In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-15-00336-CR
No. 07-15-00337-CR

DIANNA STACKS, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

On Appeal from the 108th District Court
Potter County, Texas
Trial Court Nos. 69,358-E & 69,388-E; Honorable Douglas R. Woodburn, Presiding

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August 14, 2017

MEMORANDUM OPINION

Before QUINN, CJ., and CAMPBELL and PIRTLE, JJ.

Appellant, Dianna Stacks, was convicted by a jury of two separate offenses of evading arrest or detention with a vehicle.[1] Based on the habitual felony offender statute, the jury was instructed that the range of punishment for each offense was that

[1] TEX. PENAL CODE ANN. § 38.04(a) (West 2017). An offense under this section is a third degree felony if the actor uses a vehicle while in flight. *Id.* at § 38.04(b)(2)(A)

of a second degree felony by virtue of a 1999 conviction for the second degree felony offense of burglary of a building, committed in November of 1993.[2] Additionally, in each case, the jury was submitted a special issue regarding the use or exhibition of a deadly weapon (her vehicle).

In trial court cause number 69,358-E (appellate cause number 07-15-00336-CR), the jury determined that Appellant did not use or exhibit a deadly weapon in the commission of that offense and it assessed her punishment at ten years confinement. In trial court cause number 69,388-E (appellate court cause number 07-15-00337-CR), the jury entered an affirmative finding on the use or exhibition of a deadly weapon in the commission of that offense and it assessed her punishment at twenty years confinement and a $10,000 fine. The trial court ordered that the two sentences be served concurrently.

Appellant timely filed a separate notice of appeal in each case. By three issues, she challenges only her conviction in trial court cause number 69,388-E. First, she maintains that a video of the entire incident demonstrates she never placed others in *actual* danger, making the deadly weapon finding erroneous. Second, she disputes the enhancement of her range of punishment under the habitual felony offender statute.[3] Finally, she maintains her twenty-year-sentence and a $10,000 fine for a "mere evading arrest" without causing injury or even threatening injury constitutes cruel and unusual punishment. We affirm both convictions.

[2] TEX. PENAL CODE ANN. § 12.42(a) (West Supp. 2016). Although later decriminalized, in 1993 the offense of burglary of a building was a second degree felony.

[3] Although her improper enhancement of the range of punishment argument applies to both offenses, Appellant limits her argument to a challenge regarding her conviction in trial court cause number 69,388-E.

BACKGROUND

Based on a report of a stolen gray minivan at a convenience store, Officer Jeremy Strickland of the Amarillo Police Department drove to that location and observed that another officer already at the scene had exited his patrol vehicle, drawn his service weapon, and was in the process of instructing the driver of the minivan to get out. The driver, later identified as Appellant, ignored that officer and rapidly pulled out of the parking lot in an aggressive manner. Officer Strickland immediately reversed the direction of his patrol vehicle, activated its emergency lights and sirens, and pursued the minivan into a residential neighborhood at a high rate of speed. Other patrol vehicles joined the pursuit; however, the chase was suspended after a short period of time for safety reasons.

The next day, the officer who had originally drawn his weapon on Appellant at the convenience store observed the minivan once again. This time he enlisted other Amarillo Police Department officers and a Texas Department of Public Safety helicopter to help in his pursuit of the vehicle. Eventually, the vehicle was stopped and Appellant was apprehended and arrested.

The pursuit the first day was the subject of the prosecution in trial court cause number 69,388-E, and the pursuit the second day was the subject of the prosecution in trial court cause number 69,358-E. After a jury convicted Appellant of both offenses, the case proceeded to the punishment phase where, for purposes of punishment enhancement, she entered a plea of "true" to the State's enhancement allegation based on her 1999 conviction for the offense of burglary of a building in trial court cause number 33,275-E. The State then offered evidence indicating that when the offense

was committed in November of 1993, burglary of a building was a second degree felony.[4] Evidence showed that on January 12, 1996, Appellant was placed on community supervision for the burglary of a building offense; however, on January 14, 1999, that community supervision was revoked. At that time, she was adjudged guilty of the second degree felony offense and her punishment was assessed at six years confinement in the Institutional Division of the Texas Department of Criminal Justice.

