In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-09-00516-CR

MILTON PAUL WARREN, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 163rd District Court
Orange County, Texas
Trial Cause No. B-090348-R

MEMORANDUM OPINION

A jury convicted appellant Milton Paul Warren of felony escape. *See* Tex. Penal Code Ann. § 38.06(a)(1), (c)(1) (West Supp. 2010). Warren pled true to enhancements and was sentenced to seventy-seven years confinement. In three issues, appellant challenges the sufficiency of the evidence, the court's jury charge, and effective assistance of counsel based on the alleged charge error. We affirm the judgment of the trial court.

BACKGROUND

In April 2009, two police officers for the city of Orange, Detective Wade Robinson and Sergeant Sara Jefferson, were patrolling area parks when they observed Warren stopped in the roadway on his bicycle conversing with someone in a vehicle. The patrol car windows were down and the officers smelled a strong odor of marijuana. Robinson instructed Warren to stop, however, Warren rode off on his bicycle. The officers pursued Warren. At some point, Warren abandoned the bicycle and proceeded on foot, after which he was apprehended by Robinson. Robinson handcuffed Warren and placed him under arrest for evading arrest. Robinson then escorted Warren to Officer Baggett, who had arrived on the scene.

Robinson testified that during the chase Warren kept reaching into his waistband, and Robinson observed Warren drop something near a portable toilet. After placing Warren in the custody of Baggett, Robinson went to search for the item Warren had dropped near the portable toilet. Robinson found a Colt revolver in the area near the portable toilet. Robinson testified that at that point, Warren was under arrest for being a felon in possession of a firearm.

Baggett testified that when he arrived on the scene, Warren was in handcuffs. Baggett took custody of Warren, escorted him to the front of Baggett's patrol car, and searched him. After he searched Warren, Baggett escorted Warren to the passenger side of the patrol car and was preparing to place Warren in the back seat. Baggett testified that

Jefferson walked up to speak to Warren at that moment. Baggett stated that when he opened the door to put Warren in the patrol car Jefferson told Warren they had located the firearm. Baggett stated that immediately following this statement by Jefferson, Warren jerked away from Baggett and ran. Baggett proceeded after Warren and re-apprehended him. Thereafter, Baggett transported Warren to the Orange County jail. Warren was charged with evading arrest, felon in possession of a firearm, and escape.

SUFFICIENCY OF THE EVIDENCE

In his first issue, Warren argues that the evidence was legally and factually insufficient to support the conviction. In *Brooks v. State*, the Court of Criminal Appeals concluded that there is no meaningful distinction between legal and factual sufficiency reviews. 323 S.W.3d 893, 902 (Tex. Crim. App. 2010). The Court held that "the *Jackson v. Virginia* standard is the only standard that a reviewing court should apply in determining whether the evidence is sufficient to support each element of a criminal offense that the State is required to prove beyond a reasonable doubt." *Id*. at 912. Therefore, in determining whether there is sufficient evidence to support the jury verdict, we must review all the evidence in the light most favorable to the verdict to determine whether any rational trier of fact could have found the 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); *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007).

A person commits the offense of felony escape if he escapes from custody when he is "under arrest for, charged with, or convicted of a felony[.]" Tex. Penal Code Ann. § 38.06(a)(1), (c)(1). "[A]n arrest must be complete in order to distinguish the offense of escape from the offenses of evading or resisting arrest." *Sample v. State*, 292 S.W.3d 135, 137 (Tex. App.—Houston [14th Dist.] 2008, pet. ref'd) (citing *Medford v. State*, 13 S.W.3d 769, 773 (Tex. Crim. App. 2000)). For purposes of section 38.06,

> an arrest is complete when (1) a person's liberty of movement is successfully restricted or restrained, whether this is achieved by an officer's physical force or the suspect's submission to the officer's authority; and (2) a reasonable person in the suspect's position would have understood the situation to constitute a restraint on freedom of movement of the degree which the law associates with a formal arrest.

Id.; *see also* Tex. Code Crim. Proc. Ann. § 15.22 (West 2005) ("A person is arrested when he has been actually placed under restraint or taken into custody by an officer or person executing a warrant of arrest, or by an officer or person arresting without a warrant."). Whether an arrest has been completed is determined on a case-by-case basis. *Sample*, 292 S.W.3d at 137.

