COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-15-00332-CR

BYRON BERNARD DUPREE — APPELLANT

V.

THE STATE OF TEXAS — STATE

FROM THE 30TH DISTRICT COURT OF WICHITA COUNTY
TRIAL COURT NO. 53571-A

MEMORANDUM OPINION[1]

A jury convicted pro se Appellant Byron Bernard Dupree of attempted aggravated assault against a public servant–deadly weapon and possession of a deadly weapon in a penal institution, and it assessed his punishment for each offense at thirty-five years' confinement and a $2,500 fine. In six issues, Dupree argues that the evidence is insufficient to support his attempted-aggravated-assault conviction, that he was denied his right to a speedy trial, that the State

[1]*See* Tex. R. App. P. 47.4.

secured his convictions using false testimony, that the trial court "testified . . . like a witness in favor of the State," that his convictions violate the prohibition against double jeopardy, and that the charge was erroneous. We will affirm as modified.

Chad Stephenson was working as a corrections officer at the James V. Allred Unit of the Texas Department of Criminal Justice when on February 27, 2013, Dupree, an inmate at the unit, reached his arm out of the food tray slot in his cell door and swung at Officer Stephenson with a paper pole that had two razor blades attached to its end. Officer Stephenson, who had opened the food tray slot to give Dupree a clean jumper, used the jumper as a shield, stepped back and out of the way, and was not struck by the weapon, which authorities recovered from Dupree's cell.

We construe Dupree's first issue to challenge the sufficiency of the evidence to support his conviction for attempted aggravated assault against a public servant–deadly weapon.[2] In our due-process review of the sufficiency of the evidence to support a conviction, we view all of 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 crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979). This standard gives full play to the responsibility of the trier of fact to resolve conflicts in the

[2]Dupree challenges the factual sufficiency of the evidence, but "the *Jackson v. Virginia* legal-sufficiency standard is the only standard that a reviewing court should apply in determining whether the evidence is sufficient to support" a conviction. *Brooks v. State*, 323 S.W.3d 893, 895 (Tex. Crim. App. 2010).

testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. *Murray v. State*, 457 S.W.3d 446, 448 (Tex. Crim. App.), *cert. denied*, 136 S. Ct. 198 (2015).

A person commits aggravated assault if he "commits assault as defined in § 22.01" and "uses or exhibits a deadly weapon during the commission of the assault." Tex. Penal Code Ann. § 22.02(a)(2) (West 2011). The offense becomes a first-degree felony if it is committed "against a person the actor knows is a public servant while the public servant is lawfully discharging an official duty." *Id.* § 22.02(b)(2)(B). "The actor is presumed to have known the person assaulted was a public servant . . . if the person was wearing a distinctive uniform or badge indicating the person's employment as a public servant . . . ." *Id.* § 22.02(c). "A person commits an offense if, with specific intent to commit an offense, he does an act amounting to more than mere preparation that tends but fails to effect the commission of the offense intended." *Id.* § 15.01(a) (West 2011) (criminal attempt).

The evidence demonstrates that Dupree stuck his arm out of the food tray slot in his cell door and attempted to strike Officer Stephenson with a paper pole that had two razor blades attached at its end. Officer Stephenson testified that he was wearing a full uniform at the time and that he was afraid for his life when Dupree swung at him. Dupree was alone in his cell when the incident occurred, and several witnesses opined that the paper pole with attached razor blades was a deadly weapon.

Dupree argues that the evidence is insufficient to sustain his conviction because there was no video of him possessing the weapon, there were no fingerprints found on the weapon, Officer Stephenson failed to get a good look at the weapon when Dupree swung at him, and the statements that several corrections officers submitted following the incident contained inconsistencies. Eyewitness testimony, alone, can be sufficient to support a conviction, *see Aguilar v. State*, 468 S.W.2d 75, 77 (Tex. Crim. App. 1971), and the jury presumably resolved any inconsistencies in the evidence against Dupree. *See Murray*, 457 S.W.3d at 448–49. The evidence is sufficient to support Dupree's conviction for attempted aggravated assault against a public servant–deadly weapon. *See Jackson*, 443 U.S. at 319, 99 S. Ct. at 2789. We overrule his first issue.

