In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-16-00420-CR

JORGE CARLOS HERNANDEZ FERNANDEZ, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

On Appeal from the 242nd District Court
Hale County, Texas
Trial Court No. B20144-1602, Honorable Kregg Hukill, Presiding

June 12, 2017

MEMORANDUM OPINION

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

A Hale County jury convicted appellant Jorge Carlos Hernandez Fernandez of felony evading arrest or detention[1] and assessed punishment at imprisonment for two years. It recommended suspension of the term of confinement in favor of community supervision. Sentence was imposed accordingly and appellant was placed under an order of community supervision for two years. Through one issue on appeal, appellant argues the evidence was insufficient to support his conviction. We will overrule appellant's issue and affirm the judgment of the trial court.

[1] *See* TEX. PENAL CODE ANN. § 38.04(a),(b)(2)(A) (West 2016).

Background

Background facts are drawn from the trial testimony of a Texas Department of Public Safety trooper, appellant, and his aunt, Yanisbel Fernandez. At about 6:30 a.m. the trooper was in uniform and on patrol in a marked Department vehicle. While traveling on Interstate 27 in Hale County his vehicle's radar indicated a vehicle was traveling at ninety-two miles per hour.

The speeding vehicle was driven by appellant. It was owned and also occupied by appellant's aunt, Yanisbel Fernandez. Ms. Fernandez was not feeling well at the time and asked appellant to drive. Appellant lawfully had entered the United States from Cuba about three weeks earlier. On the morning in question, he and his aunt were on their way to Amarillo for a medical appointment necessary for appellant to obtain legal residency status. Appellant spoke no English and Ms. Fernandez had limited English language capacity. Appellant possessed a Cuban driver's license.

After observing the speed of appellant's vehicle, the trooper turned around and initiated pursuit. He caught up with appellant and found him driving in the left lane. The trooper activated his vehicle's red and blue overhead lights to conduct a traffic stop for speeding. Appellant moved into the right lane and slowed to approximately sixty-six miles per hour. Appellant testified he saw the overhead lights of the trooper's vehicle and moved into the right lane so the trooper could pass. When the trooper did not pass, he asked his aunt what he should do. She instructed him to maintain his speed. Asked on the stand whether it occurred to him that the trooper wanted to detain him, he acknowledged he "thought it," but said he did not pull over because his aunt told him to wait for "a signal."

The trooper testified the highway shoulder was clear but appellant did not stop. After pursuing appellant for some two to three miles with his vehicle's lights flashing the trooper turned on the vehicle's siren. Appellant signaled for a right turn but continued traveling at about sixty-six miles an hour.

A video recording made by the camera in the trooper's vehicle was admitted in evidence and an unspecified portion played for the jury. The sound of a siren is audible in the recording but appellant and Ms. Fernandez each testified they did not hear it. The trooper agreed by that point of the pursuit appellant had passed several safe locations for stopping and an off-ramp.

The trooper then focused a spotlight on appellant's vehicle. Appellant then immediately pulled over. According to appellant, he believed the spotlight was the signal to stop he was awaiting. The trooper testified his effort to have appellant pull over lasted about five miles.

On rebuttal, the trooper testified that after he arrested appellant he searched the vehicle and noticed a small amount of a green leafy substance on the floorboard behind the driver's seat and in "the very rear part of the vehicle." In the trooper's opinion, the substance was marijuana residue in a non-usable quantity. The trooper agreed with the prosecutor that in his opinion possession of marijuana or a controlled substance is reason to flee.

Analysis

In a single issue, appellant argues the evidence was insufficient to establish his guilt beyond a reasonable doubt.

We review the sufficiency of the evidence under the familiar standard of *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, 902 (Tex. Crim. App. 2010). So doing, we determine "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements for the crime beyond a reasonable doubt." *Jackson,* 443 U.S. at 319. As fact finder, the jury is the sole judge of the credibility of the witnesses and may choose to believe all, some, or none of the testimony the parties presented. *Lancon v. State,* 253 S.W.3d 699, 707 (Tex. Crim. App. 2008); *Chambers v. State,* 805 S.W.2d 459, 461 (Tex. Crim. App. 1991); *Williams v. State,* 290 S.W.3d 407, 412 (Tex. App.—Amarillo 2009, no pet.). Reviewing the sufficiency of the evidence after conviction, a "court faced with a record of historical facts that supports conflicting inferences must presume—even if it does not affirmatively appear in the record—that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution." *Brooks*, 323 S.W.3d at 899 n.13 (quoting *Jackson*, 443 U.S. at 326).

