COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-16-00132-CR

CARMELO RAMIREZ PONCE III — APPELLANT

V.

THE STATE OF TEXAS — STATE

FROM THE 89TH DISTRICT COURT OF WICHITA COUNTY
TRIAL COURT NO. 55,317-C

MEMORANDUM OPINION[1]

Introduction

The small town of Electra, Texas, saw a chain of unhappy events on September 26, 2014, a Friday whose afternoon and evening were punctuated by various characters' drug use and heavy drinking, some intrafamily discord, and, ultimately, a bleeding and barefoot kidnapping victim stumbling into the Electra

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

police department while in another part of town Melo Ponce was running over his second casualty of the day. An Electra police dispatcher captured a sense of the day when asked why she had moved there from New York some two years earlier: she was "looking for something new," as she put it—"and found it."

A jury convicted Ponce of kidnapping and aggravated assault, acquitting him on a separate aggravated-assault count. During the punishment phase, Ponce pleaded true to the allegations that he had two earlier felony convictions. *See* Tex. Penal Code Ann. § 12.42(d) (West Supp. 2016). The trial court sentenced Ponce to life imprisonment on both Count 1 (kidnapping) and Count 3 (aggravated assault). In two points, Ponce contends that the trial court erred (a) by failing to charge the jury on the lesser-included offense of assault in connection with Count 3 and (b) by ordering the sentences on Count 1 and Count 3 to run consecutively. We affirm.

Facts

Ponce's two victims that day were Sierra Capuchino and Cody Stevens, who both started the afternoon hanging out at the home of Chase Robb, a mutual friend. Ponce and Capuchino had dated briefly in August 2014, and although Capuchino and Stevens would later get together, as of September 26 they were simply friends. Ponce apparently thought otherwise.

Ponce showed up at Robb's house and lured a shoeless Capuchino outside without anyone's noticing. He grabbed her by the hair, yanked her into a

car in which his own father was a passenger,[2] threatened to kill her, and drove away to the rodeo grounds. There Ponce stopped the car, where he hit Capuchino several times, took her phone, and threatened to shoot her or "better yet," in his words, run her over if she ran away. According to Capuchino, Ponce was facing trial on an unrelated matter the following week and found no downside to killing her, as he observed that he was "going to prison regardless."[3] Ponce proceeded to drive Capuchino to a vacant house where he continued to hit and taunt her, pricking her with a knife as he did.

At some point in the early evening Capuchino's sister, Randi Parker, happened along, but instead of being any help in the situation, Parker—already intoxicated—left to buy beer for Ponce, whom she too used to date, and his father.[4] Parker returned with beer and hung around, dancing to a boom-box and ignoring her sister. (At trial, Parker expressed some disapproval of Capuchino for having had sexual relations with Parker's fiancé, who fathered Parker's youngest child.) Ponce then summoned his own sister to come pick up Capuchino, get her "cleaned up," and bring her back to the vacant house.

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[2]Ponce's father was tried separately and did not testify at his son's trial.

[3]Based on this rationale, Ponce clearly was not expecting any leniency in that upcoming trial. He reasoned correctly. On October 1, 2014, a jury convicted Ponce of an unrelated felony and assessed his punishment at 30 years' imprisonment.

[4]Parker had begun drinking earlier in the day because she was upset with the father of one of her two young children.

Capuchino ultimately fled from Ponce's sister's car and ran to safety at the nearby Electra Police Department, arriving shortly before 9:00 p.m. The police took her to the hospital for treatment.

Meanwhile, while it was still daylight, Cody Stevens[5] and his friends had left the house from which—unbeknownst to them—Ponce had snatched Capuchino. Thinking that Capuchino had simply left without saying goodbye, Stevens called to let her know, in case she returned to retrieve her things, that they had locked Robb's house; he got no reply. Stevens ended up at the house of Diedra Dunn, where he, Dunn, and Stevens's cousin Misty Smith all smoked meth.

Later in the evening, Ponce texted Stevens from Capuchino's phone, claiming to be at Stevens's mother's house with a gun, so Stevens texted back that he would be walking there. By this time Stevens knew that Ponce had Capuchino's phone because Ponce had used it to call Stevens earlier, telling him to quit calling Capuchino's number. Also by this time, Ponce knew that Capuchino had not reappeared at the vacant house despite the order for her to come back, and he had gone looking for her.

Stevens described how he was in the middle of the street when, about 30 feet away, he saw Ponce driving Parker's car. Ponce's father and Parker were passengers. Stevens walked up to the driver's side, and Ponce asked Stevens

[5]Stevens, who testified chained because he was incarcerated for an unrelated crime, appeared at Ponce's trial under protest.

where Capuchino was, saying something to the effect that if he saw Capuchino and Stevens together, he would kill Stevens. The exchange understandably grew heated, and Stevens challenged Ponce to get out of the car and fight. Instead, Ponce drove to the corner, turned around, and accelerated toward Stevens.