Dupree argues in his second issue that he was denied his right to a speedy trial. The right to a speedy trial is constitutionally guaranteed. U.S. Const. amend. VI; Tex. Const. art. I, § 10; *see Barker v. Wingo*, 407 U.S. 514, 515, 92 S. Ct. 2182, 2184 (1972); *Zamorano v. State*, 84 S.W.3d 643, 647 (Tex. Crim. App. 2002). In determining whether a defendant has been denied this right, a court must balance four factors: (1) length of the delay; (2) reason for the delay; (3) assertion of the right; and (4) prejudice to the accused. *Barker*, 407 U.S. at 530, 92 S. Ct. at 2192–93; *Johnson v. State*, 954 S.W.2d 770, 771 (Tex. Crim. App. 1997). In order to trigger a speedy-trial violation analysis, "an accused must allege that the interval between accusation and trial has crossed

the threshold dividing ordinary from 'presumptively prejudicial' delay." *Doggett v. United States*, 505 U.S. 647, 651–52, 112 S. Ct. 2686, 2690 (1992). Once the first *Barker* factor is satisfied, an analysis of the remaining factors is triggered. *Cantu v. State*, 253 S.W.3d 273, 281 (Tex. Crim. App. 2008). The State has the burden of justifying the length of delay, but the defendant has the burden of proving the assertion of the right and showing prejudice. *Id.* at 280.

Dupree was indicted approximately two years before his trial began. The State concedes that the delay is sufficient to trigger a speedy-trial analysis, and we agree. *See Harris v. State*, 827 S.W.2d 949, 956 (Tex. Crim. App.) (recognizing that courts generally hold that any delay of eight months or longer is presumptively unreasonable and triggers speedy trial analysis), *cert. denied*, 506 U.S. 942 (1992).

Regarding the second *Barker* factor, Dupree filed his motion for speedy trial on January 23, 2014. The trial court granted the motion in March 2014.[3] On April 14, 2014, Dupree filed a motion to continue an April 2014 setting. The trial was then set for May 2014, but the trial court granted another motion for continuance that Dupree had filed. Dupree then filed a motion to continue a later trial setting, which the trial court granted on June 24, 2016. In August 2014, Dupree filed another motion for continuance, which the trial court granted. Soon

[3]Dupree seems to suggest that the delay between his filing of the motion and the trial court's granting of the motion violated his right to a speedy trial, but among other things, there is nothing in the record to indicate that Dupree presented the motion to the trial court before it granted the motion.

before a January 2015 trial setting, Dupree filed a motion to recuse the trial judge, which was later denied. The trial was then set for September 2015. Dupree filed yet another motion for continuance, but the trial court denied it, and the case was tried in September 2015. As the record reflects, the delays were caused primarily by Dupree. The State contends that this factor weighs heavily against Dupree, and we agree.

Regarding the third *Barker* factor, Dupree asserted his right to a speedy trial but then filed numerous continuance motions, effectively delaying the trial. The factor weighs neither in favor of nor against Dupree.

Finally, Dupree must make a prima facie showing of prejudice caused by the delay of the trial. *See State v. Munoz*, 991 S.W.2d 818, 826 (Tex. Crim. App. 1999). Prejudice is assessed in light of the interests that the speedy trial right is designed to protect—preventing oppressive pretrial incarceration, minimizing anxiety and concern of the accused, and limiting the possibility that the defense will be impaired. *Id.* Considering these interests, the record does not reflect that Dupree suffered any prejudice that was not caused by his own repeated requests to continue the numerous trial settings. Having balanced the *Barker* factors, we cannot conclude that Dupree's right to a speedy trial was violated. We overrule his second issue.