At the conclusion of the punishment phase, pursuant to the habitual offender statute and Appellant's plea of true, the trial court instructed the jury regarding the range of punishment for a second degree felony. The jury then imposed punishment at confinement for a term of twenty-years and a $10,000 fine in trial court cause number 69,388-E, and at ten-years confinement in trial court cause number 69,358-E.

ISSUE ONE—EVADING ARREST, DEADLY WEAPON FINDING

By her first issue, Appellant maintains she never placed others in *actual* danger, making the deadly weapon finding erroneous. She bases her argument on the contention that a video of the entire incident introduced into evidence conclusively demonstrates that no individual was ever placed in actual danger. We disagree.

APPLICABLE LAW

A person commits the offense of evading arrest or detention with a vehicle if she (1) intentionally (2) flees (3) from a person she knows is a peace officer (4) attempting lawfully to arrest or detain her, and (5) she uses a vehicle while in flight. TEX. PENAL CODE ANN. § 38.04(a), (b)(2)(A) (West 2017). Although a motor vehicle is not a deadly

[4] As discussed more fully below, burglary of a building was later reclassified as a state jail felony.

weapon *per se*, it can be found to be one if it is used in a manner that is capable of causing death or serious bodily injury. *Brister v. State*, 449 S.W.3d 490, 494 (Tex. Crim. App. 2014). A deadly weapon finding is justified if a rational jury could have concluded that the defendant's vehicle posed an actual danger of death or serious bodily injury to others. *Sierra v. State*, 280 S.W.3d 250, 256-57 (Tex. Crim. App. 2009). To sustain a deadly-weapon finding, the evidence must show (1) the object in question (Appellant's vehicle) met the definition of a deadly weapon; (2) the deadly weapon was used or exhibited during commission of the offense; and (3) other people were put in actual danger. *Brister*, 449 S.W.3d at 494. To sustain a finding regarding the use of a deadly weapon, intent to use a motor vehicle as a deadly weapon is not required. *McCain v. State*, 22 S.W.3d 497, 503 (Tex. Crim. App. 2000).

STANDARD OF REVIEW—DEADLY WEAPON FINDING

The only standard that a reviewing court should apply in determining whether the evidence is sufficient to support each element of a criminal offense the State is required to prove beyond a reasonable doubt is the standard set forth in *Jackson v. Virginia*, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). *Brooks v. State,* 323 S.W.3d 893, 912 (Tex. Crim. App. 2010). In determining whether the evidence is legally sufficient to support a conviction, this court considers all the evidence in the light most favorable to the verdict and determines whether, based on that evidence and reasonable inferences to be drawn therefrom, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Winfrey v. State*, 393 S.W.3d 763, 768 (Tex. Crim. App. 2013); *Lucio v. State*, 351 S.W.3d 878, 894 (Tex. Crim. App. 2011). As a reviewing court, we must 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. *Brooks*, 323 S.W.3d at 899. Therefore, in order to reverse, we would have to determine that, when viewed in the requisite light, no rational trier of fact could have found the necessary requirements beyond a reasonable doubt.

ANALYSIS

Here, Appellant contends the testimony of the pursuing officers indicated that the threat of danger to others was merely hypothetical because their testimony indicated that others "*could* have been injured." The testimony of the officers was not, however, the only evidence the jury was allowed to consider in making its finding. The jury was also in a position to consider the video showing Appellant's vehicle rapidly accelerate from a parking lot where she was within a few feet of an officer on foot, with a drawn weapon pointed directly at her. With another police vehicle in pursuit, its emergency lights and sirens activated, Appellant then enters a busy four-lane thoroughfare, passing within feet of one vehicle on her right, causing another vehicle on her left, moving in the opposite direction, to suddenly change lanes as she turns left onto a residential street. From there she travels at a high rate of speed past several vehicles that appear occupied (including one vehicle with its curb-side door open) before busting through a stop sign seconds after another vehicle crossed through the same intersection at a right-angle to her direction of travel. From there she passes within a matter of feet of three more occupied vehicles before eventually eluding the pursuing police vehicles. Based on the manner of use of her vehicle, including her proximity to the officer on foot and other occupied vehicles while traveling at a high rate of speed, together with the numerous traffic offenses committed during the pursuit, we are unable to conclude that

no rational trier of fact could have found beyond a reasonable doubt the necessary requirements for a deadly weapon finding. Appellant's first issue is overruled.

