



Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-19-00689-CR

Julio Jeconiah **TORRES**,
Appellant

v.

The **STATE** of Texas,
Appellee

From the 187th Judicial District Court, Bexar County, Texas
Trial Court No. 2018CR13039
Honorable Stephanie R. Boyd, Judge Presiding

Opinion by: Patricia O. Alvarez, Justice

Sitting: Rebeca C. Martinez, Justice
Patricia O. Alvarez, Justice
Liza A. Rodriguez, Justice

Delivered and Filed: December 2, 2020

AFFIRMED

Appellant Julio Jeconiah Torres was convicted of evading arrest or detention with a vehicle. On appeal, he argues that the trial court erred by declining to give an instruction for the lesser-included offense of evading arrest or detention. We affirm the trial court's judgment.

BACKGROUND

A plainclothes detective located a stolen blue Toyota Corolla parked at a convenience store in the area of Zarzamora Street and Culebra Road near Woodlawn Lake in San Antonio, Texas. The detective requested backup to stop and investigate the vehicle, but before the responding

patrolmen could effect a stop in the convenience store parking lot, the vehicle drove away. Police followed the vehicle several miles to a McDonald's at Vance Jackson Road and Loop 410, also located in San Antonio. A marked patrol car used its lights and sirens to stop the vehicle, but it fled, driving to a nearby business complex. There, police cars boxed in the vehicle, but it maneuvered around the officers and left the scene. A police helicopter followed the vehicle from above, and a detective in an unmarked police car also followed the vehicle. The helicopter pilot directed marked police cars to a convenience store approximately two miles away from the business complex where police attempted another stop. But the driver again maneuvered the vehicle around the police cars and drove away. Police continued to follow the fleeing vehicle at a distance. The vehicle then drove approximately five miles to a shopping mall where it entered a garage parking lot and the driver backed it into a parking space. The driver exited the vehicle and began to walk away. Police waited to approach the driver until he started to cross the street. The driver, identified as Torres, attempted to flee on foot, but he was apprehended.

Torres was charged with evading arrest or detention with a vehicle and unauthorized use of a motor vehicle. At trial, the State pursued only the charge of evading arrest or detention with a vehicle. Torres requested an instruction for the lesser-included offense of evading arrest or detention. The trial court found no evidence supported the lesser-included instruction, and it declined to instruct the jury on evading arrest or detention. The jury convicted Torres of evading arrest or detention with a vehicle. Torres appeals.

LESSER-INCLUDED OFFENSE

Torres contends he was entitled to an instruction on the lesser-included offense of evading arrest or detention. The State responds that no evidence supported the instruction. We agree with the State.

A. Standard of Review

Determining whether a defendant is entitled to the lesser-included instruction for evading arrest or detention requires a two-part analysis. *See Goad v. State*, 354 S.W.3d 443, 446 (Tex. Crim. App. 2011); *Powell v. State*, 206 S.W.3d 142, 143 (Tex. App.—Waco 2006, pet. ref'd).

The first part is a question of law: does the greater offense of evading arrest or detention with a vehicle contain all the elements of the lesser charge of evading arrest or detention? *See Powell*, 206 S.W.3d at 143; *see also Smith v. State*, 483 S.W.3d 648, 656 (Tex. App.—Houston [14th Dist.] 2015, no pet.). We review this question de novo. *Broughton v. State*, 522 S.W.3d 714, 735 (Tex. App.—Houston [1st Dist.] 2017) (citing *Hall v. State*, 225 S.W.3d 524, 535 (Tex. Crim. App. 2007)), *aff'd*, 569 S.W.3d 592 (Tex. Crim. App. 2018).

If the answer to the first part is yes, the second part of the analysis requires us to review all the evidence to determine whether more than a scintilla of evidence supports an instruction for *only* the lesser offense of evading arrest or detention. *Broughton*, 522 S.W.3d at 735–36 (citing *Cavazos v. State*, 382 S.W.3d 377, 382–83 (Tex. Crim. App. 2012)).

B. Applicable Law

1. Elements of Lesser-Included Offense

Evading arrest or detention, a class A misdemeanor, occurs when “[a] person . . . intentionally flees from a person he knows is a peace officer or federal special investigator attempting lawfully to arrest or detain him.” *See* TEX. PENAL CODE ANN. § 38.04; *Smith*, 483 S.W.3d at 653. If the person uses a vehicle to flee, the offense may become a third-degree felony. *See* TEX. PENAL CODE ANN. § 38.04(b) (evading arrest or detention with a vehicle); *Powell*, 206 S.W.3d at 143. Ultimately, these two offenses require the same elements of proof, with the single exception of using a vehicle. *See* TEX. PENAL CODE ANN. § 38.04; *Powell*, 206 S.W.3d at 143. As

a matter of law, evading arrest or detention is a lesser-included offense of evading arrest or detention with a vehicle. *See* TEX. CODE CRIM. PROC. ANN. art. 37.09; *Powell*, 206 S.W.3d at 143.

2. *Evidence of Lesser-Included Offense*

A defendant is entitled to an instruction on the lesser-included offense of evading arrest or detention if there is some evidence that the defendant is guilty of *only* the lesser-included offense. *See Smith*, 483 S.W.3d at 65 (citing *Hall*, 225 S.W.3d at 536). However, “[i]t is not enough that the jury may disbelieve crucial evidence pertaining to the greater offense.” *Smith*, 483 S.W.3d at 656 (citing *Skinner v. State*, 956 S.W.2d 532, 543 (Tex. Crim. App. 1997)). Whether more than a scintilla of evidence exists to suggest, for example, that a defendant only evaded arrest or detention on foot rather than as a continuation from flight with a vehicle, the lesser-included offense theory must actually be a “rational alternative to the charged offense” based on the case evidence. *See Smith*, 483 S.W.3d at 656 (citing *Hall*, 225 S.W.3d at 536).

C. **Analysis**

Torres’s argument on appeal requires a jury to disbelieve that the stolen vehicle was the same from beginning to end or that Torres was the sole occupant. The evidence from the record does not support this alternative theory. *See Smith*, 483 S.W.3d at 656 (citing *Hall*, 225 S.W.3d at 536). The record reflects that police in marked cars attempted twice to apprehend Torres before they were able to detain him. Twice, when police attempted to stop him, Torres drove the vehicle around the police cars. The evidence also shows that from the time police first identified the stolen vehicle and throughout the chase by police units and the helicopter no person entered or exited the vehicle and Torres was the only person to exit the vehicle when it finally stopped. There was no evidence that anyone other than the person who drove the vehicle from Zarzamora Street to the mall’s parking lot was the person who exited the vehicle at the mall’s parking lot and walked across the street.

CONCLUSION

Having reviewed all the evidence, we conclude that no rational trier of fact could have found that Torres did not use a vehicle “while . . . in flight.” *See Powell*, 206 S.W.3d at 143; *see also Smith*, 483 S.W.3d at 656. Thus, the trial court did not err by declining to instruct the jury on the lesser-included offense of evading arrest or detention. We affirm the trial court’s judgment.

Patricia O. Alvarez, Justice

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