NUMBER 13-19-00084-CR

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

ROBERT CASTANEDA OZUNA, Appellant,

v.

THE STATE OF TEXAS, Appellee.

On appeal from the 398th District Court of Hidalgo County, Texas.

MEMORANDUM OPINION

Before Justices Benavides, Perkes, and Tijerina
Memorandum Opinion by Justice Benavides

By three issues, appellant Robert Castaneda Ozuna challenges his conviction for evading arrest or detention with a motor vehicle, a third-degree felony. *See* TEX. PENAL CODE ANN. § 38.04(a), (b)(2)(A). Ozuna argues that the trial court erred by: (1) not granting his motion for new trial on grounds of insufficient evidence; (2) not submitting a lesser included offense of fleeing or attempting to elude a police officer and that failure

was fundamental error that caused substantial harm; and (3) considering a judgment of prior conviction at sentencing that was not shown to be that of Ozuna's which resulted in an unjust sentence. We affirm.[1]

I. BACKGROUND

According to the trial testimony of City of Donna Officer A.J. Arevalo, he saw a gray Chevrolet Avalanche traveling on Valley View Road that turned east on North Avenue in the Red River subdivision without stopping at the stop sign in the early morning hours of April 30, 2016. Arevalo saw the driver run the stop sign from his marked patrol car. The driver then reversed back down North Avenue and turned back north on Valley View. Arevalo activated his lights to pull him over and charge him with the traffic violation.

After Arevalo activated his lights, the Avalanche sped up a bit, ran the stop sign on frontage road and turned east. Arevalo activated his siren and continued to follow him. From the frontage road, the Avalanche turned south on Hutto Road and then east to Date Palm where it dead ended. The Avalanche stopped. Arevalo parked his vehicle behind the Avalanche, got out of his vehicle with his weapon drawn, approached the Avalanche on the driver's side, and ordered the driver to get out. The driver looked at him, turned around, and then reversed out of the dead-end. When the Avalanche turned onto Hutto Road, Arevalo called in the Avalanche's license plates. Arevalo testified that he got a good look at the driver when they were both stopped. Arevalo continued the pursuit and saw the Avalanche run two more stop signs before Arevalo's sergeant told him to disengage pursuit. The speed of pursuit ranged from 40 to 65 miles per hour, in places

[1] Any pending motions will be dismissed as moot.

where the speed limit was 30 miles per hour. Donna police officer Ruben Munoz obtained permission to go to the vehicle's registered address. Arevalo did too. Munoz arrived first right after the Avalanche pulled up and detained the driver, Ozuna. Arevalo arrested Ozuna for evading arrest in a motor vehicle, a third-degree felony. *See* TEX. PENAL CODE ANN. § 38.04(b). Cocaine was found in the truck.

Ozuna was indicted for possession of a controlled substance and evading arrest. *See* TEX. HEALTH & SAFETY CODE ANN. § 481.115(b); TEX. PENAL CODE ANN. § 38.04(a). Both charges were tried together. The jury acquitted Ozuna on the controlled substance charge and found him guilty of evading arrest. The trial court sentenced Ozuna to five years' imprisonment in the Texas Department of Criminal Justice—Institutional Division for evading arrest. Ozuna filed a motion for new trial arguing that the evidence at trial was insufficient. The trial court did not act on the motion, and it was overruled by operation of law. This appeal ensued.

II. MOTION FOR NEW TRIAL

By his first issue, Ozuna complains that the trial court erred by denying his motion for new trial on the grounds that the evidence at trial was insufficient for each element of the offense.

A. Standard of Review

An appellate court reviews a trial court's denial of a motion for new trial under an abuse of discretion standard. *Gonzales v.* State, 304 S.W.3d 838, 842 (Tex. Crim. App. 2010); *Holden v. State*, 201 S.W.3d 761, 763 (Tex. Crim. App. 2006). We do not substitute our judgment for that of the trial court; rather, we decide whether the trial court's decision

was arbitrary or unreasonable. *Holden*, 201 S.W.3d at 763. If the motion presents matters that are determinable from the record, the trial court's failure to conduct a hearing is not an abuse of discretion. *See Gonzales*, 304 S.W.3d at 842. A trial court abuses its discretion in denying a motion for new trial only when no reasonable view of the record could support the trial court's ruling. *Holden*, 201 S.W.3d at 763.