ISSUE TWO—HABITUAL FELONY OFFENDER ENHANCEMENT

By her second issue, Appellant contends that her 1999 second-degree felony conviction for burglary of a building cannot be used to enhance her third-degree felony conviction for evading arrest or detention because burglary of a building is an offense currently punishable as a non-aggravated state jail felony. (Emphasis by Appellant). Specifically, Appellant contends that her sentence is illegal because while her prior felony conviction for burglary of a building was actually punished as a second degree felony in 1999, that same offense was punishable as a non-aggravated state jail felony (which cannot be used to enhance punishment under section 12.42(a)) when the instant offenses were committed. According to Appellant's argument, since "punishable" refers to the current punishment status of an offense, as opposed to the punishment status of an offense at the time when the accused was actually "punished," the offense of burglary of a building can longer be used to enhance a third degree felony under section 12.42(a), regardless of when the conviction became final. We disagree.

APPLICABLE LAW

At the time Appellant committed burglary of a building in November of 1993, it was classified as a second degree felony. *See* Act of May 24, 1973, 63rd Leg., R.S., ch. 399, § 1 1973 Tex. Gen. Laws 883, 927. In 1993, the statute was amended to reclassify burglary of a building as a state jail felony. *See* Act of May 29, 1993, 73rd Leg., R.S., ch. 900, § 1.01, 1993 Tex. Gen. Laws 3586, 3633. That amendment became effective September 1, 1994. *Id.* at 3766.

Furthermore, in 1993, section 12.42(a)(3) of the Penal Code provided as follows:

> Except as provided by Subsection (c)(2), if it is shown . . . on the trial of a third-degree felony that the defendant has been once before convicted of a felony, on conviction he shall be punished for a second-degree felony.

In 2001, the Texas Court of Criminal Appeals interpreted section 12.42 as unequivocally distinguishing between the terms "felony" and "state jail felony," such that the terms were considered to be "mutually exclusive." *See Campbell v. State*, 49 S.W.3d 874, 876 (Tex. Crim. App. 2001). According to that interpretation, in 2001, a state jail felony of any kind could not be used to enhance the punishment range of a third degree felony. In 2011, section 12.42(a)(3) was amended and renumbered as section 12.42(a). As amended, section 12.42(a) presently provides as follows:

> Except as provided by Subsection (c)(2), if it is shown on the trial of a felony of the third degree that the defendant has previously been finally convicted of a felony other than a state jail felony punishable under Section 12.35(a), on conviction the defendant shall be punished for a felony of the second degree.

When section 12.42 was amended in 2011, the Legislature also included a savings provision that provided as follows:

> [t]he change in law made by this Act applies only to an offense committed on or after the effective date of this Act. An offense committed before the effective date of this Act is governed by the law in effect on the date the offense was committed, and the former law is continued in effect for that purpose. For purposes of this section, an offense was committed before the effective date of this Act if any element of the offense occurred before that date.

See Act of May 25, 2011, 82nd Leg., R.S., ch. 834, § 7, 2011 Tex. Gen. Laws 2104, 2105. The law became effective September 1, 2011. Accordingly, relevant to offenses

committed after September 1, 2011, a conviction for a non-aggravated state jail felony could still not be used to enhance the range of punishment for a third degree felony under section 12.42(a). Because state jail felonies are punishable under two separate statutory provisions (section 12.35(a) pertaining to non-aggravated state jail felonies and section 12.35(c) pertaining to aggravated state jail felonies), the true effect of the 2011 amendment to section 12.42(a) was to make state jail felonies punishable under section 12.35(c) eligible as offenses that could be used to enhance the range of punishment.

