In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-14-00155-CR

TETHERANCE JOHNSON, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

On Appeal from the 272nd District Court
Brazos County, Texas
Trial Court No. 12-02276-CRF-272, Honorable Travis B. Bryan, III, Presiding

March 31, 2016

MEMORANDUM OPINION

Before QUINN, C.J., and CAMPBELL and PIRTLE, JJ.

Appellant Tetherance Johnson appeals from his jury conviction of the first-degree felony offense of aggravated robbery[1] and the resulting sentence of fifteen years of imprisonment. Through one issue, appellant contends the evidence was insufficient to show he used a firearm in the commission of the offense. We will affirm the judgment of the trial court.

[1] TEX. PENAL CODE ANN. § 29.03 (West 2015).

Background

Appellant does not challenge the sufficiency of the State's evidence that he was one of two men who robbed a First Cash Advance store in Bryan, Texas. He was indicted for aggravated robbery, and the indictment alleged he used or exhibited a deadly weapon, a firearm.

The testimony of the store's manager, and security camera video, showed appellant and another robber accosted the manager as she opened the store shortly before 9:00 a.m. The evidence shows appellant rushed upon the manager just as she unlocked the door and stepped inside, thrusting his arm and upper body into the doorway before she could close it. He held a pistol. Appellant was arrested the same day, but the pistol was never located.

The jury found appellant guilty as charged in the indictment and assessed punishment as noted. This appeal followed.

Analysis

In determining whether the evidence is sufficient to support a conviction, a reviewing court must consider all of the evidence in the light most favorable to the verdict and determine whether, based on that evidence and reasonable inferences therefrom, a rational fact finder could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); *Brooks v. State,* 323 S.W.3d 893, 895 (Tex. Crim. App. 2010

(plurality op.). This "familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Jackson,* 443 U.S. at 319.

"Each fact need not point directly and independently to the guilt of the appellant, as long as the cumulative force of all the incriminating circumstances is sufficient to support the conviction." *Hooper v. State,* 214 S.W.3d 9, 13 (Tex. Crim. App. 2007). And if the record supports conflicting inferences, we must presume that the factfinder resolved the conflicts in favor of the prosecution and therefore defer to that determination. *Jackson,* 443 U.S. at 326. Further, circumstantial 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. Finally, it is well established that the factfinder is entitled to judge the credibility of witnesses and can choose to believe all, some, or none of the testimony presented by the parties. *Chambers v. State,* 805 S.W.2d 459, 461 (Tex. Crim. App. 1991).

The essential elements of the crime are those set out in the hypothetically correct jury charge for the case. *Adames v. State*, 353 S.W.3d 854, 861 (Tex. Crim. App. 2011). Such a charge "accurately sets out the law, is authorized by the indictment, does not unnecessarily increase the State's burden of proof or unnecessarily restrict the State's theories of liability, and adequately describes the particular offense for which the defendant was tried." *Id*. at 860 (quoting *Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997). As set out in the indictment, proof of the State's allegation appellant used or exhibited a deadly weapon during the robbery depended on its proof he used or exhibited a firearm.

The court's charge made use of the definition of "firearm" contained in Penal Code section 46.01, stating it means any device designed, made, or adapted to expel a projectile through a barrel by using the energy generated by an explosion or burning substance or any device readily convertible to that use. TEX. PENAL CODE ANN. § 46.01(3) (West 2015).

On appeal, appellant contends the State failed to prove he used a *firearm* because the evidence merely proved use of a *gun*, a broader term. Therefore, appellant asserts, the evidence was insufficient to support the aggravating factor of his use of a firearm in the commission of the robbery and the court's judgment should be reformed to reflect only a conviction for the offense of robbery. Although appellant is correct that the State failed to adduce testimony identifying the gun appellant carried as a firearm, we nonetheless find the evidence sufficient to establish that fact. We will overrule appellant's issue.

A "firearm" is a deadly weapon, *per se.* TEX. PENAL CODE ANN. § 1.07(17)(A) (West 2015); *see Boyett v. State,* 692 S.W.2d 512, 517 (Tex. Crim. App. 1985); *Arthur v. State,* 11 S.W.3d 386, 389 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd). Our courts have recognized, however, that "the term 'gun' may be a broader term than 'firearm' when taken out of context and may include such nonlethal instruments as BB guns, blow guns, pop guns, and grease guns." *Price v. State*, 227 S.W.3d 264, 266 (Tex. App.—Houston [1st Dist.] 2007, pet. dism'd, untimely filed) (citations omitted). On the other hand, our courts have recognized also that the fact finder's freedom to draw reasonable inferences and make reasonable deductions from the evidence presented may, in the context of the crime and absent any specific indication to the contrary,