The offense of evading arrest or detention under Penal Code section 38.04 occurs when the accused 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) (West 2016); *Baines v. State,* 418 S.W.3d 663, 670 (Tex. App.—Texarkana 2010, pet. refused); *Ester v. State,* 151 S.W.3d 660, 664 (Tex. App.—Waco 2004, no pet.). "A person commits a crime under Section 38.04 only if he knows a police officer is attempting to arrest him but nevertheless refuses to yield to a police show of authority." *Redwine v. State,* 305 S.W.3d 360, 362 (Tex. App.—Houston [14th Dist.] 2010, pet. refused); *Griego v. State,* 345 S.W.3d 742, 749 (Tex. App.—Amarillo 2011, no pet.) (evidence must establish that a defendant knew a peace officer was attempting to arrest

him). Evading arrest or detention is a third-degree felony offense if the person uses a vehicle while in flight. TEX. PENAL CODE ANN. § 38.04(b)(2)(A); *Syed Mansoor Ali v. State,* No. 07-13-00359-CR, 2015 Tex. App. LEXIS 169, at *3 (Tex. App.—Amarillo Jan. 9, 2015, no pet.) (mem. op., not designated for publication).

Proof of the attempt of an officer in a police vehicle to arrest or detain a person generally consists of the officer displaying authority by the use of overhead or emergency lights and siren. *Duvall v. State,* 367 S.W.3d 509, 513 (Tex. App.—Texarkana 2012, pet. refused). "[F]leeing is anything less than prompt compliance with an officer's direction to stop." *Horne v. State,* 228 S.W.3d 442, 446 (Tex. App.—Texarkana 2007, no pet.) (quotation marks omitted). While the length and speed of the chase are factors courts consider when evaluating evidence of evasion of arrest or detention, they are not, standing alone, determinative. *Baines,* 418 S.W.3d at 670. As the court in *Baines* observed, "fleeing slowly is still fleeing." *Id.* (quotation marks and citation omitted).

The offense of evading arrest or detention contains two conduct elements: "nature of the conduct," applying to the element of intentionally fleeing and "circumstances surrounding the conduct" applying to the element of knowledge that a peace officer is attempting lawfully to arrest or detain the person. *Riggs v. State,* 482 S.W.3d 270, 275 (Tex. App.—Waco 2015, pet. refused). A person acts "intentionally" with respect to the nature of his conduct "when it is his conscious objective or desire to engage in the conduct . . . ." TEX. PENAL CODE ANN. § 6.03(a) (West 2011).

Appellant's evidentiary sufficiency argument focuses on the element of intentional flight. He asserts there is no evidence he "ever refused to yield to any police authority."

We find, to the contrary, that based on this record a rational jury could have believed beyond a reasonable doubt that appellant intentionally fled the trooper's direction to stop. Appellant saw the flashing lights of the trooper's vehicle and thought the trooper was attempting to detain him. His choice not to stop but to continue driving was made consciously, and rationally can be seen as intentional. As fact finder the jury was free to believe some, all, or none of appellant's and Ms. Fernandez's testimony concerning why he did not immediately yield to the officer's show of authority and stop. In that regard, jurors were entitled to disbelieve their testimony they did not hear the vehicle's siren. Further, the jury was free to accept the trooper's testimony he saw marijuana residue in the car, and from that testimony draw the reasonable inference that appellant fled detention for fear of discovery of the residue. *See Baines,* 418 S.W.3d at 670 (finding a reasonable person could conclude defendant was fleeing detention while considering what to do with alleged marijuana in his vehicle as he drove slowly around a single city block). Appellant's sole issue is overruled.

Conclusion

Having overruled appellant's issue, we affirm the judgment of the trial court.

James T. Campbell
Justice

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