In The
Court of Appeals
Seventh District of Texas at Amarillo

Nos. 07-15-00251-CR
07-15-00253-CR
07-15-00254-CR
07-15-00255-CR

DEREK KYLE AUVENSHINE, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

On Appeal from the 415th District Court
Parker County, Texas[1]
Trial Court Nos. CR14-0087, CR14-088,CR14-0089 CR15-236,
Honorable David Cleveland, Presiding

March 31, 2016

MEMORANDUM OPINION

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

Appellant, Derek Kyle Auvenshine, appeals the judgments by which he was convicted of two counts of assaulting a public servant with a deadly weapon, one count of unlawful possession of a firearm as a felon, and one count of evading arrest or

[1] Pursuant to the Texas Supreme Court's docket equalization efforts, this case was transferred to this Court from the Second Court of Appeals. *See* TEX. GOV'T CODE ANN. § 73.001 (West 2013).

detention.[2] On appeal from those convictions, he challenges the sufficiency of the evidence as to certain elements of each offense. We will affirm.

Factual and Procedural History

Acting on a tip from the Fort Worth Police Department regarding the whereabouts of Adam Crooks, the White Settlement Police Department conducted surveillance on the house at which he was supposed to be located and confirmed the presence of two men and a green Jeep Grand Cherokee at that location. Many of the White Settlement police officers were familiar with Crooks, who was wanted that day in January 2014 for parole violation. The two men got in the Jeep and left the residence, passing officer William "Bill" Ross located in a nearby parking lot. Ross announced by radio that the driver of the Jeep matched the description given of Crooks: short, dark hair and a goatee. As was planned, Ross attempted a traffic stop. As was feared, the Jeep fled from Ross, embarking on what would become high-speed pursuit covering two counties and involving several White Settlement police units.

Having reached speeds of approximately 120 miles per hour, the Jeep exited the freeway onto a farm-to-market road, having left Tarrant County and entered into Parker County. The Jeep tried to make a right-hand turn too fast, nearly flipped over, and spun around, such that the Jeep was then facing Ross's vehicle. At that point, Ross, who had remained the lead unit in the pursuit, came upon the Jeep, now stalled as the driver apparently attempted to reorient the vehicle. With the Jeep now facing Ross's vehicle, Ross drove toward the Jeep's driver side. As Ross's vehicle and the Jeep met, the

[2] *See* TEX. PENAL CODE ANN. §§ 22.02(a)(2), 46.04(a)(1) (West 2011), § 38.04(a) (West Supp. 2015), respectively.

driver of the Jeep pointed a gun out the window toward Ross. Ross maneuvered his vehicle so as to provide him cover from expected gunfire, got his rifle, exited the vehicle, and began firing toward the Jeep as it began to pull away from the scene.

Following shortly behind Ross was Corporal Joshua Dacus, who saw the gun being pointed at Ross and who, it appears, collided with the Jeep and then approached its passenger side. At that point, Dacus saw appellant reach across the cabin and point the gun at him. Dacus was also able to see that Crooks was the passenger. The driver was able to maneuver the Jeep away from the gunfire and other arriving police units and continue flight for a short while. The Jeep eventually veered off the road, hit an embankment, flipped rear over front, and landed on its passenger side. The driver, who, like Crooks, also had short, dark hair and a goatee and who was later identified as appellant, crawled out of the vehicle and took off over a hill. Ross, who had gotten back into his car after his first encounter with the Jeep and arrived at the scene of the crash after other officers, again exited his vehicle and fired his rifle, hitting appellant and effectively ending the chase. Medical care was summoned for appellant. The passenger, Crooks, was arrested without further incident. A search of the Jeep found a variety of incriminating items, including a firearm.

Appellant was charged with two counts of aggravated assault on a peace officer with a deadly weapon, unlawful possession of a firearm as a felon, and evading arrest or detention. A Parker County jury found him guilty of the charged offenses and assessed punishment at forty-five years' imprisonment for each aggravated assault, twenty-seven years' imprisonment for unlawful possession of a firearm, and thirty-five years' imprisonment for evading arrest. Appellant now appeals from the judgments by

which he was convicted, challenging the sufficiency of the evidence as to certain elements of each offense. We will affirm.

Standard of Review

Each of appellant's points of error challenges the sufficiency of the evidence as to certain elements of the offense of which he was convicted. In assessing the sufficiency of the evidence, we review 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. *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, 912 (Tex. Crim. App. 2010). "[O]nly that evidence which is sufficient in character, weight, and amount to justify a factfinder in concluding that every element of the offense has been proven beyond a reasonable doubt is adequate to support a conviction." *Brooks*, 323 S.W.3d at 917 (Cochran, J., concurring). We remain mindful that "[t]here is no higher burden of proof in any trial, criminal or civil, and there is no higher standard of appellate review than the standard mandated by *Jackson*." *Id.* When reviewing all of the evidence under the *Jackson* standard of review, the ultimate question is whether the jury's finding of guilt was a rational finding. *See id.* at 906–07 n.26 (discussing Judge Cochran's dissenting opinion in *Watson v. State*, 204 S.W.3d 404, 448–50 (Tex. Crim. App. 2006), as outlining the proper application of a single evidentiary standard of review). "[T]he reviewing court is required to defer to the jury's credibility and weight determinations because the jury is the sole judge of the witnesses' credibility and the weight to be given their testimony." *Id.* at 899.

