TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-16-00332-CR

Clifton Hennington, Appellant

v.

The State of Texas, Appellee

FROM THE DISTRICT COURT OF HAYS COUNTY, 207TH JUDICIAL DISTRICT
NO. CR-14-0271, HONORABLE JACK H. ROBISON, JUDGE PRESIDING

M E M O R A N D U M O P I N I O N

A jury found appellant Clifton Hennington guilty of aggravated robbery. *See* Tex. Penal Code § 29.03. The jury then found the State's accusation of a prior conviction "true" and assessed punishment at life imprisonment and a $10,000 fine. The trial court rendered judgment consistent with the jury's verdicts. In two points of error, Hennington contends that the evidence was insufficient to show that he used a deadly weapon during the commission of the robbery and that the trial court erred in allowing one of the State's witnesses "to invade the province of the jury by testifying that he had come to the conclusion that appellant was guilty of" the robbery. We will affirm the trial court's judgment of conviction.

BACKGROUND

At trial, the State alleged that Hennington robbed a convenience store in October 2013. The former owner of the store, Steven Parker, testified that he was working at the

store when a man entered, pointed a gun at him, and demanded money. Parker further testified that he opened the cash register and the man took money from the register and fled. Jimmy Schroeder, a Texas Ranger, later testified concerning the efforts of law enforcement to identify the robber. Ranger Schroeder testified that he determined that Hennington had robbed the store with the help of an accomplice, Nathaniel Jones. Jones also testified, stating that he drove the getaway vehicle and that Hennington entered the store with the gun. The jury found Hennington guilty of aggravated robbery. During the punishment phase of trial, the State presented evidence that Hennington and Jones "went on an unparalleled crime spree," committing more than two dozen robberies. After the jury assessed punishment and the trial court rendered its judgment of conviction, this appeal followed.

DISCUSSION

Deadly Weapon

In his first point of error, Hennington contends that the evidence was insufficient to support the jury's finding that he used a deadly weapon during the commission of the robbery and that the evidence was therefore insufficient to support his conviction for aggravated robbery.[1] Specifically, Hennington argues that the evidence was insufficient to show that the weapon he

[1] In evaluating the sufficiency of the evidence supporting a jury's verdict, we "view 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 crime beyond a reasonable doubt.'" *Montgomery v. State*, 369 S.W.3d 188, 192 (Tex. Crim. App. 2012) (quoting *Brooks v. State*, 323 S.W.3d 893, 902 n.19 (Tex. Crim. App. 2010)). We are instructed only to "ensure that the evidence presented supports the jury's verdict and that the state has presented a legally sufficient case of the offense charged." *Id.* "The jury is the sole judge of credibility and weight to be attached to the testimony of witnesses," and if "the record supports conflicting inferences, we presume that the jury resolved the conflicts in favor of the verdict, and we defer to that determination." *Dobbs v. State*, 434 S.W.3d 166, 170 (Tex. Crim. App. 2014).

allegedly used during the robbery was a "deadly weapon" under the Penal Code. The Penal Code defines "deadly weapon" as "(A) a firearm or anything manifestly designed, made, or adapted for the purpose of inflicting death or serious bodily injury; or (B) anything that in the manner of its use or intended use is capable of causing death or serious bodily injury." *See* Tex. Penal Code § 1.07(a)(17). In the context of Chapter 46, the Penal Code defines "firearm" as "any device designed, made, or adapted to expel a projectile through a barrel by using the energy generated by an explosion or burning substance or any device readily convertible to that use," *see id.* § 46.01(3), and the jury charge in this case included that definition.

A BB gun is not a "firearm" and is therefore not per se a deadly weapon under the Penal Code. *See Adame v. State*, 69 S.W.3d 581, 582 (Tex. Crim. App. 2002); *Auston v. State*, No. 03-12-00482-CR, 2014 WL 1285810, at *4 (Tex. App.—Austin Mar. 27, 2014, pet. ref'd) (mem. op., not designated for publication). However, the State may prove that a BB gun is a deadly weapon by presenting evidence concerning its capabilities or use. *See Adame*, 69 S.W.3d at 582 ("With testimony that a BB gun is capable of causing serious bodily injury, it is reasonable for a jury to make a deadly weapon finding.").