STANDARD OF REVIEW

We construe a statute according to its plain language, unless the language is ambiguous or the interpretation would lead to absurd results that the Legislature could not have intended. *Tapps v. State*, 294 S.W.3d 175, 177 (Tex. Crim. App. 2009). We focus on the literal text of the statutory language in question and construe it "according to the rules of grammar and common usage." TEX. GOV'T CODE ANN. § 311.011(a) (West 2013). We assume that every word has been used for a purpose and that each word, phrase, clause, and sentence should be given effect if reasonably possible. *Campbell*, 49 S.W.3d at 876. It is only when the application of the statute's plain language would lead to absurd results unintended by the Legislature that a court may stray from applying the literal language and resort to extra-textual factors as legislative history, intent, or purpose. *State v. Mason*, 980 S.W.2d 635, 638 (Tex. Crim. App. 1998).

ANALYSIS

When the Legislature reclassified burglary of a building in 1994 as a state jail felony, it included a savings provision that provided, "an amendment to any provision of the Penal Code made by another Act of the 73rd Legislature . . . applies only to an offense committed under the provision on or after the other Act and before September 1, 1994. The amendment made by the other Act continues in effect only for the limited purpose of the prosecution of an offense committed before September 1, 1994." *See* Act of May 29, 1993, 73rd Leg., R.S., ch. 900, § 13.02(a), 1993 Tex. Gen. Laws 3586, 3766. The savings provision shows legislative intent that the amendments apply only to offenses committed on or after the effective date. *See Boren v. State*, 182 S.W.3d 422, 423-24 (Tex. App.—Fort Worth 2005, pet. ref'd). Therefore, in 1999, when Appellant's punishment was assessed for the 1993 burglary of a building, it was punished as a second degree felony—the offense classification applicable at the time of the commission of the offense. That conviction has subsequently become final.

Appellant argues that the 2011 amendments to section 12.42 reflect the Legislature's intent to prohibit the use of an offense *currently punishable* as a non-aggravated state jail felony for purposes of enhancement. According to her argument, since burglary of a building is now *punishable* as a state jail felony, a prior conviction for burglary of a building cannot be used to enhance the range of punishment for any felony, regardless of the fact that the offense was actually punished as a second degree felony. A similar argument was rejected by the Texas Court of Criminal Appeals in *Moreno v. State*, 541 S.W.2d 170, 1974 (Tex. Crim. App. 1976). There, the Court held an offense originally punished as a felony could still be used for enhancement purposes

even though that offense had subsequently been reclassified as a misdemeanor. *See Alvarado v. State*, 596 S.W.2d 904, 906 (Tex. Crim. App. [Panel Op.] 1980) (rejecting the appellant's argument that a prior conviction could not be used to enhance his range of punishment just because the offense was no longer a felony). Accordingly, we find the reclassification of an offense as a state jail felony does not foreclose the use of a conviction for that offense for enhancement purposes if the offender was convicted of the offense as a felony. "[T]he crucial factor in determining what may be used for enhancement is the fact that there has been a final felony conviction." *Ex parte Rice*, 629 S.W.2d 56, 58-59 (Tex. Crim. App. 1982) (finding that once there has been a final felony conviction, that conviction may be used for purposes of enhancement even if the felony is later reclassified as a misdemeanor).

When Appellant committed the offense of burglary of a building, it was a second degree felony. When she was convicted and the punishment for that offense was assessed, it was assessed as a second degree felony. That conviction having become final, the trial court did not err in using that conviction for purposes of enhancing Appellant's range of punishment. Issue two is overruled.

CRUEL AND UNUSUAL PUNISHMENT

By her third and final issue, Appellant maintains her sentence of twenty years and fine of $10,000 for a "mere evading arrest" without causing injury or even threatening injury constitutes cruel and unusual punishment. Finding Appellant did not preserve this issue for our review, we overrule her issue.

To avoid procedural default on appeal on a punishment issue, a defendant must complain of the sentence by objection during trial or, if there was no opportunity to object, in a motion for new trial. *See* TEX. R. APP. P. 33.1(a)(1). *See also Hardeman v. State*, 1 S.W.3d 689, 690 (Tex. Crim. App. 1999); *Issa v. State*, 826 S.W.2d 159, 161 (Tex. Crim. App. 1992). The requirement that an objection be raised in the trial court assumes that the defendant had the opportunity to raise it there. *Hardeman*, 1 S.W.3d at 690.

