Affirmed and Opinion filed July 12, 2001.

In The

Fourteenth Court of Appeals

NO. 14-00-00781-CR
&
NO. 14-00-00782-CR

FRANK ERNEST SHEPHARD, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 185th District Court
Harris County, Texas
Trial Court Cause Nos. 826,375 & 826,374

O P I N I O N

In this consolidated appeal, Frank E. Shephard appeals his felony convictions for aggravated assault with a deadly weapon and escape[1] on the grounds that: (1) the evidence is legally and factually insufficient to support each conviction; and (2) the trial court erred in the felony escape trial by denying appellant's requested charge on the offense of resisting arrest. We affirm.

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[1] A jury convicted appellant of each offense and sentenced him to confinement of five years for assault and three years for escape.

Sufficiency of the Evidence

Appellant's issues contend that the evidence was legally and factually insufficient to sustain his convictions for: (1) aggravated assault because the evidence proved that he acted in self-defense; and (2) felony escape because the State failed to prove that he left the detention or restraint of a police officer.

Standard of Review

When reviewing legal sufficiency, we view the evidence in the light most favorable to the verdict, asking whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *Curry v. State*, 30 S.W.3d 394, 406 (Tex. Crim. App. 2000). In reviewing the legal sufficiency of the evidence supporting a conviction relative to a claim of self-defense, we do not look to whether the State presented evidence which refuted the self-defense theory, but only whether after viewing all the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt and could have found against the self-defense theory beyond a reasonable doubt. *Saxton v. State*, 804 S.W.2d 910, 913 (Tex. Crim. App. 1991).

In reviewing factual sufficiency, we ask whether a neutral review of all the evidence, both for and against the finding, demonstrates that the proof of guilt is either so obviously weak as to undermine confidence in the jury's determination, or, although adequate if taken alone, is greatly outweighed by contrary proof. *Johnson v. State*, 23 S.W.3d 1, 11 (Tex. Crim. App. 2000). We will set aside a verdict for factual insufficiency only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *Wesbrook v. State*, 29 S.W.3d 103, 112 (Tex. Crim. App. 2000).

Sufficiency Review

A. Aggravated Assault

An aggravated assault occurs when one intentionally, knowingly, or recklessly threatens another with imminent bodily injury while using or exhibiting a deadly weapon. TEX. PEN. CODE ANN. §§ 22.01(a)(2), 22.02(a)(2) (Vernon 1998). A person is generally justified in using deadly force against another in self-defense if, among other things, he reasonably believes the force is immediately necessary to protect himself against the other's use or attempted use of unlawful deadly force, and if a reasonable person in the actor's situation would not have retreated. TEX. PEN. CODE ANN. §§ 9.31(a), 9.32(a) (Vernon 1994).

In this case, an altercation occurred between appellant and Darrell Day in which appellant left his vehicle at a red light, approached Day's truck, and swung an ax, which struck Day's wristwatch and the inside of his truck. Day testified that he grabbed a lug wrench in order to defend himself, but appellant knocked the lug wrench out of his hands and continued to swing the ax. In addition, Houston Police Officer, C.B. Nickerson testified that he witnessed appellant strike Day with an ax. Because a rational trier of fact could conclude from this evidence that appellant assaulted Day with a deadly weapon and was not acting in self-defense, the evidence is legally sufficient to support his conviction.

With regard to factual sufficiency, appellant's girlfriend, Cherean Robinson and appellant both testified that Day threw Clorox in appellant's face, while holding a tire-iron, before appellant responded with the ax in self-defense. Although there is thus conflicting testimony regarding who initiated the encounter, the evidence supporting the verdict is not so weak, or the contrary evidence so strong, as to render the verdict so contrary to the weight of the evidence as to be clearly wrong or unjust. Because appellant's two issues challenging his aggravated assault conviction do not establish that the evidence is legally or factually insufficient to support that conviction, they are overruled.