In the present case, the parties do not dispute that Warren was under arrest at the time of his escape. Rather, Warren contends that he was under arrest for the misdemeanor offense of evading arrest and not the felony offense of a convicted felon in possession of a firearm. The State contends that Warren was under arrest for the felony as soon as Robinson located the firearm, which was prior to Warren's escape.

To place a suspect under arrest for a particular offense, the arresting officer must

have probable cause to believe the person arrested has committed or is committing an offense. *See Amores v. State*, 816 S.W.2d 407, 411 (Tex. Crim. App. 1991); *see also Parker v. State*, 206 S.W.3d 593, 596 (Tex. Crim. App. 2006). Probable cause to make an arrest exists when the facts and circumstances within the arresting officer's knowledge and of which he has reasonably trustworthy information are sufficient in themselves to warrant a person of reasonable caution to believe an offense has been or is being committed. *See Amores*, 816 S.W.2d at 413; *see also Amador v. State*, 275 S.W.3d 872, 878 (Tex. Crim. App. 2009). "Probable cause . . . requires more than mere suspicion but far less evidence than that [necessary] to support a conviction or . . . a finding by a preponderance of the evidence." *Guzman v. State*, 955 S.W.2d 85, 87 (Tex. Crim. App. 1997). "'[T]he officer's opinion is a factor to be considered, along with the other facts and circumstances of the detention, in determining whether an arrest has taken place.'" *See Amores*, 816 S.W.2d at 412 (quoting *Hoag v. State*, 728 S.W.2d 375, 379 (Tex. Crim. App. 1987)).

Robinson testified that during the chase, Warren was reaching into his waistband and he observed Warren drop something next to a portable toilet. After restraining Warren, handcuffing him, and placing him in the custody of Baggett, Robinson searched the area near the portable toilet and discovered a Colt revolver. Robinson testified that he had known Warren for roughly seventeen years and that Warren was a convicted felon. Robinson explained that Warren was under arrest for being a felon in possession of a firearm, in addition to the offense of evading arrest, as soon as Robinson located the

firearm. Baggett's testimony was consistent with Robinson's testimony.

Warren also testified at trial. Warren testified that he was smoking marijuana laced with PCP when the officers pulled up behind him. Warren explained that he initially ran from the officers so he could dispose of the marijuana he had on his person. Warren testified that the firearm located near the portable toilet was not his and denied running past the portable toilet during the chase. Warren testified that after he was in the custody of Baggett, the officers told him they knew he had been carrying drugs and they were going to find the drugs and arrest him for more than just evading arrest. Warren further stated that Baggett searched him and then started to put him into the patrol car, however, according to Warren, Baggett stopped and said "'Hold on. I'm going to help them search [for drugs,]'" and told Warren to "'[s]tay there.'" Warren testified that he ran when Baggett "started walking off" to join the other officers in their search. According to Warren, he did not hear Jefferson say anything about a gun until after he was re-apprehended. Warren testified additionally, that he was first told that the officers had located a gun while they were attempting to restrain him the second time.

The defense also called Officer Campbell to testify at trial. Campbell's testimony corroborated the testimony of Robinson and Baggett. Campbell testified that when he arrived on the scene Warren was detained and in handcuffs. Campbell stated that Jefferson was standing next to a portable toilet and asked him if he had a camera. Campbell testified that Jefferson told him there was a gun they wanted him to photograph.

Campbell stated that he walked back to his patrol car to retrieve his camera and then heard the commotion surrounding Warren's escape. Campbell stated that "[Warren] was running, and [Baggett] told him to stop[,]" and Campbell immediately ran after Warren and helped restrain him.

At the time the firearm was located, sufficient facts existed to give rise to probable cause for Robinson to arrest Warren for being a convicted felon in possession of a firearm. At that point in time, Warren's liberty of movement had already been restricted and he was in the custody of another police officer. Robinson testified that he knew Warren was a convicted felon and, when he located the firearm, Warren was under arrest for being a felon in possession of a firearm in addition to the evading offense. Moreover, evidence was presented that Warren escaped from custody after he was told that the firearm had been found. Under these circumstances, a reasonable trier of fact could have found beyond a reasonable doubt that Warren was under arrest for the felony offense at the time of his escape.

Viewing the evidence in the light most favorable to the verdict, we hold that the evidence was sufficient to prove the elements of felony escape. We overrule issue one.

