see Perry v. State*, 957 S.W.2d 894, 896 (Tex. App.—Texarkana 1997, pet. ref'd). One exception to hearsay includes public records, reports, statements, or data compilations setting forth matters observed pursuant to a legal duty to report such

matters. Tex. R. Evid. 803(8)(B); *McLeod v. State*, 56 S.W.3d 704, 710 (Tex. App.—Houston [14th Dist.] 2001, no pet.). However, in criminal cases, matters observed by police officers and other law enforcement personnel are excluded from this exception. Tex. R. Evid. 803(8)(B). Alexander's report is hearsay and does not fall within an exception to the rule. Accordingly, the trial did not err in refusing to admit it into evidence.

Appellant further complains the trial court's decision to sustain the State's objection to the report was a denial of his right to self-representation. Appellant provides no explanation as to how the trial court's refusal to admit hearsay resulted in such a denial. Nor does appellant cite any legal authorities that would afford him appellate relief. We find this complaint to be without merit. Part F is overruled.

Part G

Appellant contends the trial court should have declared a mistrial when Scott failed to appear to testify. Appellant raised Scott's absence during the hearing on his motion to suppress but he did not move for a mistrial at that time. The next day, appellant moved for a mistrial on the grounds that trial was beginning and Scott, a material witness, was not present. The trial court overruled the motion.

The record reflects that on August 21, 2015, (trial began in March 2016) appellant filed a "Motion for Subpoena Duces Tecum." Appellant's motion did not state when Scott was to appear. *See* Tex. Code Crim. Proc. art. 24.01(a)(1). Scott was on the State's witness list but the State did not subpoena her. Appellant told the trial court that he had not had any contact with Scott since December 31, 2014. When Scott failed to appear at the hearing or on the day of trial, appellant did not request a writ of attachment or a continuance. *See* Tex. Code Crim. Proc. art. 24.12.

The first step for preserving error when a properly subpoenaed witness does not appear is to request a writ of attachment, which must be denied by the trial court. *Sturgeon v. State*, 106 S.W.3d 81, 85 (Tex. Crim. App. 2003). The record does not demonstrate Scott was properly subpoenaed. Even so, appellant never requested a writ of attachment. Accordingly, nothing is preserved for our review. Part G is overruled.

Part H

Appellant complains the trial court and the State had impermissible contact with the jury during the sentencing phase of trial. Appellant relies upon a form in the clerk's record entitled "Jury Communication" which states "TDC DOCUMENT SHOWN IN COURT ON OVERHEAD DURING SENTENCING." Appellant claims this showing occurred without his presence in contravention of article 36.27, entitled "Jury may communicate with court," which provides:

> When the jury wishes to communicate with the court, it shall so notify the sheriff, who shall inform the court thereof. Any communication relative to the cause must be written, prepared by the foreman and shall be submitted to the court through the bailiff. The court shall answer any such communication in writing, and before giving such answer to the jury shall use reasonable diligence to secure the presence of the defendant and his counsel, and shall first submit the question and also submit his answer to the same to the defendant or his counsel or objections and exceptions, in the same manner as any other written instructions are submitted to such counsel, before the court gives such answer to the jury, but if he is unable to secure the presence of the defendant and his counsel, then he shall proceed to answer the same as he deems proper. The written instruction or answer to the communication shall be read in open court unless expressly waived by the defendant.
>
> All such proceedings in felony cases shall be a part of the record and recorded by the court reporter.

Tex. Code Crim. Proc. art. 36.27. The record does not contain any communication from the jury to the court and does not reveal whether or not appellant was in the courtroom when the TDC document[5] allegedly was shown on the overhead. In the absence of a record of the communication or a showing that appellant was absent when the TDC document allegedly was shown on the overhead, we cannot say the trial court erred. *See Revell v. State*, 885 S.W.2d 206, 212 (Tex. App.—Dallas 1994, pet. ref'd); *see also Rodriguez v. State*, 625 S.W.2d 101, 103 (Tex. App.—San Antonio 1981, pet. ref'd) (holding "that a communication between the judge and the jury, although not in compliance with art. 36.27, *supra*, is not reversible error unless it amounts to an additional instruction by the court upon the law or some phase of the case."). Part H is overruled.

