In The
Court of Appeals
Sixth Appellate District of Texas at Texarkana

No. 06-13-00199-CR

CHARLES RAY OWENS, JR., Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 71st District Court
Harrison County, Texas
Trial Court No. 10-0461X

Before Morriss, C.J., Moseley and Burgess, JJ.
Memorandum Opinion by Justice Moseley

MEMORANDUM OPINION

Charles Ray Owens, Jr., was convicted in Harrison County of felony murder after he was involved in an automobile wreck while fleeing from State Trooper Dennis Redden. The collision caused the death of Bobby Smith, the driver of the other automobile involved in the collision.

Owens raised the issue of his competency to stand trial based on his claim of amnesia for a period of time beginning a few days before the fatal collision and continuing for a period of some days after it. Dr. Thomas Allen was appointed by the trial court to examine Owens and render his opinion of Owens' competency to stand trial and opined that Owens was, in fact, competent to stand trial. A jury agreed and another jury was empaneled. After a finding of guilt, Owens was then sentenced to forty years' confinement.

On appeal, Owens originally raised three points of error. He claimed that the trial court erred (1) by admitting the expert testimony of Allen regarding Owens' competency because Allen did not meet the statutory requirements to testify regarding the matters at issue, (2) by failing to quash the indictment, and (3) by failing to find a fatal variance between the crime with which he was charged and the evidence adduced at trial.

This Court concurred with Owens' first point of error and determined that his conviction should be reversed. The Texas Court of Criminal Appeals reversed our ruling and remanded the matter to us with an instruction that we were to analyze Owens' third issue. That third issue, in the words of Owens, alleges that "[t]he Court erred when it failed to find a variance between the offense alleged and the offense proven by the evidence, i.e. alleged that the underlying offense

was evading and the proof was escape, resulting in the evidence being insufficient to prove the alleged evading arrest."

In other words, Owens contends that there is a fatal variance between the indictment and the evidence at trial because the indictment alleged the underlying offense of evading arrest or detention in a vehicle, while he maintains that the evidence at trial proved an underlying offense of escape.

A "variance" occurs when there is a discrepancy between the allegations in the indictment and the proof at trial. *Gollihar v. State*, 46 S.W.3d 243, 246 (Tex. Crim. App. 2001). Arguing that a fatal variance exists between the allegation and proof is an attack on the sufficiency of the evidence to prove the offense alleged in the indictment. *Id*. at 247. In evaluating legal sufficiency, we review all the evidence in the light most favorable to the trial court's judgment to determine whether any rational jury could have found the essential elements of the offense beyond a reasonable doubt. *Brooks v. State*, 323 S.W.3d 893, 912 (Tex. Crim. App. 2010) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)); *Hartsfield v. State*, 305 S.W.3d 859, 863 (Tex. App.—Texarkana 2010, pet. ref'd). We examine legal sufficiency under the direction of the *Brooks* opinion, while giving deference to the responsibility of the jury "to fairly resolve conflicts in testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007) (citing *Jackson*, 443 U.S. at 318–19); *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007).

When reviewing a variance claim, the "'sufficiency of the evidence should be measured by the elements of the offense as defined by the hypothetically correct jury charge for the case.'"

Gollihar, 46 S.W.3d at 253 (quoting *Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997)). To render the evidence insufficient to support the verdict, the variance must be "fatal," meaning material, and prejudice the defendant's substantial rights. *Id*. at 256–57. The "hypothetically correct" jury charge is "one that 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." *Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997).

A person commits the offense of evading arrest or detention "if he intentionally flees from a person he knows is a peace officer attempting lawfully to arrest or detain him."[1] Act of May 29, 1993, 73d Leg., R.S., ch. 900, § 1.01, sec. 38.04(a), 1993 Tex. Gen. Laws 3586, 3667 (amended 2011) (current version at TEX. PENAL CODE ANN. § 38.04(a) (West Supp. 2015)). Under the circumstances of this case, the offense is a third degree felony. Act of May 29, 1993, 73d Leg., R.S., ch. 900, § 1.01, sec. 38.04(b)(2), (3), 1993 Tex. Gen. Laws 3586, 3667 (amended 2011) (current version at TEX. PENAL CODE ANN. § 38.04(b)(2), (3) (West Supp. 2015)).

Here, Owens does not dispute that he fled in his truck from Redden, whom he knew to be a peace officer. The issue is whether Owens was already under arrest at the time he did so. Owens argues that Redden had successfully placed him under arrest at the time he fled in his truck. Relying on this, he says that the evidence at trial was directed at proving that he had escaped and

[1]The relevant statutory language at the time of Owens' offense is effectively the same as that of the present evading arrest or detention statute.

was insufficient to prove that he fled while evading arrest or detention in a vehicle because one cannot evade an already perfected arrest.

