

In The
Court of Appeals
Ninth District of Texas at Beaumont

NO. 09-09-00537-CR

COY FORD SMITH, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the 284th District Court
Montgomery County, Texas
Trial Cause No. 08-05-05141 CR**

MEMORANDUM OPINION

A jury found Coy Ford Smith guilty of robbery and evading arrest or detention using a vehicle. Tex. Penal Code Ann. § 29.02(a)(1) (West 2003), § 38.04 (West Supp. 2010). Following the punishment phase of the trial, the jury recommended sentences of fifty years on the robbery conviction and twenty years on the evading arrest conviction. Subsequently, the trial court sentenced Smith to fifty years in prison on the robbery case, and sentenced Smith to twenty years in prison on the evading arrest case, with the sentences to run concurrently. On appeal, Smith argues that the evidence is factually

insufficient to support his robbery conviction. Smith further contends that in connection with his robbery case, the trial court erred by denying his request for an instruction on a lesser-included offense. Smith also argues that the evidence is legally insufficient to support his evading arrest conviction. We overrule Smith's issues and affirm the trial court's judgment.

Background

In April 2008, Smith approached Gabriela Cuesta in the parking lot of a retail store and asked if she was having car trouble. After Cuesta told Smith that she was having car trouble, Smith asked if Cuesta had change for a \$50 bill. Cuesta entered her car to get change, and after she did so, Smith snatched the bills from her hand while throwing a fake \$50 bill at her. Smith then walked to his pickup truck which was parked near Cuesta's car in the same lot.

Cuesta followed Smith to retrieve her money. According to Cuesta, she wrestled with Smith who then hit her. Also, during the scuffle, Smith pushed Cuesta to the ground and then kicked her, causing her pain. Smith then left in his pickup.

The trial court admitted a video-recording into evidence of Cuesta's encounter with Smith. The manager of the retail store where the video was made explained that a motion detector triggers the camera, which makes the video appear jumpy.

Cuesta's sister called 911 when she saw Cuesta and Smith struggling. While reporting the incident to the 911 operator, Cuesta provided Smith's description and a

description of his pickup, including his license plate number. The 911 records indicate that the call was made at 4:59 p.m.

Deputy Brian Flynn was working in the vicinity of the retail store where the robbery was alleged to have occurred when an attempt to locate a vehicle notice was sent out to law enforcement. At approximately 5:17 p.m., Flynn located a pickup matching the description of the pickup, including the license plate number, that Cuesta reported had been used to leave the scene of the alleged robbery. Flynn attempted to stop the pickup by activating his car's overhead lights and siren. During the ensuing chase, Flynn observed the driver of the pickup run several stop signs and disregard traffic lights, and he observed the pickup being driven recklessly and at speeds exceeding the posted speed limit. Flynn did not succeed in stopping the pickup, and he acknowledged that he did not encounter the driver of the pickup.

Sufficiency Standard of Review

We first examine Smith's second and third issues, as both challenge the sufficiency of the evidence supporting his convictions. In issue two, Smith argues the evidence is factually insufficient to support his robbery conviction. Smith's third issue contends the evidence is legally insufficient to support his conviction for evading arrest or detention using a vehicle. In a sufficiency review, an appellate court considers all the evidence in the light most favorable to the verdict to determine whether any rational trier-of-fact could have found the essential elements of the offense beyond a reasonable doubt.

Hooper v. State, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007) (citing *Jackson v. Virginia*, 443 U.S. 307, 318-19, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)). Under the *Jackson* standard, the reviewing court gives full deference to the jury's responsibility to fairly resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. *Id.* Although Smith characterizes issue two as a factual sufficiency challenge, and issue three as a legal sufficiency challenge, we note that the Court of Criminal Appeals recently concluded that there is no meaningful distinction between a legal sufficiency review and a factual sufficiency review. *Brooks v. State*, 323 S.W.3d 893, 902 (Tex. Crim. App. 2010) (overruling *Clewis v. State*, 922 S.W.2d 126 (Tex. Crim. App. 1996)). 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. The jury determines the weight to give the testimony of witnesses, and the determination may turn on an evaluation of credibility. *See Cain v. State*, 958 S.W.2d 404, 408-10 (Tex. Crim. App. 1997). We apply the *Jackson* standard in reviewing issues two and three to determine whether any rational trier-of-fact could have found the essential elements of the offenses beyond a reasonable doubt. *See Jackson*, 443 U.S. at 318-19.