Part I

In two separate sections, appellant complains of the trial court's instructions to the jury. The record reflects that no objections to the charge were made by appellant or the State.

Reversal is warranted in a case in which the defendant voiced no objection to the charge only if the error resulted in harm so egregious that the defendant did not have a fair and impartial trial. *See Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1984); *Lopez v. State*, 515 S.W.3d 547, 551 (Tex. App.—Houston [14th Dist.] 2017, pet. ref'd). Egregious harm is a difficult standard to meet. *Reeves v. State*, 420 S.W.3d 812, 816 (Tex. Crim. App. 2013). For harm to be egregious, it must be actual and not just theoretical. *Id.* In making this determination, we consider

[5] The record does not reflect what the "TDC DOCUMENT" was but we note that during sentencing a fingerprint card for appellant and a pen packet were admitted into evidence (State's Exhibits four and six, respectively). No other documents were mentioned during the punishment phase.

1) the complete jury charge, 2) the arguments of counsel, 3) the entirety of the evidence, including the contested issues and weight of the probative evidence, and 4) any other relevant factors revealed by the record as a whole. *See Hollander v. State*, 414 S.W.3d 746, 749–50 (Tex. Crim. App. 2013). "Neither party bears a burden of production or persuasion with respect to an *Almanza* harm analysis, the question being simply what the record demonstrates." *Id.* (citing *Warner v. State*, 245 S.W.3d 458, 464 (Tex. Crim. App. 2008)).

In section one, appellant identifies the following error in the charge. The abstract portion of the charge states:

> A person who has been convicted of a felony commits an offense if he possesses a firearm after conviction and *before* the fifth anniversary of the person's release from confinement following conviction of the felony . . . at a location other than the premises at which the defendant lived.

(Emphasis added.) Section 46.04 of the Texas Penal Code states:

> (a) A person who has been convicted of a felony commits an offense if he possesses a firearm:
>
> (1) after conviction and before the fifth anniversary of the person's release from confinement following conviction of the felony or the person's release from supervision under community supervision, parole, or mandatory supervision, whichever date is later; or
>
> (2) *after* the period described by Subdivision (1), at any location other than the premises at which the person lives.

Tex. Penal Code § 46.04 (emphasis added.) The indictment correctly alleged appellant "did then and there, having been convicted of the felony offense of Deadly Weapon in a Penal Institution on the 5th day of November 2001 . . . intentionally or knowingly possess a firearm *after* the fifth anniversary of the defendant's release from confinement following conviction of said felony at a location other than the

premises at which the defendant lived. . ..” (Emphasis added.) The application paragraph provides:

> Now, if you believe from the evidence beyond a reasonable doubt that on or about the 31st day of December, A.D., 2014, in Galveston County, Texas, the Defendant, MICHAEL BELLE, did then and there, having been convicted of the felony offense of Possession of a Deadly Weapon in a Penal Institution . . . intentionally or knowingly possess a firearm *after* the fifth anniversary of the Defendant's release from confinement following conviction of said felony at a location other than the premises at which the Defendant lived . . ..”

(Emphasis added.)

We conclude the charge error did not cause egregious harm. The record reflects it was not a contested issue at trial whether subsection (1) or subsection (2) applied to the case at bar. The indictment and the application paragraph tracked the language of subsection (2). Nothing in the record before us suggests the jury was so confused by the complained-of instruction that appellant was denied a fair and impartial trial. *See Herrera v. State*, 527 S.W.3d 675, 679 (Tex. App.—Houston [14th Dist.] 2017, no pet.).

In the second section of Part I, appellant claims the trial court gave written instructions that are not in the record. The record reference appellant provides is to statements made by the trial court after the jury panel was sworn. The record reflects the trial court gave oral instructions to the jury; it does not establish any written instructions were given at that time. Appellant's complaint is without factual support in the record and so affords no basis for appellate relief. For these reasons, Part I is overruled.

