In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-11-00056-CR

JAMES STOCKTON EVANS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 221st District Court
Montgomery County, Texas
Trial Cause No. 10-07-07206-CR

MEMORANDUM OPINION

James Stockton Evans pled guilty to the felony offense of driving while intoxicated. *See* Tex. Penal Code Ann. §§ 49.04(a), 49.09(b)(2) (West 2011). Based on a prior felony conviction for committing intoxication manslaughter, his punishment was enhanced to a second-degree felony. *See id.* § 12.42(a)(3) (West 2011). After conducting a punishment hearing, the trial court imposed a sentence of twenty years in prison; the trial court also found that Evans used his vehicle as a deadly weapon when committing the offense. *See id.* § 1.07(a)(17)(B) (West 2011).

In his sole appellate issue, Evans asserts the evidence is insufficient to support the trial court's deadly weapon finding. The Texas Penal Code defines the term "deadly weapon" as "anything that in the manner of its use or intended use is capable of causing death or serious bodily injury." *Id.* With respect to the trial court's deadly weapon finding, we note that Texas law authorizes a deadly weapon finding in felony DWI cases. *Sierra v. State*, 280 S.W.3d 250, 254 (Tex. Crim. App. 2009) (citing *Mann v. State*, 58 S.W.3d 132, 132 (Tex. Crim. App. 2001)). To obtain an affirmative finding that a driver used his vehicle as a deadly weapon, it is not necessary to show that the driver intended to use the vehicle as a deadly weapon. *Id*. at 255 (citing *Walker v. State*, 897 S.W.2d 812, 814 (Tex. Crim. App. 1995)).

In this case, Evans's issue requires that we review the evidence to determine whether the manner in which Evans used the vehicle during his commission of the felony supports the trial court's determination that Evans used the vehicle as a deadly weapon. *See Sierra*, 280 S.W.3d at 255; *see also Foley v. State*, 327 S.W.3d 907, 916 (Tex. App.—Corpus Christi 2010, no pet.); *Hilburn v. State*, 312 S.W.3d 169, 177 (Tex. App.—Fort Worth 2010, no pet.). In resolving Evans's sufficiency challenge, we view the evidence in the light most favorable to the verdict to determine if a rational trier of fact could have found, beyond a reasonable doubt, that the defendant used his vehicle as a deadly weapon when driving while intoxicated. *See id*.; *see also Jackson v. Virginia*, 443

U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *Brooks v. State*, 323 S.W.3d 893, 894-95 (Tex. Crim. App. 2010).

First, we review the evidence to determine if it supports the trial court's determination that Evans used his vehicle in a reckless manner. *See Sierra*, 280 S.W.3d at 255. In the light most favorable to the trial court's judgment, the evidence admitted during the punishment phase of the trial established that Evans was intoxicated, weaved from shoulder to shoulder and veered into oncoming traffic, traveled between forty-five and seventy miles per hour, and narrowly missed several oncoming vehicles before rear-ending a pickup. We conclude that the manner in which Evans used his vehicle is sufficient to support the trial court's implied finding that Evans drove his vehicle in a reckless manner.

We also review the evidence to determine whether the evidence shows that Evans used his vehicle in a manner that made it capable of causing death or serious bodily injury. *See Sierra*, 280 S.W.3d at 255. To prevail on appeal, the State is not required to show that Evans used the vehicle to actually cause death or serious bodily injury. *See Hilburn*, 312 S.W.3d at 177. Instead, the question is whether Evans used or intended to use his vehicle in a manner capable of causing death or serious bodily injury. *See id.*

"To sustain a deadly weapon finding, there must be evidence that others were actually endangered, not 'merely a hypothetical potential for danger if others had been present.'" *Cates v. State*, 102 S.W.3d 735, 738 (Tex. Crim. App. 2003) (quoting *Mann v.*

State, 13 S.W.3d 89, 92 (Tex. App.—Austin 2000)), *affd*, 58 S.W.3d 132 (Tex. Crim. App. 2001); *see Foley*, 327 S.W.3d at 916-17. Therefore, we examine the record for evidence demonstrating that others were present when the reckless driving occurred. *See Foley*, 327 S.W.3d at 916-17; *Williams v. State*, 946 S.W.2d 432, 435 (Tex. App.—Fort Worth, 1997, pet. dism'd) (concluding that to find whether a vehicle was capable of causing death or serious bodily injury the evidence must show that there was someone present who was placed in danger of serious bodily injury or death when the DWI offense occurred).

Here, the record shows that Evans used his vehicle in a manner that placed other motorists in danger of death or serious bodily injury. A witness who had been travelling behind Evans testified that she saw Evans cause several near-miss collisions before Evans rear-ended a pickup. A Texas Department of Public Safety trooper described the damage to the rear of the pickup that Evans struck as being "severe[,]" and the trooper also testified that Evans had used his vehicle in a manner that could have caused death or injury to another person.

Viewing the evidence in the light most favorable to the verdict, a rational trier of fact could have found beyond a reasonable doubt that other motorists were actually placed in danger of death or serious bodily injury. *See Mann*, 13 S.W.3d at 92 (finding evidence on use of deadly weapon to be sufficient where defendant almost hit another vehicle head-on and another driver took evasive action to avoid being hit by the

defendant); *see also Davis v. State*, 964 S.W.2d 352, 354 (Tex. App.—Fort Worth 1998, no pet.) (finding evidence on use of deadly weapon to be sufficient where defendant took evasive action to avoid hitting another car). Having reviewed all of the evidence, we conclude that the evidence is sufficient, beyond reasonable doubt, to establish that Evans, while intoxicated, used his vehicle as a deadly weapon. We overrule Evans's sole issue on appeal and affirm the trial court's judgment.

AFFIRMED.

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HOLLIS HORTON
Justice

Submitted on September 15, 2011
Opinion Delivered September 28, 2011
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Before McKeithen, C.J., Kreger and Horton, JJ.