Here, Ranger Schroeder presented the following testimony:

> [Prosecutor:] Did you, in fact, find any evidence near where Mr. Hennington was eventually captured?
>
> [Ranger Schroeder:] Yeah. Probably about 30 feet from where he was actually captured, we found evidence.
>
> ***
>
> [Ranger Schroeder, looking at exhibit:] To the left, right there, is where the—a BB pistol was found.

***

[Prosecutor:] Remind the jury of the items that were found there in the woods from your search.

[Ranger Schroeder:] We found one black Daisy Powerline BB pistol . . . .

***

[Prosecutor:] Is—what do we see in State's Exhibit Number 88?

[Ranger Schroeder:] That is another BB pistol. I believe it was also a Daisy Powerline, I guess, that was found inside the blue bag in the truck.

***

[Prosecutor:] Are you familiar with, from your own training and experience, weapons of various sorts?

[Ranger Schroeder:] Yes, I am.

[Prosecutor:] Can the weapons that have been located as—admitted as State's Exhibit 151 and 152 [the BB pistols] cause death or serious bodily [sic]?

[Ranger Schroeder:] Yes, sir.

[Prosecutor:] These aren't soft-cushion weapons, are they?

[Ranger Schroeder:] No, sir.

[Prosecutor:] Did you—you can beat somebody to death or injure them severely by hitting them, if nothing else, with these items. Correct?

[Ranger Schroeder:] I believe so.

[Prosecutor:] You indicated on the outside of State's Exhibit Number 152 a .177 caliber. What does that mean?

[Ranger Schroeder:] That basically is the—the size of the ammunition that this weapon would fire, .177 caliber, is consistent with a pellet or a—or a copper BB that could be fired out of these two pistols.

[Prosecutor:] Being hit by .177 caliber pellets or BBs, particularly at close range, in and of itself, could cause death or serious bodily injury?

[Ranger Schroeder:] Yes, it could.[2]

Viewing this evidence in the light most favorable to the verdict, we conclude that a jury could have reasonably concluded that the weapon that Hennington used during the robbery was

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[2] Jones, Hennington's accomplice, provided the following testimony concerning what weapon may have been used during the robbery:

[Prosecutor:] Who went into the Hays City Store with the gun?

[Jones:] Cliff [Clifton Hennington].

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[Prosecutor:] Did you and Mr. Hennington talk about the kind of weapon that he would use to commit the robbery?

[Jones:] Yes.

[Prosecutor:] What kind of weapon was used?

[Jones:] It was a Airsoft BB pistol that looked like a real gun.

[Prosecutor:] Who bought—purchased that gun?

[Jones:] I had.

***

[Prosecutor:] Was it purchased some day prior to [the date of the robbery]?

[Jones:] Yes.

[Prosecutor:] Do you remember if on [the date of the robbery] Mr. Hennington brought the gun with him or if you had it with you?

[Jones:] I don't remember.

a BB gun and that the BB gun, as it was used here, was a deadly weapon. Accordingly, we conclude that the evidence was sufficient to support the jury's deadly-weapon finding and Hennington's conviction for aggravated robbery, and we overrule his first point of error.[3]

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[3] We also note that Parker, the victim, testified as follows:

> [Parker:] He [the robber] had his arm extended out with a pistol in his hand, right about head high for me.
>
> ***
>
> [Prosecutor:] Did you feel like your life was in danger?
>
> [Parker:] Yes, sir, I felt my life was in danger.
>
> ***
>
> [Prosecutor:] What kind of pistol do you think he was carrying from your observation of it?
>
> [Parker:] I described it as a Beretta automatic. The barrel on the top of the Berettas are raised above the slide a little bit, whereas, like, on the Glocks and Smith & Wessons and Colts, it's all a flat top. And so it had that raised barrel on it.
>
> When you're looking down the barrel, of course, you know, you're—but it didn't seem as big as, like, my .45. So I thought it was maybe a 9-millimeter or a 40-millimeter [sic] Beretta semiautomatic. It was black.
>
> [Prosecutor:] [I]t sounds from your description in answer to my question that you are familiar with guns?
>
> [Parker:] Yes, sir, a little bit.
>
> ***
>
> [Prosecutor:] At any point was he close enough that he could have used his gun to pistol whip you?
>
> [Parker:] Yes, sir.