Stevens acknowledged that Ponce was not going "super fast." Stevens threw his cell phone at the car and ran into a yard, trying to get away, but Ponce still "came at [him]" and managed to clip him on the side. Stevens said that Ponce barely hit him but added that "when he hit me, . . . I fell right into the yard"; "[i]t knocked me into the yard." Stevens also testified that Ponce "came through the yard and at that time kind of went over my leg . . . ." Putting it slightly differently, Stevens later said, "Once—he clipped me in my side when I fell and the back tire went over my leg." Stevens explained, "After he nudged me back over. He passed me a little and knocked me back down, put it in reverse, knocked me back down[,] and he took off." According to Stevens, while Ponce was backing up, the car was "barely . . . moving." Although the meth in his system initially blocked the pain, Stevens began to hurt once the drugs started wearing off, and his mother and father took him to the hospital.

Stevens's cousin Smith—who like Stevens had also been brought from jail to testify—said that she had been using meth at Dunn's house when for some

reason Stevens became mad and left.[6] Following him, she saw Stevens talking to someone in a car he was standing next to. According to Smith, Stevens told her to go away, but she stayed because she wanted to know what Stevens was doing. When asked what happened next, Smith said, "The car ended up going up in the yard and hit [Stevens]. I don't know how it happened. It happened really fast." Her memory of Ponce's car's hitting Stevens extended to only one time. After Stevens got up, Smith described him as limping. Smith admitted being "pretty messed up" on meth that night.

Capuchino's sister testified about her time with Ponce in the car that night. Parker admitted being "pretty drunk" and dozing in and out, but she remembered Stevens walking down the road. Because she had been drinking—by her own account as many as 20 beers—she acknowledged that her memories were "fuzzy." She testified that Stevens "was walking the same we were coming, we pulled up, and I had gotten a little bit—I had got back up, kind of leaned on the passenger door and dozed off and I hear something go thud on the hood and then I guess he pulled off." She did not see what caused the thud. Parker then described Stevens as walking up and slamming both hands on the hood, after which Ponce "just sped off, like drove off."

Ponce, his father, and Parker headed for an Electra bar, The Friendly Lounge, where witness Deborah Holley worked as a bartender. (Perhaps

[6]Smith knew nothing of Ponce's text to Stevens.

unsurprisingly, Parker did not remember having gone there.) Holley testified that Ponce came up to the bar, ordered a drink, and volunteered that he had run Stevens over. Two other witnesses testified that Ponce admitted running over Stevens: one overheard Ponce say that he hoped he had hurt Stevens, and the other was told directly by Ponce that he had "r[u]n Cody's bitch ass over" in that witness's grandmother's yard.

With these facts in mind, we turn to Ponce's points on appeal.

The trial court did not err by failing to charge the jury on the lesser-included offense of assault.

In his first point, Ponce argues that the trial court erred by not submitting a charge on the lesser-included offense of assault on Count 3. In that count, the State alleged that Ponce intentionally, knowingly, or recklessly caused bodily injury to Stevens by striking him with a car and that Ponce used or exhibited a deadly weapon—a car—during the assault's commission. Ponce contends that he did not use the car in a way supporting a deadly-weapon finding, pointing to the facts that even Stevens testified that the car was not going fast, that the car just nudged Stevens, and that the car struck him as Ponce was pulling away.

We use a two-step analysis to determine if a defendant was entitled to a lesser-included-offense instruction. *Hall v. State*, 225 S.W.3d 524, 528 (Tex. Crim. App. 2007); *Rousseau v. State*, 855 S.W.2d 666, 672–73 (Tex. Crim. App.), *cert. denied*, 510 U.S. 919 (1993).

First, the lesser offense must come within article 37.09 of the code of criminal procedure. Tex. Code Crim. Proc. Ann. art. 37.09 (West 2006); *Moore v. State*, 969 S.W.2d 4, 8 (Tex. Crim. App. 1998). The parties here do not dispute that this criterion is satisfied, with assault being a lesser-included offense of aggravated assault.

Second—and the crux of Ponce's initial appellate issue—some evidence must exist in the record that would permit a jury to rationally find that if the defendant is guilty, he is guilty of the lesser offense only. *Hall*, 225 S.W.3d at 536; *Salinas v. State*, 163 S.W.3d 734, 741 (Tex. Crim. App. 2005); *Rousseau*, 855 S.W.2d at 672–73. The evidence must be evaluated in the context of the entire record. *Moore*, 969 S.W.2d at 8. There must be some evidence from which a rational jury could acquit the defendant of the greater offense while convicting him of the lesser-included offense. *Id.* The court may not consider whether the evidence is credible, controverted, or in conflict with other evidence. *Id.* In other words, anything more than a scintilla of evidence may suffice to entitle a defendant to a lesser-included-offense jury charge. *Hall*, 225 S.W.3d at 536.

Ponce's appellate point involving his conviction on Count 3 requires us to review what constitutes a deadly weapon, and whether Ponce's use of a car under these circumstances fits the definition. By statute, a "deadly weapon" includes "anything that in the manner of its use or intended use is capable of causing death or serious bodily injury." Tex. Penal Code Ann. § 1.07(a)(17)

(West Supp. 2016). This provision does not require that the actor actually intend death or serious bodily injury; rather, it requires only that the actor intend the use of an object such that it would be capable of causing death or serious bodily injury. *McCain v. State*, 22 S.W.3d 497, 503 (Tex. Crim. App. 2000).