B. Felony Escape

A person commits the offense of escape if he escapes from lawful custody while he is under arrest for, charged with, or convicted of an offense. TEX. PEN. CODE ANN. § 38.06(a)(1) (Vernon 1994). For this purpose, "escape" is defined as an "unauthorized departure from custody,"[2] and "custody" is defined as being "under arrest by a peace officer." TEX. PEN. CODE ANN. § 38.01(1)(A), (2) (Vernon 1994).

In this case, Houston Police Officer C. B. Nickerson testified at trial that when he arrested appellant (for the aggravated assault offense discussed in the preceding section), he initially placed appellant in a patrol car. When he subsequently attempted to move appellant to another patrol car, appellant broke free while still in handcuffs and ran approximately 75 feet before Nickerson managed to get him back into custody. Nickerson stated that he was able to catch appellant when appellant fell down. Kyle Drey, another Houston police officer, testified that he also saw appellant, while handcuffed, break loose and run along the street approximately 40 to 50 feet, with Nickerson in pursuit. In addition, Terri Shawn Charles, a third Houston police officer present at the scene, testified that she saw appellant run an estimated 65 feet. Because a rational trier of fact could conclude from this evidence that appellant made an unauthorized departure from custody after being arrested, the evidence is legally sufficient to support his conviction for escape.

Contrary to the above testimony, appellant's grandmother testified that appellant did not try to run when the police officers took him out of the car. She testified that appellant "left but he didn't go," and went perhaps five feet before falling. Appellant's aunt testified that appellant "walk-trot[ted], a few steps," only three to four feet, before falling down. Appellant's uncle testified that after police officers removed appellant from the first patrol car, appellant ran four or five steps covering a distance of five feet, before falling in the street. Appellant testified that after being arrested and placed in handcuffs, he took four or five steps and then fell. Appellant stated that most of the steps were taken in order to gain his balance because he had the handcuffs behind his back.

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[2] The phrase "unauthorized departure from custody" denotes the act of leaving a state of detention or restraint by a peace officer and once the act is done, the escape is accomplished. *Lawhorn v. State*, 898 S.W.2d 886, 890 (Tex. Crim. App. 1995).

Although there is conflicting testimony, it does not render the verdict so contrary to the weight of the evidence as to be clearly wrong and unjust. Accordingly, appellant's first and second issues challenging his escape conviction do not establish that the evidence is legally or factually insufficient to support that conviction and are overruled.

Lesser Included Offense

Appellant's third issue challenging his escape conviction complains of the trial court's failure to instruct the jury on the offense of resisting arrest, which he claims was raised by his testimony that he had no intent to escape while being transported.

A defendant is entitled to an instruction on a lesser included offense if: (1) the proof for the charged offense includes the proof necessary to establish the lesser included offense; and (2) there is some evidence in the record that would permit a rational jury to find that if the defendant is guilty, he is guilty of only the lesser-included offense. *Wesbrook v. State*, 29 S.W.3d 103, 113 (Tex. Crim. App. 2000).

A person commits the offense of escape if he escapes from custody after having been arrested for, charged with, or convicted of an offense. TEX. PEN. CODE ANN. § 38.06(a)(1) (Vernon 1994). A person commits the offense of resisting arrest if he intentionally prevents or obstructs a person he knows is a peace officer from effecting an arrest or a search by using force against the peace officer or another. TEX. PEN. CODE ANN. § 38.03(a) (Vernon 1994).

Because the use of force against a peace officer is within the proof necessary to establish resisting arrest but not escape, resisting arrest is not a lesser included offense of escape. Therefore, appellant was not entitled to a jury instruction on resisting arrest, appellant's third issue challenging his felony escape conviction is overruled, and the judgments of the trial court on both offenses are affirmed.

/s/ Richard H. Edelman
Justice

Judgment rendered and Opinion filed July 12, 2001.

Panel consists of Justices Edelman, Frost, and Murphy.[3]

Do not publish — TEX. R. APP. P. 47.3.

[3] Senior Chief Justice Paul C. Murphy sitting by assignment.