LESSER-INCLUDED OFFENSE

In his second issue, Warren argues that the trial court erred in not charging the jury on the lesser-included offense of misdemeanor escape. We review a trial court's denial of the request to include a lesser-included offense in the jury charge for an abuse of discretion.

Brock v. State, 295 S.W.3d 45, 49 (Tex. App.—Houston [1st Dist.] 2009, pet. ref'd). Texas courts use a two-prong test to determine whether a defendant is entitled to have the jury instructed on a lesser-included offense. *See Hall v. State*, 158 S.W.3d 470, 473 & n.7 (Tex. Crim. App. 2005) (citing *Aguilar v. State*, 682 S.W.2d 556, 558 (Tex. Crim. App. 1985) and *Rousseau v. State*, 855 S.W.2d 666, 672 (Tex. Crim. App. 1993)). This test requires (1) that the lesser offense actually be a lesser-included offense of the charged offense, and (2) that the record contain some evidence that permits a rational jury to find the defendant guilty only of the lesser-included offense. *Id.* at 473; *see also Salinas v. State*, 163 S.W.3d 734, 741 (Tex. Crim. App. 2005). "An offense is a lesser included offense if[,] it is established by proof of the same or less than all the facts required to establish the commission of the offense charged[.]" Tex. Code Crim. Proc. Ann. art. 37.09(1) (West 2006); *see also Hall v. State*, 225 S.W.3d 524, 533-34 (Tex. Crim. App. 2007). The parties agree that the first step of this test is satisfied. Therefore, our analysis turns on the second prong of the test.

In this second step, we consider whether there was some evidence from which a rational jury could find Warren guilty only of misdemeanor escape. *See Hall*, 158 S.W.3d at 473. In making this determination, we review all the evidence presented at trial. *Bignall v. State*, 887 S.W.2d 21, 23 (Tex. Crim. App. 1994). "[A]nything more than a scintilla of evidence may be sufficient" to entitle a defendant to an instruction on the lesser charge. *Hall*, 225 S.W.3d at 536. However, the evidence must establish that the

lesser-included offense is "'a valid, rational alternative to the charged offense.'" *Id.* (quoting *Forest v. State*, 989 S.W.2d 365, 367 (Tex. Crim. App. 1999)). Thus, some evidence must permit a rational jury to acquit Warren of the greater offense while convicting him of the lesser-included offense. *See Bignall*, 887 S.W.2d at 23. "[I]t is not enough that the jury may disbelieve crucial evidence pertaining to the greater offense; there must be some evidence directly germane to a lesser included offense for the factfinder to consider before an instruction on a lesser included offense is warranted." *Id*. at 24.

It is undisputed that Warren committed the offense of escape. Warren argues that he could have been convicted only of the offense of misdemeanor escape had the court granted defense counsel's request to include the instruction on the lesser offense in the charge. In other words, Warren argues that a rational jury could have determined that he was not under arrest for being a felon in possession of a firearm at the time of his escape. We disagree.

The parties do not dispute that Warren was a convicted felon at the time of his escape. Robinson, the arresting officer, testified that he had known Warren for seventeen years and knew Warren was a convicted felon on the day of the offense. While Warren testified that he had only seen Robinson "once or twice" and that he was incarcerated during the bulk of the preceding seventeen years, he admitted that he was a convicted felon. Robinson testified that he saw Warren drop something by a portable toilet during his initial pursuit. According to the testimony of both Robinson and Baggett, the firearm was found

near the portable toilet shortly after Warren was placed in Baggett's custody. Additionally, Campbell testified that the firearm had already been located when he arrived on the scene, prior to Warren's escape. Robinson testified that at the moment he located the firearm, Warren was then under arrest for being a felon in possession of a firearm.

Significantly, Warren testified that when he was apprehended following his escape the officers told him they had found a firearm in the field and were going to prove it was his. Though Warren testified that he did not hear the officers say anything about the firearm until after he was re-apprehended, there is no testimony in the record that the firearm was located after Warren's escape. There is no evidence from which a rational jury could determine that Warren was only under arrest for the misdemeanor at the time of his escape. We overrule issue two.

Because we find that the trial court did not err in denying Warren's request for an instruction on the lesser-included offense, we need not address issue three. *See* Tex. R. App. P. 47.1. We affirm the trial court's judgment.

AFFIRMED.

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CHARLES KREGER
Justice

Submitted on January 24, 2011
Opinion Delivered March 9, 2011
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Before McKeithen, C.J., Gaultney and Kreger, JJ.