In his third issue, Dupree argues that the State knowingly presented false testimony to obtain his convictions because Officer Stephenson was unable to thoroughly describe the weapon; Officer Stephenson stated in a report that there

were no witnesses to the incident, even though Michael Almon, a corrections officer, testified that he had witnessed the incident; and a report by Officer Almon went missing. A prosecutor's knowing use of perjured testimony violates the due process clause of the Fourteenth Amendment. *Ex parte Castellano*, 863 S.W.2d 476, 479 (Tex. Crim. App. 1993). There is nothing in the record to indicate that any witness testified falsely. Officer Stephenson's inability to precisely describe the weapon had nothing to do with perjury; it was simply his recollection of the incident. Officer Stephenson wrote in an administrative report that there were no witnesses because he was unaware that Officer Almon, who was stationed in the "control picket," had witnessed the incident. And as the State points out, Officer Almon's missing report may demonstrate sloppy housekeeping, but it in no way amounts to false testimony. We overrule Dupree's third issue.

Dupree argues in his fourth issue that the trial court made certain statements that showed it was "vouching and testifying on behalf of the State." Dupree primarily complains of statements that the trial court made at a pretrial hearing in May 2014, but that hearing occurred over a year before the September 2015 jury trial, when testimony was elicited and evidence admitted. Dupree also complains about several instances during trial in which the court instructed Dupree not to testify while cross-examining a witness, but the trial court was simply exercising its discretion and authority as afforded by rule of evidence

611.[4] *See* Tex. R. Evid. 611(a) (stating that court should exercise reasonable control over the mode and order of examining witnesses so as to avoid wasting time and to protect witnesses from harassment). We overrule Dupree's fourth issue.

In his fifth issue, Dupree argues that he was denied his state and federal protections against double jeopardy because he received multiple punishments for the same offense. One of our sister courts recently explained the appropriate standards:

> A double jeopardy claim based on multiple punishments arises when the State seeks to punish the same criminal act twice under two distinct statutes under circumstances in which the Legislature intended the conduct to be punished only once. *Langs v. State*, 183 S.W.3d 680, 685 (Tex. Crim. App. 2006). There are two ways to assess whether the Legislature intended to authorize separate punishments: (1) analyzing the elements of the offenses and (2) identifying the appropriate "unit of prosecution" for the offenses. *Garfias v. State*, 424 S.W.3d 54, 58 (Tex. Crim. App. 2014). We use an "elements" analysis when the offenses in question come from different statutory sections and use a "units" analysis when the offenses are alternate means of committing the same statutory offense.[5] *Id.* . . .
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> In an "elements" analysis, the *Blockburger* test is the starting point. *Shelby v. State*, 448 S.W.3d 431, 436 (Tex. Crim. App. 2014) (citing *Blockburger v. United States*, 284 U.S. 299, 304 (1932).

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[4]Dupree also failed to object to the trial court's statements. *See generally Blue v. State*, 41 S.W.3d 129, 130–31 (Tex. Crim. App. 2000) (stating general rule that in order to preserve for appellate review a complaint about a trial judge's comments during trial, counsel must object or otherwise bring the complaint to the trial judge's attention). Dupree complains of no fundamental error. *See id.* at 131.

[5]We use an elements analysis here because Dupree's convictions come from different statutory sections.

Under *Blockburger*, two offenses are not the same if each requires proof of a fact that the other does not. *Id.* We use the cognate-pleadings approach to the *Blockburger* test. We examine the statutory elements in the abstract and compare the offenses as pleaded to determine if the pleadings have alleged the same "facts required." *Id.* (citing *Bigon v. State*, 252 S.W.3d 360, 370 (Tex. Crim. App. 2008)). But the *Blockburger* test is a rule of statutory construction and not the exclusive test for determining if two offenses are the same. *Id.* The ultimate question is whether the Legislature intended to allow the same conduct to be punished under both relevant statutes. *Id.*

The Texas Court of Criminal Appeals has provided a non-exclusive list of factors useful in discerning whether the Legislature intended to punish conduct under different statutes. *Id.* (citing *Ex parte Ervin*, 991 S.W.2d 804, 814 (Tex. Crim. App. 1999)). Those factors are:

> (1) whether offenses are in the same statutory section; (2) whether the offenses are phrased in the alternative; (3) whether the offenses are named similarly; (4) whether the offenses have common punishment ranges; (5) whether the offenses have a common focus; (6) whether the common focus tends to indicate a single instance of conduct; (7) whether the elements that differ between the two offenses can be considered the same under an imputed theory of liability that would result in the offenses being considered the same under *Blockburger*; and (8) whether there is legislative history containing an articulation of an intent to treat the offenses as the same or different for double jeopardy purposes.

