



**In The
Court of Appeals
Seventh District of Texas at Amarillo**

No. 07-16-00433-CR

PATRICK CLEMONS, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

**On Appeal from the 181st District Court
Potter County, Texas
Trial Court No. 70,798-B; Honorable John B. Board, Presiding**

November 6, 2017

MEMORANDUM OPINION

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

Appellant, Patrick Dewayne Clemons, was convicted by the trial court of the third-degree felony offense of possession of a controlled substance, to-wit: methamphetamine, in an amount of one gram or more but less than four grams,¹

¹ TEX. HEALTH & SAFETY CODE ANN. § 481.115(c) (West 2017).

enhanced by a prior felony conviction² and sentenced to twenty years in prison. The judgment entered also included an affirmative finding regarding the use of a deadly weapon, to-wit: a firearm. By a single issue, Appellant contends the evidence is insufficient to support the deadly weapon finding. We affirm.

BACKGROUND

On May 28, 2015, Appellant was detained by two officers of the Amarillo Police Department pursuant to a traffic stop. Appellant was the driver and sole occupant of the vehicle. During the course of the traffic stop, the officers discovered the controlled substance and subsequently located a firearm, hidden from view, between the driver's seat and the center console seat. While Appellant freely admitted that the methamphetamine belonged to him, he denied ownership of the firearm. Appellant explained that he had borrowed the vehicle from an unknown Hispanic male for \$20 and consequently had no personal knowledge of the presence of the firearm. Via a cellphone conversation with an unidentified Hispanic male, one of the officers was able to obtain verbal confirmation of Appellant's story that he had borrowed the vehicle. It was later determined that both the vehicle and the firearm were stolen. The Hispanic male was never identified or located.

STANDARD OF REVIEW

The only standard that a reviewing court should apply in determining whether the evidence is sufficient to support a deadly-weapon finding is the standard set forth in

² The indictment alleged a single prior felony conviction for the offense of aggravated assault. Although the State filed notice of intent to enhance the range of punishment by two prior felony convictions, it later waived that notice in favor of the enhancement contained in the indictment. As enhanced, the offense at issue was punishable as a felony of the second degree. TEX. PENAL CODE ANN. § 12.42(a) (West Supp. 2016).

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). In determining whether the evidence is legally sufficient, 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 a deadly weapon beyond a reasonable doubt. *Coleman v. State*, 145 S.W.3d 649, 652 (Tex. Crim. App. 2004); *Bahr v. State*, 295 S.W.3d 701, 709 (Tex. App.—Amarillo 2009, pet. ref'd). As a reviewing court, we must defer to the fact finder's credibility and weight determinations because the fact finder is the sole judge of the credibility of the witnesses and the weight to be given their testimony. *Brooks*, 323 S.W.3d at 899. In doing so, we may not re-evaluate those weight and credibility determinations or substitute our judgment for that of the fact finder. *Williams v. State*, 235 S.W.3d 742, 750 (Tex. Crim. App. 2007).

DEADLY-WEAPON FINDING

A deadly weapon is a firearm or anything manifestly designed, made, or adapted for the purpose of inflicting death or serious bodily injury. TEX. PENAL CODE ANN. § 1.07(a)(17)(A) (West Supp. 2016). As such, a firearm is considered to be a deadly weapon *per se*. The Texas Code of Criminal Procedure provides that a deadly-weapon finding is appropriate “when it is shown that a deadly weapon as defined in Section 1.07, Penal Code, was used or exhibited during the commission of a felony offense or during immediate flight therefrom” TEX. CODE CRIM. PROC. ANN. art. 42.12 § 3g(a)(2) (West Supp. 2016).

A deadly-weapon finding is extremely important to a convicted defendant because it affects that person's eligibility for parole. Section 508.145(d)(2) of the Texas Government Code provides that an inmate serving a sentence pursuant to a judgment containing an affirmative finding regarding the use or exhibition of a deadly weapon must serve a longer period of confinement, without consideration of good conduct time, before he is eligible for release on parole. See TEX. GOV'T CODE ANN. § 508.145(d)(2) (West Supp. 2016).