Under *Brooks v. State*, 323 S.W.3d 893 (Tex. Crim. App. 2010) (plurality op.), we review the sufficiency of the evidence establishing the elements of a criminal offense for which the State has the burden of proof under the single sufficiency standard set out in *Jackson v. Virginia*, 443 U.S. 307 (1979). *Matlock v. State*, 392 S.W.3d 662, 667 (Tex. Crim. App. 2013). Under that standard, we view the evidence in the light most favorable to the verdict and determine whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Jackson*, 443 U.S. at 319.

Additionally, the sufficiency of the evidence adduced at trial is "measured against the elements of the offense as defined by a hypothetically correct jury charge." *Villarreal v. State*, 286 S.W.3d 321, 327 (Tex. Crim. App. 2009). A 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. *Id.*; *Matamoros v. State*, 500 S.W.3d 58, 62 (Tex. App.—Corpus Christi–Edinburg 2016, no pet.)

B. Applicable Law

The elements of the offense of evading arrest or detention by using a vehicle are:

(1) a person (2) intentionally (3) flees (4) from a person (5) he knows is a peace officer (6) attempting to lawfully arrest or detain him and (6) the actor uses a vehicle while in flight. *Calton v. State*, 176 S.W.3d 231, 234 (Tex. Crim. App. 2005); *see also Robinson v. State*, No. 13-10-00064-CR, 2011 WL 861152, at *4 (Tex. App.—Corpus Christi–Edinburg Mar. 10, 2011, pet. ref'd) (mem. op., not designated for publication).

The evidence before the jury was that Arevalo, a uniformed patrolman, was patrolling in a marked City of Donna patrol car, activated his lights behind Ozuna after Ozuna ran a stop sign, followed Ozuna for a few blocks, observed Ozuna run another stop sign, activated his siren, and continued to pursue Ozuna. Ozuna made a few quick turns and ended up at a dead end. Arevalo drew his weapon, approached Ozuna and ordered him out of the vehicle. Instead, Ozuna put his truck in reverse, and sped away. Arevalo followed for a few more blocks until his sergeant told him to disengage pursuit.

From this evidence, the jury could have concluded that Ozuna intentionally fled a police officer in a vehicle when the officer was attempting to lawfully detain or arrest him. *See Calton*, 176 S.W.3d at 234; *see also Holloman v. State*, No. 06-10-00113-CR, 2011 WL 941384, at *2 (Tex. App.—Texarkana Mar. 18, 2011, no pet.) (mem. op., not designated for publication); *Robinson*, 2011 WL 861152, at *4. As a result, the trial court had record evidence from which to determine that the evidence was sufficient and did not abuse its discretion in denying the motion for new trial based upon a claim of insufficient evidence.

We overrule Ozuna's first issue.

III. JURY CHARGE

By his second issue, Ozuna argues that the trial court erred by failing sua sponte to include the lesser included offense of fleeing or attempting to elude a police officer, a violation of Texas Transportation Code § 545.421(a). *See* TEX. TRANSP. CODE ANN. § 545.421(a) (usually referred to as eluding arrest). Ozuna argues that the failure to include the lesser included offense caused him substantial harm.

The Texas Court of Criminal Appeals rejected this very claim in *Farrakhan v. State*, where the court held that the crime of fleeing in § 545.421(a) was not a lesser-included offense of evading. 247 S.W.3d 720, 724 (Tex. Crim. App. 2008); *see McKithan v. State*, 324 S.W.3d 582, 593 (Tex. Crim. App. 2010) ("In *Farrakhan*, we approved of the court of appeals' decision that the 'fleeing' offense was not a lesser-included offense of the charged 'evading' offense even though proof of the charged 'evading' offense may also have shown the 'fleeing' offense . . . . These were not lesser-included offenses of the charged offenses . . . because the State was not required to prove these offenses in establishing the charged offenses, even though the State's evidence may have shown them."); *see also Holloman*, 2011 WL 941384, at *1; *Robinson*, 2011 WL 861152, at *3.

Ozuna cites *Walker v. State*, 95 S.W.3d 516, (Tex. App.—Fort Worth 2002, pet. ref'd), in support of his position that eluding under § 545.421(a) is a lesser included offense, but *Walker* was decided before *Farrakhan* and *McKithan* both of which are binding authority on our Court. *See McKithan*, 324 S.W.3d at 593; *Farrakhan*, 247 S.W.3d at 724.

We overrule Ozuna's second issue.