Part J

Appellant next complains of the delay by the trial court and court reporter in sending him the record. While a defendant may be entitled to reversal if he is entirely deprived of the statement of facts, *Timmons v. State*, 586 S.W.2d 509, 512 (Tex. Crim. App. 1979), delay is not a basis for reversal. *Reese v. State*, 481 S.W.2d 841, 843 (Tex. Crim. App. 1972). Part J is overruled.

Issue Two

Part A

In Part A of his second issue, appellant asserts the State committed prosecutorial misconduct. Appellant alleges numerous acts. However, appellant does not refer this court to any place in the record where these allegations were made known to the trial court and an adverse ruling was obtained, both of which are a necessary prerequisite for appellate review.[6] *See* Tex. R. App. P. 33.1(a). Rule 38.1(i) requires a brief's argument section to contain appropriate citations to the record. Tex. R. App. P. 38.1(i). Although we are to construe the appellate rules liberally, we are under no duty to make an independent search of the record to determine whether an assertion of reversible error is valid. *See Segundo v. State,* 270 S.W.3d 79, 106 (Tex. Crim. App. 2008) (op. on reh'g); *Cook v. State*, 611 S.W.2d 83, 87 (Tex. Crim. App. [Panel Op.] 1981); *see also Lape v. State*, 893 S.W.2d 949, 953 (Tex. App.—Houston [14th Dist.] 1994, pet. ref'd) (citing *Cook*, 611 S.W.2d at 87) (applying former Tex. R. App. P. 74(f)). Appellant has therefore waived this issue. Part A is overruled.

[6] Some of these same allegations were made in appellant's "Motion for 'Spears Hearing' Request for Dismissal of Court-appointed counsel; Petition for Self-representation," to which appellant does make reference. However, the trial court granted the relief requested in that motion and allowed appellant to represent himself at trial.

Part C

Appellant again claims the State altered the video of his arrest. As noted above in our discussion of subpart E of issue one, appellant presented no evidence to the trial court that the video was altered. Part C is overruled.

Part D

Appellant next contends the indictment is insufficient for failure to state a material element. Specifically, appellant contends section 46.04 of the Texas Penal Code does not authorize a conviction for felon in possession of a firearm "after the fifth anniversary." As noted above in subpart I of issue one, section 46.04 of the Texas Penal Code states:

> (a) A person who has been convicted of a felony commits an offense if he possesses a firearm:
>
> > (1) after conviction and before the fifth anniversary of the person's release from confinement following conviction of the felony or the person's release from supervision under community supervision, parole, or mandatory supervision, whichever date is later; or
> >
> > (2) *after* the period described by Subdivision (1), at any location other than the premises at which the person lives.

Tex. Penal Code §46.04. The indictment correctly alleged appellant "did then and there, having been convicted of the felony offense of Deadly Weapon in a Penal Institution on the 5th day of November 2001 . . . intentionally or knowingly possess a firearm *after* the fifth anniversary of the defendant's release from confinement following conviction of said felony at a location other than the premises at which the defendant lived. . .." (Emphasis added.) Appellant's complaint is without merit. Part D is overruled.

Part E

In his last issue, appellant complains of numerous statements by the district attorney. However, appellant does not refer this court to any place in the record where his objections were made known to the trial court and an adverse ruling was obtained, both of which are a necessary prerequisite for appellate review. *See* Tex. R. App. P. 33.1(a). Rule 38.1(i) requires a brief's argument section to contain appropriate citations to the record. Tex. R. App. P. 38.1(i). Although we are to construe the appellate rules liberally, we are under no duty to make an independent search of the record to determine whether an assertion of reversible error is valid. *See Segundo*, 270 S.W.3d at 106; *Cook*, 611 S.W.2d at 87; s*ee also Lape*, 893 S.W.2d at 953. Appellant has therefore waived this issue. Part E is overruled.

Having overruled all of appellant's issues, we affirm the trial court's judgment.

/s/ John Donovan
Justice

Panel consists of Chief Justice Frost and Justices Donovan and Wise. (Frost, C.J., dissenting.)
Publish — Tex. R. App. P. 47.2(b).