In *Medford v. State*, a police officer who believed that there was an outstanding warrant for the arrest of Medford approached Medford and asked him for identification. *Medford v. State*, 21 S.W.3d 668, 669 (Tex. App.—Austin 2000, no pet.) (op. on remand). The officer did a pat-down search of Medford, saying that he had done so because it was dark and that they were located in a dangerous part of town. *Id*. During the pat-down search, the officer found crack cocaine on Medford's person. *Id*. He told Medford to turn around because he was under arrest, but as he touched Medford's arm to handcuff him, Medford lunged free. *Id*. At trial, Medford was convicted of escape, but the Austin Court of Appeals reversed the conviction, finding that the evidence was legally insufficient to sustain Medford's escape conviction because the stop-and-frisk detention of Medford fell short of a completed arrest, and "a seizure short of a completed arrest will not support a conviction for escape." *Id.* at 670.

In *Warner v. State*, a deputy sheriff was dispatched to investigate a report of domestic violence involving Warner. As the deputy was en route, he was informed that there was an outstanding arrest warrant for Warner due to a parole violation. *Warner v. State*, 201 S.W.3d 197 (Tex. App.—Houston [14th Dist.] 2006), *aff'd*, 257 S.W.3d 243, 244 (Tex. Crim. App. 2008). When the deputy arrived at the location, Warner walked to the patrol car; the deputy then promptly placed his hands on Warner's arms and told Warner that he was under arrest. Warner broke free of the deputy's grasp and ran away. *Id*. The accused was charged with and convicted of escape, but on appeal, the Court of Appeals reversed the conviction, finding legally insufficient evidence

that Warner was under arrest at the time he fled. *Id*. at 243. In affirming the Court of Appeals' decision, the Court of Criminal Appeals examined the difference between escape and evading detention or arrest:

> [T]he language of the statute expressly requires that a person have been in custody before he can escape. . . . [E]scape can occur only after an officer *has* successfully restrained or restricted a suspect—that is, when the officer's grasp has amounted to an arrest. To hold otherwise would ignore the distinction the legislature has made between the offense of escape and the offenses of evading arrest (which a person commits when "he intentionally flees from a person he knows is a peace officer attempting lawfully to arrest or detain him")[2] and resisting arrest (which a person commits when he "intentionally prevents or obstructs a person he knows is a peace officer . . . from effecting an arrest, search, or transportation of the actor or another by using force against the peace officer or another").[3] Those are the offenses that a person commits when the officer has not successfully restrained or restricted a suspect.

Id. at 247.

Here, Redden stopped Owens for speeding. By use of computer check, Redden discovered that Owens was subject to an outstanding arrest warrant from Michigan, and he informed Owens of that finding. On cross-examination, Redden admitted that it was then his intention to "take [Owens] to jail" and that he inquired whether Owens knew someone who could come pick up his truck. Redden testified that Owens was not free to leave because, pending confirmation of the arrest warrant, Owens was "going to be placed under arrest." Although Redden requested a confirmation of the arrest warrant, he never received it. Despite Redden's intention to eventually place Owens under arrest, he informed Owens that he would follow Owens to a place to drop off

[2]*See* [TEX.] PENAL CODE [ANN.] § 38.04(a).

[3]*See* [TEX.] PENAL CODE [ANN.] § 38.03(a) [(West 2011)].

Owens' child passenger, after which they would "go and take care of" the warrant. The men shook hands and departed with Owens leading in his truck as Redden followed in his patrol car. Owens then took the child to a place that he could be dropped off and, as soon as the child was out of the truck, immediately sped away.

In both *Medford* and *Warner*, the officers had unequivocally announced that the subjects were under arrest, and in each instance, the officer either physically grasped the suspect or attempted to handcuff him. *Warner*, 257 S.W.3d at 244, 247; *Medford*, 21 S.W.3d at 669–70. Here, even though Redden might have made clear to Owens that he was not free to leave because he was going to be arrested, Redden's actions to restrict or restrain Owens fall short of those required to be legally sufficient to prove that an arrest had been accomplished.[4] *See Warner*, 257 S.W.3d at 244, 247; *Medford*, 21 S.W.3d at 669–70.

Having found insufficient evidence that Owens was under arrest at the time he fled, and viewing the evidence in the light most favorable to the verdict, we find sufficient evidence to support the jury's determination that Owens committed the underlying felony offense of evading arrest or detention in a vehicle. Therefore, we overrule this point of error.

[4]As Owens does not dispute any other element of the alleged offense of evading arrest or detention in a vehicle, we need not address them.

We affirm the trial court's judgment.

Bailey C. Moseley
Justice

Date Submitted: November 23, 2015
Date Decided: February 10, 2016

Do Not Publish