In the underlying case, after the jury returned its punishment verdict, the trial court announced, "[a]ny reason why the Court should not pronounce sentence at this time?" Defense counsel replied, "[n]othing from us, Judge." At that time, Appellant was given an opportunity to complain about the "cruel and unusual" nature of her punishment, but she did not. She did, however, file a motion for new trial complaining that her twenty-year sentence was disproportionate to the offense and therefore constituted cruel and unusual punishment. Based on *Hardeman and Issa*, Appellant failed to preserve error by failing to object at her earliest opportunity.

Moreover, even if Appellant had preserved this issue for review, we would not find her contention meritorious. The sentences imposed here were within the applicable range of punishment for a second-degree felony offense, and Texas courts have traditionally held that, so long as the punishment imposed lies within the range prescribed by the Legislature in a valid statute, that punishment is not excessive, cruel, or unusual. *See, e.g., Darden v. State,* 430 S.W.2d 494, 496 (Tex. Crim. App. 1968). *See also Jackson v. State,* 680 S.W.2d 809, 814 (Tex. Crim. App. 1984); *Rodriguez v. State,* 917 S.W.2d 90, 92 (Tex. App.— Amarillo 1996, pet. ref'd).

Nonetheless, a prohibition against grossly disproportionate punishment survives under the Eighth Amendment to the United States Constitution, separate and apart from any consideration of whether the punishment imposed lies within the legislatively prescribed range of punishment. *See* U.S. CONST. amend. VIII; *Solem v. Helm*, 463 U.S. 277, 290, 103 S. Ct. 3001, 77 L. Ed. 2d 637 (1983); *Harmelin v. Michigan*, 501 U.S. 957, 985, 989-90, 111 S. Ct. 2680, 115 L. Ed. 2d 836 (1991) (plurality op.); *Lackey v. State*, 881 S.W.2d 418, 420-21 (Tex. App.—Dallas 1994, pet. ref'd). Assessing such a claim, we make an initial threshold comparison of the gravity of the offense with the severity of the sentence. *See Harmelin,* 501 U.S. at 1004-05 (Kennedy, J., concurring); *McGruder v. Puckett,* 954 F.2d 313, 316 (5th Cir. 1992). Then, and only if our initial comparison creates an inference that the sentence was *grossly disproportionate* to the offense, do we consider the other two *Solem* factors: (1) sentences for similar crimes in the same jurisdiction and (2) sentences for the same crime in other jurisdictions. *See McGruder,* 954 F.2d at 316; *Lackey*, 881 S.W.2d at 420-21. *See also Jones v. State*, No. 07-13-00430-CR, 2014 Tex. App. LEXIS 5694, at *4 (Tex. App.—Amarillo May 28, 2014, no pet.) (mem. op., not designated for publication) (noting same).

Appellant contends the disproportionality of her sentence is exacerbated by two considerations: (1) her lack of funds to purchase medication in light of the societal recognition of mental and physical illness and (2) the fact that she will have to serve a greater percentage of her sentence before she is eligible for parole due to the deadly weapon finding. Her testimony supporting those contentions, although uncontested by the State, consists of little more than her statement that she had a mental health disability and could not afford her medication. No testimony was offered to explain how

her disability or lack of medication correlated to her decision to flee from the police (not once, but twice) or why it should mitigate her punishment. Considering the nature of the offense, the fact that she committed the offense twice in two days, the fact that she endangered the officers, the public, and herself, and the jury's conscious differentiation in the punishment it assessed for each offense (as opposed to merely defaulting at the maximum punishment for both offenses), we find no gross disproportionality. Accordingly, we would not reach the considerations regarding sentences for similar crimes in the same jurisdiction and in other jurisdictions. *See McGruder,* 954 F.2d at 316. Issue three is overruled.

CONCLUSION

The trial court's judgments are affirmed.

Patrick A. Pirtle
Justice

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