IV. PUNISHMENT EVIDENCE

By his third and final issue, Ozuna argues that the trial court erred by considering previous judgments of conviction that were not adequately connected to him. The State offered certified copies of three misdemeanor judgments and one felony judgment naming a Roberto Ozuna with differing middle names. The trial court provisionally admitted the judgments, but later stated that it did not consider them in imposing Ozuna's five-year sentence. Ozuna argues that the length of his sentence suggests that the trial court must have considered this evidence, otherwise his sentence would have been shorter.

Ozuna's only punishment witness was his mother who testified to his date of birth, that she knew he had several DWI's and a possession of marijuana. The State argued that Ozuna had a misdemeanor record of two DWIs, a felony DWI, and a possession of marijuana case. The State further argued for a sentence of five years' imprisonment. Defense counsel argued that the trial court should not consider the exhibits because they had not been adequately connected to Ozuna and further argued for probation. After the trial court imposed a sentence of five years' imprisonment, the trial court addressed the exhibits, "And I will state on the record that I did not consider the Exhibits 6 through 10 in setting the punishment. If I had, I probably would have given you more time in prison."

A. Standard of Review

A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *Casey v. State*, 215 S.W.3d 870, 879 (Tex. Crim. App. 2007). "As long as the trial court's ruling was at least within the zone of reasonable disagreement, an appellate court should not intercede." *Gentry v. State*, 259 S.W.3d 272, 279 (Tex. App.—Waco

2008, pet. ref'd).

B. Sentencing

The punishment range for a third-degree felony is two to ten years. *See* TEX. PENAL CODE ANN. § 12.34(a). The trial court had before it the uncontroverted evidence that Ozuna ran multiple stop signs while speeding away from Arevalo who attempted to stop him for a traffic citation after Ozuna failed to stop at the first stop sign. The intent of the evading-arrest statute "is to deter flight from arrest or detention by the threat of an additional penalty, thus discouraging forceful conflicts between police and suspects." *Duval v. State*, 367 S.W.3d 509, 513 (Tex. App.—Texarkana 2012, pet. ref'd) (citing *Alejos v. State*, 555 S.W.2d 444, 449 (Tex. Crim. App. 1977)); *see also Collins v. State*, No. 02-18-00449-CR, 2019 WL 4126612, at *4 (Tex. App.—Fort Worth Aug. 30, 2019, no pet.) (mem. op., not designated for publication). Here, speeding and running stop signs while fleeing from police is the type of conduct that endangers the public.

The trial court was aware of its authority to grant probation to Ozuna. *See* TEX. CODE CRIM. PROC. ANN. art. 42A.054. The trial court questioned defense counsel regarding probation. Ozuna's sentence of five years' imprisonment is in the middle of the punishment range for a third-degree felony.

When a sentence is within the prescribed statutory range, sentencing authorities have nearly unfettered discretion to impose any punishment within that range. *See State v. Simpson*, 488 S.W.3d 318, 322 (Tex. Crim. App. 2016); *Ex parte Chavez*, 213 S.W.3d 320, 323 (Tex. Crim. App. 2006); *see also Nino v. State*, No. 13-18-00158-CR, 2019 WL 2847442, at *3 (Tex. App.—Corpus Christi–Edinburg July 3, 2019, no pet.) (mem. op.,

not designated for publication). The trial court imposed the sentence it did based upon Ozuna's clear disregard for the law as evidenced by his conduct:

> The evidence showed this Defendant had the opportunity to stop when the officer put on his lights and his siren. And in the unlikely event that he was not aware that a police officer was pursuing him as he was speeding through the streets and running stop signs and going faster than the speed limits for those particular streets—at least when he came to that cul-de-sac or that dead end and saw the officer and heard the officer tell him to stop and get out of the car and turn off the engine and then he decides to drive off, that clearly shows that this Defendant has no regard for the law. And based on all the evidence, the Court will deny the request for probation and will set the punishment at 5 years imprisonment.

Because the trial court explicitly stated that it did not consider the challenged judgments of convictions and there is no evidence in the record that it did, the trial court did not abuse its discretion in imposing a sentence within the sentencing range. *See Simpson*, 488 S.W.3d at 322.

We overrule Ozuna's third issue.

V. CONCLUSION

We affirm the trial court's judgment.

GINA M. BENAVIDES,
Justice

Do not publish.
TEX. R. APP. P. 47.2 (b).

Delivered and filed the
23rd day of July, 2020.