Aggravated Assaults on Public Servants

Appellant was convicted of two aggravated assaults of public servants with a deadly weapon. The two public servants alleged to have been the subject of his assaults are Officers Ross and Dacus. A person commits the offense of assault if that person intentionally or knowingly threatens another with imminent bodily injury. TEX. PENAL CODE ANN. § 22.01(a)(2) (West Supp. 2015). An assault becomes aggravated if the actor commits assault and uses or exhibits a deadly weapon during commission of the assault. *Id.* § 22.02(a)(2); *see also id.* § 22.02(b)(2)(B) (elevating second-degree felony offense of aggravated assault to a first-degree felony when committed against a public servant). A firearm is a deadly weapon *per se*. *See id.* § 1.07(a)(17) (West Supp. 2015); *Ex parte Huskins*, 176 S.W.3d 818, 820 (Tex. Crim. App. 2005) (en banc). Appellant maintains that the evidence was insufficient that he possessed the gun found in the vehicle, thereby making the evidence also insufficient that he used or exhibited a firearm during the interaction with police that day.

The record reveals testimony from Ross that, when the Jeep appellant was driving first spun out and was oriented in such a way as to face Ross's car, appellant pointed a gun out the driver's side window at Ross. Ross explained that, when the gun was pointed at him, he and the driver were approximately six feet away from each other and described the gun pointed at him as a semiautomatic weapon that appeared to have a black barrel. Indeed, video from Corporal Dacus's dash camera confirms that appellant's hand came up to the driver's side window with a dark-colored object that appears to be a firearm. Ross testified that, at that moment, he feared death or serious bodily injury: "I thought he was taking me away from my children. I thought I was about

to die." Dacus also saw appellant point the gun at Ross, prompting him to alert fellow officers by radio transmission that the "[d]river has a gun."

Then, according to Dacus's account, appellant pointed the firearm across the cabin of the Jeep and toward Dacus, whose vehicle had collided with the Jeep and who had come around to the passenger side of the stalled Jeep. Dacus testified that it was at that moment that he saw Crooks, with whom Dacus was familiar, was actually the passenger in the Jeep. Dacus acknowledges that due to the quality of the video recording, the angle at which the camera was situated, and the darkness of the windows, appellant's motion of pointing the gun across the cabin at him is not clearly visible from his dash camera. But, he confirmed, without any doubt, he saw appellant in the driver's seat pointing the gun directly at him and described the event as one in which moments and movement seemed to slow down, allowing him to see the gun very clearly and even see appellant attempting to fire the gun, but the gun did not fire properly. He described the gun he saw as a slender, semiautomatic weapon that appeared to be black from his vantage point, but also pointed out that the passenger side window was up. He explained that he was probably about ten feet away from the gun and testified that he "[a]bsolutely" believed he was in imminent danger of death or serious bodily injury at that moment.

A subsequent search of the Jeep revealed that there was, in fact, a loaded firearm in the vehicle, located in the driver's side floorboard, along with two additional magazines and more ammunition. The firearm found was a black and tan, Fabrique Nationale Herstal semiautomatic, nine millimeter Luger. Based on the officers' testimony, video evidence showing appellant pointing a gun at Ross, and the confirmed

presence of a gun in the Jeep appellant was driving, the evidence is sufficient to permit the jury to have found that appellant used a deadly weapon during his assaults on Ross and Dacus. We overrule appellant's points of error challenging the evidence in support of said finding.

Unlawful Possession of a Firearm by a Felon

With respect to his conviction for unlawful possession of a firearm by a felon, appellant again attacks the evidence in support of the jury's finding that he possessed the firearm that was found in the Jeep. To prove the offense of unlawful possession of a firearm by a felon, the State must show that the accused was convicted previously of a felony offense and possessed a firearm after the conviction and before the fifth anniversary of his release from confinement or from community supervision, parole, or mandatory supervision, whichever date is later. *See* TEX. PENAL CODE ANN. § 46.04(a)(1). Again, however, appellant challenges only the possession element of the offense at issue.

To prove the offense of possession of a firearm by a felon, the State was required to prove that appellant (1) exercised care, control, or custody over the firearm; (2) was conscious of his connection to the firearm; and (3) knowingly possessed the firearm. *See Brown v. State*, 911 S.W.2d 744, 747 (Tex. Crim. App. 1995) (en banc). "Possession" means actual care, custody, control, or management. TEX. PENAL CODE ANN. § 1.07(a)(39). "Possession is a voluntary act if the possessor knowingly obtains or receives the thing possessed or is aware of his control of the thing for a sufficient time to permit him to terminate his control." *James v. State*, 264 S.W.3d 215, 218 (Tex.

