NO. 12-11-00283-CR

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

ODESSA STERNS, APPELLANT	***§***	***APPEALS FROM THE 145TH***
V.	***§***	***JUDICIAL DISTRICT COURT***
THE STATE OF TEXAS, APPELLEE	***§***	***NACOGDOCHES COUNTY, TEXAS***

MEMORANDUM OPINION

Odessa Sterns appeals her conviction for evading arrest with a prior conviction. In two issues, Appellant argues that the evidence is legally and factually insufficient to support her conviction. We affirm.

BACKGROUND

On September 20, 2010, Nacogdoches police officer Kendall Kersch was patrolling the southeast district of Nacogdoches. At approximately 2 a.m., Officer Kersch saw a female walk across a vacant lot. He thought that was suspicious, and decided to follow her in his patrol car. As he drove, he saw the female cross a street and walk onto a lot where there were some trees. He stopped to see where the female had gone, exited his patrol car, and suddenly heard a female scream coming from where he had seen the female enter the lot. He then heard someone running and concluded the person was running from him. He radioed the dispatcher, and immediately saw the female he had been following run through a gate. Officer Kersch told the dispatcher he was in pursuit of "the subject." He chased the fleeing female, and when he was approximately fifty feet behind her, he called to her that he was the police and directed her to stop. However, she continued to run approximately another half block until she stumbled and fell.

The female, who was later identified as Appellant, was arrested and charged by indictment for evading arrest with a prior conviction. The indictment included enhancement paragraphs alleging that Appellant had a prior conviction for evading arrest, two prior convictions for delivery of a controlled substance, and a prior conviction for burglary of a habitation.

Appellant pleaded not guilty to the charged offense, but pleaded true to the prior evading arrest conviction. At a subsequent jury trial, Officer Kersch testified that the area in which Appellant was walking was a high crime, high drug area throughout the night. He also stated that, due to his training and experience, seeing someone walking through the darkened areas off the streets was suspicious. Officer Kersch testified further that the vehicle he was driving that night was designated as a police car, and that he was wearing his police uniform and his badge at the time of the chase. According to Officer Kersch, there was no doubt in his mind that Appellant knew he was a police officer and wanted her to stop.

The jury found Appellant guilty of evading arrest with a prior conviction. On punishment, Appellant pleaded true to one of the prior delivery of a controlled substance convictions and the burglary of a habitation conviction.[1] The jury sentenced Appellant to imprisonment for ten years and also imposed a $2,500.00 fine. This appeal followed.

EVIDENTIARY SUFFICIENCY

In her first issue, Appellant argues that the evidence is insufficient to support a finding that the officer was attempting to lawfully detain Appellant. In her second issue, she argues that the evidence is insufficient to prove that she knew a peace officer was attempting to detain her.[2] Because both issues arise from the same facts, we will discuss them together.

---

[1] The offense of evading arrest is a state jail felony if the actor has been previously convicted for evading arrest. TEX. PENAL CODE ANN. § 38.04(b)(1)(A) (West Supp. 2012). With the two prior felony convictions, the offense of evading arrest was enhanced to a second degree felony, with a punishment range of imprisonment for two to twenty years and a possible $10,000.00 fine. ***Id***. § 12.425(b) (West Supp. 2012). For ease of reference, we cite to the current version of the provisions that were applicable at the time of the offense. The substance of the relevant portions remained unchanged following the revisions made by the legislature in 2011.

.

[2] Appellant invokes both legal and factual sufficiency review of the evidence. The Texas Court of Criminal Appeals has held that the legal sufficiency standard enunciated in ***Jackson v. Virginia***, 443 U.S. 307, 99 S. Ct. 2781, 61 L.Ed.2d (1979), is the only standard a reviewing court should apply in determining whether the evidence is sufficient to support each element of a criminal offense that the state is required to prove beyond a reasonable doubt. *See* ***Brooks v. State***, 323 S.W.3d 893, 894-95 (Tex. Crim. App. 2010) (plurality op.). We will review the evidence under the ***Jackson*** standard. *See, e.g.*, ***Harris v. State***, No. 12-10-00388-CR, 2011 Tex. App. LEXIS 9288, at *2-3 (Tex. App.–Tyler Nov. 23, 2011) (mem. op., not designated for publication).

Standard of Review

When reviewing the sufficiency of the evidence, we view all 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. *See* ***Jackson v. Virginia***, 443 U.S. 307, 315-16, 99 S. Ct. 2781, 2786-87, 61 L. Ed. 2d (1979); ***Brooks v. State***, 323 S.W.3d 893, 899 (Tex. Crim. App. 2010) (plurality op.). Under this standard, a reviewing court does not sit as a thirteenth juror and may not substitute its judgment for that of the fact finder by reevaluating the weight and credibility of the evidence. *See* ***Brooks***, 323 S.W.3d at 899; ***Dewberry v. State***, 4 S.W.3d 735, 740 (Tex. Crim. App. 1999). Instead, a reviewing court defers to the fact finder's resolution of conflicting evidence unless that resolution is not rational in light of the burden of proof. *See* ***Brooks***, 323 S.W.3d at 899-900. The duty of a reviewing court is to ensure that the evidence presented actually supports a conclusion that the defendant committed the crime. *See* ***Williams v. State***, 235 S.W.3d 742, 750 (Tex. Crim. App. 2007).