permit the conclusion that a weapon identified as a gun was, beyond a reasonable doubt, a firearm. *Id.*; *Cruz v. State,* 238 S.W.3d 381, 388 (Tex. App.—Houston [1st Dist.] 2006, pet. ref'd) (absent any specific indication to the contrary at trial, jury "should be able to make the reasonable inference, from the victim's testimony that the 'gun' was used in the commission of a crime, was, in fact, a firearm"); *see also Davis v. State,* 180 S.W.3d 277, 286 (Tex. App.—Texarkana 2005, no pet.); *Rodriguez v. State*, No. 07-07-0348-CR, 2008 Tex. App. LEXIS 6961, *6 (Tex. App.—Amarillo September 17, 2008, pet. ref'd) (mem. op., not designated for publication) (both holding same). The Court of Criminal Appeals long ago held, "Testimony using any of the terms 'gun,' 'pistol,' or 'revolver' is sufficient to authorize the jury to find that a deadly weapon was used." *Wright v. State*, 591 S.W.2d 458, 459 (Tex. Crim. App. [Panel op.] 1979).

Here, during her testimony the manager used the term "gun" to describe the weapon appellant displayed as he and his cohort took money, jewelry and her purse from the store. Asked if appellant pointed the gun, she responded her back was to the robbers most of the time "[b]ut the few times I was able to know really what was going on, they did have the gun either on me or out around me." The men told the manager to "go open the safe" and she did so. A responding officer testified the manager told him "she was forced at gunpoint to open the [store's] secured door." When the manager called 911, the dispatcher inquired whether the gun was "a handgun." The manager responded, "Yes, a handgun." The manager testified she was scared and had resigned from her job as a result of the robbery.

The store had several security cameras. From the video evidence, the jury viewed the robbery from several vantage points, and more than one depicts appellant

brandishing the gun. One video, State's exhibit 3-1, gave the jury a relatively clear view of the gun as appellant struggled to enter the store against the manager's effort to keep him out. In his testimony, an investigating officer made reference to his review of the security camera videos of the robbery and their depiction of a "black-colored pistol, looked like a semi-automatic." The officer's description is consistent with the appearance of the gun shown in the videos.

The manager testified that during her effort to pull the door shut, she was hit on the forehead with the gun. State's exhibit 3-1 also shows that as appellant struggled to push his way through the door, the manager was hit in the head by the pistol. Asked what part of the gun hit her, she said she did not know but said it was "something very hard."

Another video, State's exhibit 3-2, shows appellant walking behind the manager in the store's secured area, with his arm extended pointing the gun at her back. Where the accused threatens the victim with a gun, the act itself suggests the gun is a firearm rather than a non-lethal instrument. *Benavides v. State*, 763 S.W.2d 587, 589 (Tex. App.—Corpus Christi 1988, pet. ref'd); *Lewis v. State*, No. 10-09-00308-CR, 2012 Tex. App. LEXIS 86, *14 (Tex. App.—Waco January 4, 2012, no pet.) (mem. op., not designated for publication). Although the robbers did not specifically threaten to shoot the manager, the jury reasonably could have seen appellant's use of his gun to prompt the manager's actions as such a threat.

In *Gipson v. State*, No. 10-08-00232-Cr, 2009 Tex. App. LEXIS 1934, *3-4 (Tex. App.—Waco March 18, 2009, pet. ref'd) (mem. op., not designated for publication), the

court found the evidence sufficient to support use of a firearm that was described in testimony with the words "gun" and "handgun." The two victims were both threatened with guns and struck with guns. One was forced at gunpoint to open a safe. And, in the defendants' vehicle, police recovered "a live .380 caliber bullet." The court concluded its analysis with the observation that no evidence suggested "the gun used by [Gipson] was a toy or anything other than a firearm." *Id*. at *4 (quoting *Cruz*, 238 S.W.3d at 389).

Similarly, here, when police searched appellant's apartment, they found in his closet a box of .22-caliber ammunition, with several rounds missing. Appellant's possession of ammunition, his open brandishing of the weapon and use of it in a threatening manner, the weapon's appearance and witnesses' descriptions of it combine to satisfy us that the jury acted rationally by concluding the weapon the manager called a "gun" was a firearm. *Gipson*, 2009 Tex. App. LEXIS 1934 at *3-4. We see in the evidence no specific indication contrary to that conclusion. *Price*, 227 S.W.3d at 266. Viewed in the light most favorable to the verdict, the evidence thus was sufficient to permit the jury to find the robbery was committed with a deadly weapon, a firearm. We resolve appellant's sole issue against him, and affirm the judgment of the trial court.

James T. Campbell
Justice

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