Id. The *Shelby* court wrote that the factor concerning the "focus" or "gravamen" of a penal provision is the best indicator of legislative intent when determining whether a multiple-punishments violation has occurred. *Id.* The sixth factor requires a court to consider the allowable unit of prosecution for the offenses when conducting an "elements" analysis. *Id.*; *Ex parte Benson*, 459 S.W.3d 67, 73 (Tex. Crim. App. 2015).

Fox v. State, No. 03-14-00617-CR, 2016 WL 111154, at *2–3 (Tex. App.—Austin Jan. 7, 2016, pet. ref'd) (mem. op., not designated for publication).

Attempted aggravated assault against a public servant–deadly weapon and possession of a deadly weapon in a penal institution are separate offenses because each requires proof of a different element. *Compare* Tex. Penal Code Ann. § 22.02(a)(2), (b)(2)(B), *with id.* § 46.10 (West 2011); *see Blockburger*, 284 U.S. at 304, 52 S. Ct. at 182. Further, having considered the *Ervin* factors, the legislature clearly intended that separate punishments be imposed for each offense. *See Ervin*, 991 S.W.2d at 814. Dupree sustained no double jeopardy violation. We overrule his fifth issue.

In his sixth issue, Dupree argues that the trial court's amended charge at guilt/innocence was erroneous because it instructed the jury that its duty was to unanimously determine his guilt or *innocence*. He contends that the jury was not responsible for finding him guilty or innocent but, instead, guilty or not guilty.[6] "[A]ll alleged jury-charge error must be considered on appellate review regardless of preservation in the trial court." *Kirsch v. State*, 357 S.W.3d 645, 649 (Tex. Crim. App. 2012). We first determine whether error occurred; if error did not occur, our analysis ends. *Id.*

As the State observes, the complained-of language is consistent with code of criminal procedure article 37.07, which states in relevant part, "In all criminal cases, . . . which are tried before a jury on a plea of not guilty, the judge shall, before argument begins, first submit to the jury the issue of guilt or innocence of

[6]Dupree also seems to argue that part of the charge was vague. The argument is forfeited as inadequately briefed because it contains no citations to any authority. *See* Tex. R. App. P. 38.1(i).

the defendant . . . ." Tex. Code Crim. Proc. Ann. art. 37.07, § 2(a) (West Supp. 2016); *see Flores v. State*, 920 S.W.2d 347, 357 (Tex. App.—San Antonio 1996, pet. ref'd) ("The instruction is clearly designed to focus the jury's attention on the first phase of the bifurcated criminal trial—the 'guilt/innocence' phase—and to direct the jury away from consideration of other issues, e.g. punishment."). Further, the charge specifically instructed the jury that the law does *not* require the defendant to prove his innocence and that it should acquit Dupree unless it found him guilty beyond a reasonable doubt. There was no charge error; therefore, our analysis is complete. *See Kirsch*, 357 S.W.3d at 649. We overrule Dupree's sixth issue.

The State contends that we should reform the judgments of convictions to delete the $2,500 fines because penal code section 12.42(d) does not permit the imposition of a fine. *See* Tex. Penal Code Ann. § 12.42(d) (West Supp. 2016) (habitual offender statute providing in relevant part that punishment be "for any term of not more than 99 years or less than 25 years"). We agree. We modify both of Dupree's judgments of conviction to delete the $2,500 fine that each imposes. *See* Tex. R. App. P. 43.2(b); *Taylor v. State*, No. 11-12-00317-CR, 2014 WL 6806849, at *8 (Tex. App.—Eastland Nov. 26, 2014, pet. ref'd) (mem. op., not designated for publication) (holding similarly).

Having overruled Dupree's six issues, we affirm the trial court's judgments as modified.

PER CURIAM

PANEL: MEIER, GARDNER, and WALKER, JJ.

DO NOT PUBLISH
Tex. R. App. P. 47.2(b)

DELIVERED: August 31, 2016