We further note that jurors are entitled to give circumstantial evidence significant weight in evaluating whether a defendant is guilty of the crime alleged by the indictment.

“On appeal, the same standard of review is used for both circumstantial and direct evidence cases.” *Hooper*, 214 S.W.3d at 13. It is unnecessary for every fact to point directly and independently to the guilt of the accused; it is enough if the finding of guilt is warranted by the cumulative force of all the incriminating evidence. *Johnson v. State*, 871 S.W.2d 183, 186 (Tex. Crim. App. 1993).

Robbery Conviction

A person commits robbery if, “in the course of committing theft” and “with intent to obtain or maintain control of the property,” he “intentionally, knowingly, or recklessly causes bodily injury to another[.]” Tex. Penal Code Ann. § 29.02(a)(1). The Penal Code defines “in the course of committing theft” as “conduct that occurs in an attempt to commit, during the commission, or in immediate flight after the attempt or commission of theft.” Tex. Penal Code Ann. § 29.01(1) (West 2003). Theft is the unlawful appropriation of property with the intent to deprive the owner of the property. Tex. Penal Code Ann. § 31.03(a) (West Supp. 2010).

Smith contends the evidence at trial conflicts to such an extent that it cannot support his conviction. Specifically, Smith claims that the video-recording does not depict him approaching Cuesta, taking money from Cuesta, or kicking Cuesta. According to Smith, the video depicts Smith and Cuesta struggling, and Smith “trying to get away from [Cuesta’s] attacks.”

However, in a challenge to the sufficiency of the evidence, we are required to view the evidence in the light most favorable to the verdict. *See Hooper*, 214 S.W.3d at 13; *see also Jackson*, 443 U.S. at 318-19. In this case, Cuesta and her sister testified to facts that support the jury's finding that Smith caused Cuesta to suffer a bodily injury in his effort to obtain or maintain control of Cuesta's money. Cuesta testified that Smith kicked her during her struggle to retrieve her money from him. The video-recording also shows a struggle between Cuesta and Smith, and it depicts Cuesta being forced to the ground and rolling over with Smith standing over her. Based on the testimony of the store manager and the appearance of the video, the jury could reasonably infer that the video failed to capture a precise or complete account of what had occurred, or that the camera's angle prevented it from catching Smith kicking Cuesta. In summary, the video neither conclusively shows that Smith kicked Cuesta, nor does it conclusively show that he did not. Because the video was not conclusive on whether Smith kicked Cuesta, the jury was entitled to believe Cuesta's account of her struggle with Smith. In the light most favorable to the verdict, a rational jury could have determined from all of the evidence admitted at trial that Smith took Cuesta's money and then caused Cuesta to suffer a bodily injury. On this record, we conclude that a rational trier-of-fact could find the essential elements of the offense beyond a reasonable doubt. *See Hooper*, 214 S.W.3d at 13; *see also Jackson*, 443 U.S. at 318-19. We overrule Smith's second issue.

Evading Arrest Conviction

A person commits the offense of evading arrest or detention “if he intentionally flees from a person he knows is a peace officer attempting lawfully to arrest or detain him.” Tex. Penal Code Ann. § 38.04(a). Evading arrest or detention is a felony if “the actor uses a vehicle while the actor is in flight.” Tex. Penal Code Ann. § 38.04(b)(1)(B).

Smith argues that there is no evidence showing that he was driving the pickup when Deputy Flynn attempted to stop it. Smith points to the fact that Flynn acknowledged he never made contact with Smith, and that Flynn acknowledged he could not identify Smith as the evading driver at trial. However, “[c]ircumstantial evidence is as probative as direct evidence in establishing the guilt of an actor, and circumstantial evidence alone can be sufficient to establish guilt.” *Hooper*, 214 S.W.3d at 13. Moreover, appellate courts allow jurors to draw reasonable inferences from basic facts to ultimate facts. *See id.*

Despite Flynn’s inability to identify the pickup’s driver, the record contains circumstances tending to show that Smith was the driver of the pickup that Flynn chased. The pickup Flynn pursued matched the description of the pickup owned by Smith, including a matching license plate number. Cuesta identified Smith as the driver of a gray pickup that left the parking lot following the robbery, and she provided the pickup’s license plate number to the 911 operator. Additionally, there is no other evidence in the

record to suggest that someone other than Smith was driving Smith's pickup when Flynn attempted to stop it.