On appeal, an affirmative finding regarding the use or exhibition of a deadly weapon should be affirmed if the reviewing court can determine that a rational fact finder could have found beyond a reasonable doubt that the appellant used or exhibited a deadly weapon to facilitate the felony offense in question. See *Coleman*, 145 S.W.3d at 652. Thus, as the reviewing court in this case, we must determine whether the trial court, acting as the fact finder, could have found beyond a reasonable doubt that Appellant used or exhibited a deadly weapon to facilitate his possession of methamphetamine.

Because the State concedes Appellant did not *exhibit* a deadly weapon during the commission of this offense, we will restrict our review to the question of whether the trial court could have found beyond a reasonable doubt that he *used* a deadly weapon to facilitate that offense. In this context, the term "use" means "any employment of a deadly weapon, even simple possession, if such possession facilitates the associated felony." See *id.* (holding that the word "use" typically means that the deadly weapon was "utilized, employed, or applied in order to achieve its intended result," to-wit: the commission of the offense in question). See also *Patterson v. State*, 769 S.W.2d 938,

941 (Tex. Crim. App. 1989) (holding that “use” of a deadly weapon “extends as well to any employment of a deadly weapon, even its simple possession, if such possession facilitates the associate felony”).

In her concurring opinion in *Coleman*, Judge Cochran outlined several factors discussed by Texas and federal cases when considering the sufficiency of the evidence to support a deadly-weapon finding. These factors include: (1) the type of deadly weapon involved; (2) if the deadly weapon was a gun, whether or not it was loaded; (3) whether or not the deadly weapon was stolen; (4) the proximity of the deadly weapon to the drugs, drug paraphernalia, or drug-manufacturing materials; (5) the accessibility of the deadly weapon to the accused; (6) the quantity of drugs involved; and (7) any evidence that might demonstrate an alternative purpose for the presence of the deadly weapon. See *Coleman*, 145 S.W.3d at 658-59 (Cochran, J., concurring). See also *Bahr*, 295 S.W.3d at 709-10 (applying Judge Cochran's *Coleman* factors).

Applying the *Coleman* factors to the facts of this case, we begin our analysis by noting that the weapon in question was identified as a “Rossi .357 revolver” containing live rounds of ammunition (factors one and two). Because this weapon was a firearm, it was a deadly weapon, *per se*. While testimony did establish that the firearm was stolen (factor three), there was no evidence tending to connect Appellant with its theft. The firearm was, however, located in close proximity to the methamphetamine located on Appellant’s person and in a nearby baggie (factor four) and the firearm was located near other drug paraphernalia typically associated with drug trafficking, to-wit: packaging materials and a digital scale (factor four). Although hidden from plain view, the firearm was located to the immediate right of the driver’s seat of the vehicle and it was readily

accessible to anyone sitting in that seat (factor five). Furthermore, Appellant was the sole occupant of the vehicle and he was sitting in the driver's seat when he was stopped by the police (factor five). Additionally, the evidence shows that the firearm was located in a stock-out orientation, such that it could be readily retrieved in a shooting position (factor five). While the amount of drugs located was a relatively insignificant amount in comparison to what a dealer might typically possess, there was other evidence indicating that the drugs possessed were not solely for the purpose of personal consumption (factor six). While factor three does not necessarily lead to a conclusion that the firearm was used to facilitate Appellant's possession of methamphetamine, factors one, two, four, five, and six tend to support that conclusion.

Of the seven factors articulated by Judge Cochran, the only factor that arguably supports a finding that the firearm was *not* used to facilitate the offense of possession of a controlled substance was Appellant's explanation to the officer that he was unaware of its presence because it was hidden and it was located in a vehicle that did not belong to him (factor seven). In evaluating this factor, we must be mindful of the fact finder's weight and credibility determinations. In that regard, it is not unreasonable to assume the fact finder may have found Appellant's explanation of the surrounding circumstances to be self-serving, unsubstantiated by independent evidence, and unreliable. Upon consideration of these seven factors, after having weighed all of the evidence in the light most favorable to the verdict, based on the evidence presented and reasonable inferences to be drawn therefrom, we find a rational trier of fact could have found the essential elements of a deadly-weapon finding beyond a reasonable doubt. Accordingly, we overrule Appellant's single issue.

CONCLUSION

The trial court's judgment is affirmed.

Patrick A. Pirtle
Justice

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