The sufficiency of the evidence is measured against the offense as defined by a hypothetically correct jury charge. *See* ***Malik v. State***, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997). Such a charge would include 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 is tried." ***Id.***

Applicable Law

The elements of evading arrest or detention are (1) a person, (2) intentionally flees, (3) from a peace officer, (4) with knowledge that he is a peace officer, (5) who is attempting to arrest or detain the person, and (6) the attempted arrest or detention is lawful. TEX. PENAL CODE ANN. § 38.04(a) (West 2011); *see also* ***Rodriguez v. State***, 578 S.W.2d 419, 419 (Tex. Crim. App. 1979).

Under the Fourth Amendment, a warrantless detention of a person that amounts to less than a custodial arrest must be justified by a reasonable suspicion. ***Derichsweiler v. State***, 348 S.W.3d 906, 914 (Tex. Crim. App. 2011). A police officer has reasonable suspicion to detain if he has specific, articulable facts that, combined with rational inferences from those facts, would lead him reasonably to conclude that the person detained is, has been, or soon will be engaged in criminal activity. ***Id***. The standard is an objective one that disregards the actual subjective intent of the

detaining officer and looks instead to whether there was an objectively justifiable basis for the detention. ***Terry v. Ohio***, 392 U.S. 1, 21-22, 88 S. Ct. 1868, 1880, 20 L. Ed. 2d 889 (1968); ***Derichsweiler***, 348 S.W.3d at 914. In other words, the officer must be able to articulate something more than an "inchoate and unparticularized suspicion or 'hunch.'" ***Foster v. State***, 326 S.W.3d 609, 613 (Tex. Crim. App. 2010) (quoting ***Terry***, 392 U.S. at 21, 88 S. Ct. at 1880). The test for determining reasonable suspicion is a factual one and is made and reviewed by considering the totality of the circumstances at the time of the stop. ***Loesch v. State***, 958 S.W.2d 830, 832 (Tex. Crim. App. 1997) (en banc).

Mere flight does not justify an investigative detention. ***Gurrola v. State***, 877 S.W.2d 300, 303 (Tex. Crim. App. 1994). Nor does the detainee's mere presence in a high crime area. ***Id***. The time of day is a relevant factor in determining reasonable suspicion. ***Foster***, 326 S.W.3d at 613. Facts that do not show reasonable suspicion in isolation may do so when combined with other facts. ***Loesch***, 958 S.W.2d at 832.

Analysis

In the present case, Officer Kersch testified that he saw Appellant walking across a vacant lot while he was patrolling in a high crime, high drug use area at about 2 a.m. The officer testified that, based upon his training and experience, seeing someone walking through the darkened areas and off the streets in that particular area was suspicious. Consequently, he began following Appellant in his patrol car and saw her walk onto another vacant lot that had some trees on it. According to Officer Kersch, once Appellant entered the wooded lot, he could no longer see where she was going. He stated further that he exited his patrol car in an attempt to determine where Appellant had gone, and heard a female scream and the sound of someone running. He quickly concluded that the person was running from him. He radioed the dispatcher, and immediately saw Appellant run through a gate. At that moment, given the totality of the circumstances, Officer Kersch had reasonable suspicion to lawfully detain Appellant to ascertain why there had been a scream in a darkened portion of a high crime area.

Officer Kersch first saw Appellant while he was patrolling in a marked police car. He testified that the lighting in the area was such that Appellant should have been able to see his police vehicle. When Appellant emerged from the vacant wooded lot and ran through a gate, the officer began to chase her. According to his testimony, he was wearing a uniform and his badge. He stated further that because of the lighting, Appellant should have been able to see that he was a

police officer. Moreover, because he had a constitutionally sound basis for detaining Appellant, he identified himself as the police and called on her to stop. He testified that he was approximately fifty feet from Appellant when he called to her, but she continued to run until she stumbled and fell. Officer Kersch testified that, based on the circumstances, he had no doubt that Appellant knew he was a peace officer. The jury was entitled to find Officer Kersch's uncontroverted testimony credible. *See* ***Brooks***, 323 S.W.3d at 899 (jury is sole judge of witnesses' credibility); *see also* ***Johnson v. State***, 571 S.W.2d 170, 173 (Tex. Crim. App. [Panel Op.] 1978) (fact finder need not believe even uncontroverted testimony).

Based upon our review of the record, we hold that the jury reasonably could have found that Officer Kersch was attempting to lawfully detain Appellant and that Appellant knew that the person attempting to detain her was a peace officer. Therefore, the evidence is sufficient to support Appellant's conviction for evading arrest with a prior conviction.

Appellant's first and second issues are overruled.

DISPOSITION

Having overruled Appellant's first and second issues, we ***affirm*** the judgment of the trial court.

SAM GRIFFITH
Justice

Opinion delivered August 15, 2012.
Panel consisted of Worthen, C.J., Griffith, J., and Hoyle, J.

(DO NOT PUBLISH)

COURT OF APPEALS
TWELFTH COURT OF APPEALS DISTRICT OF TEXAS
JUDGMENT

AUGUST 15, 2012

NO. 12-11-00283-CR

ODESSA STERNS,
Appellant
V.
THE STATE OF TEXAS,
Appellee

Appeal from the 145th Judicial District Court
of Nacogdoches County, Texas. (Tr.Ct.No. F1018045)

THIS CAUSE came to be heard on the appellate record and briefs filed herein, and the same being considered, it is the opinion of this court that there was no error in the judgment.

It is therefore ORDERED, ADJUDGED and DECREED that the judgment of the court below **be in all things affirmed**, and that this decision be certified to the court below for observance.

Sam Griffith, Justice.
Panel consisted of Worthen, C.J., Griffith, J., and Hoyle, J.