Viewed in the light most favorable to the verdict, a rational jury could conclude that Smith was driving the pickup and used it to evade being arrested. We hold the evidence is sufficient to support Smith's conviction of evading arrest or detention using a vehicle. *See Brooks*, 323 S.W.3d at 894; *see also Jackson*, 443 U.S. at 319. We overrule Smith's third issue.

Lesser-Included Offense

In his first issue, Smith argues the trial court erred by failing to instruct the jury on the lesser-included offense of theft. We review a trial court's decision regarding a lesser-included offense charge for an abuse of discretion. *See Threadgill v. State*, 146 S.W.3d 654, 666 (Tex. Crim. App. 2004).

Determining whether an offense has lesser-included offenses is a two-step process. *See Hall v. State*, 225 S.W.3d 524, 535-36 (Tex. Crim. App. 2007). Step one generally requires comparing the elements of the offense alleged in the indictment with the elements of the proposed lesser-included offense. *See id.*; *see also* Tex. Code Crim. Proc. Ann. art. 37.09(1) (West 2006). Smith contends that theft is a lesser-included offense of robbery, and he argues the evidence is sufficient to find him guilty of only the lesser-included offense of theft. The State acknowledges that "when the evidence shows the completion of a theft in addition to the requisite assaultive conduct, the theft is a lesser-

included offense of robbery.” *See Earls v. State*, 707 S.W.2d 82, 84-85 (Tex. Crim. App. 1986) (concluding that the offense of robbery included the lesser offense of theft where the evidence showed a completed theft); *see also Jones v. State*, 280 S.W.3d 294 (Tex. App.—Amarillo 2007, pet. ref’d). In this case, Smith’s indictment alleges that Smith caused bodily injury to the victim “while in the course of committing theft[.]” *See Sweed v. State*, 321 S.W.3d 42, 47 (Tex. App.—Houston [1st Dist.] 2010, pet. granted). We conclude that under the pleadings in Smith’s case, theft is a lesser-included offense of robbery.

In the second step under *Hall*, the appellate court determines whether ““there is some evidence in the record that would permit a jury rationally to find that if the defendant is guilty, he is guilty only of the lesser-included offense.”” *Hall*, 225 S.W.3d at 536 (quoting *Bignall v. State*, 887 S.W.2d 21, 23 (Tex. Crim. App. 1994), which cites *Rousseau v. State*, 855 S.W.2d 666, 673 (Tex. Crim. App. 1993)). The evidence must establish that theft is ““a valid, rational alternative to the charged offense.”” *Id.* (quoting *Forest v. State*, 989 S.W.2d 365, 367 (Tex. Crim. App. 1999) which quotes *Arevalo v. State*, 943 S.W.2d 887, 889 (Tex. Crim. App. 1997)). In other words, some evidence must permit a rational jury to acquit Smith on the greater offense while convicting him of the lesser-included offense. *Salinas v. State*, 163 S.W.3d 734, 741 (Tex. Crim. App. 2005). In evaluating whether a jury could have acquitted Smith of robbery but convicted him of theft, we review all of the evidence admitted at Smith’s trial. *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.

Here, there is no evidence to show that Smith did not cause Cuesta to suffer bodily injury during the altercation. *See Hall*, 225 S.W.3d at 536. Cuesta testified that Smith forced her to the ground and kicked her. Additionally, the video-recording is not conclusive regarding whether Cuesta suffered a bodily injury during the altercation. Instead, the video depicts events that are consistent with the jury’s conclusion that the altercation caused Cuesta to experience pain. We conclude that the video is not directly germane to Smith’s claim that he was guilty only of theft. The trial court did not err in overruling Smith’s request for a lesser-included instruction. *See id.* We overrule Smith’s first issue.

Having overruled all of Smith’s issues, we affirm the trial court’s judgment.

AFFIRMED.

HOLLIS HORTON
Justice

Submitted on April 1, 2011
Opinion Delivered May 11, 2011
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Before Gaultney, Kreger, and Horton, JJ.