Objects that are usually not considered dangerous weapons may become so depending on how they are used during an offense's commission. *Drichas v. State*, 175 S.W.3d 795, 798 (Tex. Crim. App. 2005). A car in particular can become a deadly weapon if the manner of its use is capable of causing death or serious bodily injury. *Id.* Specific intent to use a car as a deadly weapon is not required. *Id.* To sustain a deadly-weapon finding, however, evidence must exist that others were actually endangered; the mere existence of a "hypothetical potential for danger" is insufficient. *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) *aff'd*, 58 S.W.3d 132 (Tex. Crim. App. 2001)).

To decide if a car is a deadly weapon in a particular case, we evaluate the manner in which the defendant used the car during the felony, and then we consider whether the car was capable of causing death or serious bodily injury during the felony. *See Sierra v. State*, 280 S.W.3d 250, 255 (Tex. Crim. App. 2009).

As we understand Ponce's argument, the fact that he was not driving very fast constitutes some evidence that he drove the car in a manner not capable of causing death or serious bodily injury but perhaps only in a manner capable of

causing bodily injury. *Compare* Tex. Penal Code Ann. § 1.07(a)(8) ("'Bodily injury' means physical pain, illness, or any impairment of physical condition"), *with id.* § 1.07(a)(46) ("Serious bodily injury" means "bodily injury that creates a substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ."). We disagree.

Although Stevens testified that Ponce's car was not going "super fast," the evidence also showed that Ponce was driving fast enough to hit Stevens as he tried to get away and that Ponce ran him over with the car. Far from being disconcerted or contrite, Ponce then went to a bar, told other people about it, and seemed pleased with the results.

Smith's testimony also independently demonstrates that Ponce assaulted Stevens and did so using a car in a manner sufficient to knock Stevens down. Nothing Smith said at trial suggests that Ponce was driving the car in a manner capable of causing only bodily injury but not serious bodily injury or death.

All we know from Parker's testimony is that she was asleep and was awakened by a thud; she could not provide any details regarding the circumstances preceding the contact or at the moment of contact. Her testimony thus lacks any details showing that Ponce was driving the car in a manner calculated to cause only bodily injury and constitutes no affirmative evidence one way or another on how Ponce was driving the car before or when it hit Stevens.

We hold that a car used in this manner—chasing a person into a yard, hitting him even after that person had tried to move away, knocking him over, and running him over—is in fact capable of causing death or serious bodily injury and, consequently, that there was no evidence that Ponce drove the car in a manner capable of causing only bodily injury. We thus hold that the trial court did not err by refusing to include a charge on the lesser-included offense of assault. *See Hall*, 225 S.W.3d at 536 (holding evidence must permit jury to rationally find defendant guilty of lesser offense only); *see also Newsome v. State*, 01-14-00834-CR, 2015 WL 4366043, at *3–5 (Tex. App.—Houston [1st Dist.] July 16, 2015, no pet.) (mem. op., not designated for publication) (upholding deadly-weapon status of car that defendant backed slowly out of parking space and then stopped after traveling only two feet without ever hitting officer, who jumped out of the way); *Dobbins v. State*, 228 S.W.3d 761, 767–68 (Tex. App.—Houston [14th Dist.] 2007, pet. dism'd) (holding that evidence of defendant's driving directly at officer at 5–10 miles per hour constituted evidence of conduct endangering the officer's life).

We overrule Ponce's first point.

The trial court did not order the sentences to run consecutively, as Ponce complains.

In Ponce's second point, he asserts that the trial erred by ordering Count 1 and Count 3 to run consecutively because they both arose from the same

criminal episode. *See* Tex. Penal Code Ann. § 3.01 (West 2011), § 3.03 (West Supp. 2016). Ponce's second point is moot because that is not what happened.

At the sentencing hearing, the trial court ordered the sentences in Count 1 and Count 3 to run concurrently, not consecutively. The judgments themselves are silent about whether Counts 1 and 3 run consecutively or cumulatively, but where judgments are silent, sentences run concurrently. *See Ex parte Knipp*, 236 S.W.3d 214, 215 n.2 (Tex. Crim. App. 2007).

Our review of Ponce's sentencing and the judgments shows that the trial court ordered Counts 1 and 3 to run concurrently with each other but consecutively with a prior offense for credit-card abuse. Ponce, however, does not complain about that sequencing.[7]

Because Counts 1 and 3 are in fact running concurrently as to each other, we overrule Ponce's second point as moot.

Conclusion

Having overruled both of Ponce's points, we affirm the trial court's judgments.

[7]We note that the trial court initially signed judgments ordering Counts 1 and 3 to run consecutively with cause number "50,298-C," the same number referred to at sentencing. On the State's motion, the trial court later signed nunc pro tunc orders correcting that cause number to "52,098-C." Ponce does not complain about that either.

/s/ Elizabeth Kerr
ELIZABETH KERR
JUSTICE

PANEL: MEIER, GABRIEL, and KERR, JJ.

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

DELIVERED: April 13, 2017