Ranger Schroeder's Testimony

In his second point of error, Hennington contends that the trial court reversibly erred when it allowed Ranger Schroeder to testify as follows:

> [Prosecutor:] Ranger Schroeder, after you concluded your investigation in this case, who did you conclude was the robber depicted in State's Exhibit Number 1 [surveillance video of the robbery]?
>
> [Defense Counsel:] Objection, Your Honor. It invades the province of the jury.
>
> [Court:] Overruled.
>
> [Ranger Schroeder:] The defendant, Clifton Hennington.

According to Hennington, Ranger Schroeder's testimony invaded the province of the jury. *See Sandoval v. State*, 409 S.W.3d 259, 292 (Tex. App.—Austin 2013, no pet.) ("It is well settled that no witness, expert or lay, is competent to voice an opinion about the guilt or innocence of a defendant."). We review a trial court's decision to admit evidence for an abuse of discretion. *See Davis v. State*, 329 S.W.3d 798, 803 (Tex. Crim. App. 2010); *Jessop v. State*, 368 S.W.3d 653, 666 (Tex. App.—Austin 2012, no pet.).

> [Prosecutor:] And certainly, he was in close enough that if he had shot you, he probably wouldn't have missed?
>
> [Parker:] Yes, sir.

Based on this testimony, a jury could have reasonably concluded that Hennington used a firearm during the robbery. Because a firearm is per se a deadly weapon, *see* Tex. Penal Code § 1.07(a)(17)(A), this evidence was also sufficient to support the jury's deadly-weapon finding and Hennington's conviction.

Assuming, without deciding, that the trial court improperly overruled Hennington's objection and allowed Ranger Schroeder to testify that he believed Hennington to be the robber depicted in the surveillance video, we must still determine whether this error is reversible. Generally, the erroneous admission of evidence is non-constitutional error that we must disregard unless it affects the defendant's "substantial rights." *See* Tex. R. App. P. 44.2(b); *Coble v. State*, 330 S.W.3d 253, 280 (Tex. Crim. App. 2010) (applying rule 44.2(b) analysis when trial court erroneously admitted evidence). "A substantial right is affected when the error had a substantial and injurious effect or influence in determining the jury's verdict." *Schmutz v. State*, 440 S.W.3d 29, 39 (Tex. Crim. App. 2014). "Where the error did not influence the jury or had but a 'slight effect,' substantial rights are not affected." *Cantos v. State*, No. 03-14-00585-CR, 2016 WL 691012, at *2 (Tex. App.—Austin Feb. 19, 2016, no pet.) (mem. op., not designated for publication) (quoting *Sandoval*, 409 S.W.3d at 293).

Here, by identifying Hennington as the robber, Ranger Schroeder was merely summarizing all of his prior testimony. That testimony had laid out, in detail, how he and other law enforcement officials had determined the identity of the robber. This process involved tracing cell phone calls and placing a tracking device on Jones's vehicle. His conclusion—that Hennington was the robber—was obvious given the evidence previously presented, and indeed it was the main point of Ranger Schroeder's testimony. Moreover, Jones testified in detail concerning the robbery and identified Hennington as the one who entered the store with the gun. In his appellate brief, Hennington does not explain how the admission of Ranger Schroeder's comments "had a substantial and injurious effect or influence in determining the jury's verdict," *see Schmutz*, 440 S.W.3d at 39,

and, based on the record before us, we cannot determine that it did. Therefore, we conclude that any error the trial court may have committed in admitting Ranger Schroeder's testimony concerning his belief that Hennington was the robber did not affect Hennington's substantial rights and must be disregarded. Accordingly, we overrule Hennington's second point of error.

CONCLUSION

Having overruled both of Hennington's points of error, we affirm the trial court's judgment of conviction.

Scott K. Field, Justice

Before Chief Justice Rose, Justices Goodwin and Field

Affirmed

Filed: February 15, 2018

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