App.—Houston [1st Dist.] 2008, pet. ref'd); *see* TEX. PENAL CODE ANN. § 6.01(b) (West 2011).

If the firearm was neither on the person of the defendant nor in his exclusive possession, the evidence must otherwise link him to the firearm. *Williams v. State*, 313 S.W.3d 393, 397 (Tex. App.—Houston [1st Dist.] 2009, pet. ref'd) (citing *Evans v. State*, 202 S.W.3d 158, 161 (Tex. Crim. App. 2006)). Such evidence may include that (1) the firearm was in plain view; (2) the defendant was the owner of a vehicle in which the firearm was found; (3) the defendant was in close proximity and had ready access to the firearm; (4) the firearm was on the same side of a vehicle as the defendant; (5) a consciousness of guilt was indicated by the defendant's conduct, including extreme nervousness or furtive gestures; (6) the defendant had a special connection or relationship to the firearm; (7) the firearm was found in an enclosed place; (8) occupants of the place gave conflicting statements about relevant matters; (9) the defendant was the driver of a vehicle in which the firearm was found; (10) contraband was found on the defendant; (11) the defendant attempted to flee; and (12) the defendant is connected to the firearm by affirmative statements, including incriminating statements by the defendant upon his arrest. *See id.* at 397–98. It is not the number of links that is dispositive, but the logical force of all the evidence, whether direct or circumstantial. *Id.* at 398. The absence of certain links is not evidence of innocence to be weighed against the links present. *Id.* The evidence must rise to the level that the connection between the firearm and the accused is more than just fortuitous. *See Brown*, 911 S.W.2d at 747.

In the case before us, we know that there were two occupants of the Jeep, so appellant was not in exclusive possession of the firearm. However, because the firearm was found within the cabin of the Jeep, appellant had ready access to the firearm and was within close proximity to it. Further, the record indicates that appellant was the driver of the Jeep that day, and the record suggests that appellant was also the owner of the Jeep. Crooks testified that, as passenger, he saw that appellant had the firearm at some point "at the beginning" of events of the day; he maintains that he could not recall all the details of appellant's relationship to the firearm during the pursuit because he was very frightened and had his eyes closed and head ducked down at times. We know also that appellant attempted to flee by both vehicle and then by foot, indications of his consciousness of guilt. And, most obviously, we have testimony that appellant pointed the firearm at two officers, a very clear demonstration of custody and control of the firearm. The record provides evidence that sufficiently links the firearm to appellant such that the jury could have rationally found that he knowingly possessed the firearm. *See Jackson*, 443 U.S. at 319; *Brooks*, 323 S.W.3d at 912. We overrule appellant's point of error to the contrary.

Evading Arrest or Detention

Generally, "[a] person commits an offense 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). While, ordinarily, the offense of evading arrest or detention is a misdemeanor, it becomes a state jail felony if the "actor uses a vehicle while the actor is in flight." *Id.* at § 38.04(b)(1)(B).

Appellant maintains that the evidence is insufficient to show that it was he who was driving the vehicle that fled from police that day. Most of the officers involved in the pursuit of the Jeep that day were familiar with Crooks. The one who was not was Officer Ross who happened to be the one who first saw the described vehicle and attempted to pull the vehicle over. The officers had been provided with a fairly general description of Crooks as having short, dark hair and a goatee, and the driver of the vehicle that passed Ross at his designated location did, indeed, match that general description, prompting Ross to originally report that Crooks was the driver. As the pursuit continued and as officers began to approach and interact more closely with the two occupants, it became clear to officers who were familiar with Crooks that Crooks was in fact the passenger and appellant, who also had short hair and a goatee, was the driver. Dacus, who testified as having been familiar with Crooks, unequivocally identified Crooks as the passenger when he encountered the Jeep following the spin out and collision with Dacus's vehicle. He was very close to the vehicle—within arm's reach of the passenger side window—and very clearly saw Crooks as the passenger. When the vehicle flipped, landed on its passenger side, and came to a stop, officers on the scene reported that the driver, who was identified as appellant, first crawled out of the vehicle and attempted to flee, while the passenger, identified as Crooks, surrendered without further incident. Further, Crooks testified that he was the passenger in the Jeep that day, that appellant was driving.

The evidence sufficiently demonstrates that appellant was the driver of the vehicle when the vehicle fled from pursuing officers; the jury could have rationally found

all the essential elements of the offense of evading arrest or detention. *See Jackson*, 443 U.S. at 319; *Brooks*, 323 S.W.3d at 912. We overrule appellant's point of error.

Conclusion

Having overruled appellant's points of error, we affirm the trial court's judgments of conviction. *See* TEX. R. APP. P. 43.2(a).

Mackey K. Hancock
Justice

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