In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-19-00139-CR

JOHN AVILA, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

On Appeal from the 140th District Court
Lubbock County, Texas
Trial Court No. 2018-415,689, Honorable Bradley S. Underwood, Presiding

May 27, 2020

MEMORANDUM OPINION

Before PIRTLE and PARKER and DOSS, JJ.

Appellant John Avila appeals his conviction for the third degree felony of evading arrest or detention in a motor vehicle[1] and sentence of four years' incarceration in the Texas Department of Criminal Justice. Appellant contends that (1) the State failed to prove beyond a reasonable doubt that he intended to evade arrest and (2) the trial court erred by admitting evidence of a controlled substance found in his vehicle. We affirm the judgment of the trial court.

[1] *See* TEX. PENAL CODE ANN. § 38.04(b)(2)(A) (West 2016).

Background

On a Saturday morning in February of 2016, appellant left his home in Lubbock to drive to Muleshoe. As appellant drove through Lamb County, Texas State Troopers Adrian Briseno and Benjamin Neville, who were patrolling Highway 84, clocked the speed of his vehicle at 73 miles per hour. The posted speed limit on that portion of the highway was 65 miles per hour. Trooper Briseno, who was driving the officers' marked Tahoe, pulled behind appellant's SUV and followed him for a short distance before activating the Tahoe's emergency lights. Appellant drove on. Then, Briseno pulled his vehicle next to appellant's. Trooper Neville, who was in Briseno's passenger seat, waved his hands out the window at appellant to get his attention. Appellant drove on. Briseno activated his siren. Appellant drove on. Briseno pulled his patrol unit in front of appellant's SUV to get him to slow down or stop. Appellant then drove across the highway median and turned around, heading back toward Lubbock.

By then, the vehicles were near the town of Littlefield. According to Trooper Briseno, the situation had changed from a routine traffic stop to a pursuit. The officers notified the Lamb County Sheriff's Office and the Littlefield Police Department. As Briseno and Neville continued to pursue appellant, supporting units laid out tire deflation systems, known as spikes, on the highway. Appellant continued driving, avoiding the spikes by driving in the bar ditch or by swerving toward the officers on the roadway.

The vehicles approached the city of Lubbock. Briseno and Neville, concerned that the situation presented a danger to others, determined that they should use their firearms to disable appellant's vehicle. When they reached a concrete berm near the intersection of Highway 84 and North Loop 289, Neville shot at appellant's tires. Appellant then

changed course, exiting the eastbound roadway and heading west on the Loop. Eventually, one of appellant's tires came off its rim, and appellant exited the Loop onto 34th Street. He drove onto a curb to go around a vehicle stopped at a red light, turning south onto Slide Road. Appellant drove down Slide Road, under South Loop 289, and turned into the parking lot of a restaurant. Officers continued following him. Appellant was not driving at a high rate of speed, but officers considered it a pursuit nonetheless.

Another attempt was made to deflate appellant's tires with spikes, but it was unsuccessful. On the South Loop 289 access road near Quaker Avenue, Briseno, driving with his right hand and holding his firearm with his left hand, took a shot at appellant's back right tire. The shot hit the rim. Appellant continued driving through Lubbock, going down busy streets and through parking lots. The Lubbock County Sheriff's Office and Lubbock Police Department were assisting in the efforts to stop appellant. As appellant was driving eastbound on 50th Street, he turned into a restaurant parking lot and stopped, ending the chase. The officers' pursuit of appellant lasted more than an hour and took them through three counties.

Medical personnel came to the scene and determined that appellant was uninjured. Appellant was placed under arrest.

A Lubbock County jury found appellant guilty of evading arrest with a motor vehicle. The trial court assessed punishment at four years' incarceration in the Texas Department of Criminal Justice. Appellant timely filed this appeal.

Discussion and Analysis

Appellant raises two issues on appeal. In his first, he argues that the State failed to prove beyond a reasonable doubt that he intended to evade arrest. In his second, he asserts that the trial court erred by admitting evidence of a controlled substance found in his vehicle.

Sufficiency of the Evidence

Appellant's first issue is a challenge to the sufficiency of the evidence to support his conviction. In assessing the sufficiency of the evidence, we review 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 offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); *see Brooks v. State*, 323 S.W.3d 893, 912 (Tex. Crim. App. 2010). "[O]nly that evidence which is sufficient in character, weight, and amount to justify a factfinder in concluding that every element of the offense has been proven beyond a reasonable doubt is adequate to support a conviction." *Brooks*, 323 S.W.3d at 917 (Cochran, J., concurring). We remain mindful that "[t]here is no higher burden of proof in any trial, criminal or civil, and there is no higher standard of appellate review than the standard mandated by *Jackson*." *Id.* When reviewing all of the evidence under the *Jackson* standard of review, the ultimate question is whether the jury's finding of guilt was a rational finding. *See id.* at 906-07 n.26 (discussing Judge Cochran's dissenting opinion in *Watson v. State*, 204 S.W.3d 404, 448-50 (Tex. Crim. App. 2006), as outlining the proper application of a single evidentiary standard of review). "[T]he reviewing court is required to defer to the jury's credibility and

weight determinations because the jury is the sole judge of the witnesses' credibility and the weight to be given their testimony." *Id.* at 899.

"A jury may accept one version of the facts and reject another, and it may reject any part of a witness's testimony." *Febus v. State*, 542 S.W.3d 568, 572 (Tex. Crim. App. 2018). If the record contains conflicting inferences, we must presume the jury resolved such facts in favor of the verdict and defer to that resolution. *Brooks*, 323 S.W.3d at 899 n.13.

The elements of evading arrest or detention while using a motor vehicle are (1) intentionally fleeing (2) from a person whom the defendant knows is a peace officer (3) trying to lawfully arrest or detain him, and (4) using a motor vehicle while in flight. *See* TEX. PENAL CODE ANN. § 38.04(a), (b)(2)(A). Here, appellant argues that the evidence was insufficient to support the first element, i.e., that he had the requisite intent to evade arrest.

Intent is a question of fact for the jury. *Brown v. State*, 122 S.W.3d 794, 800 (Tex. Crim. App. 2003). In determining whether a defendant intended to evade, the relevant inquiry is whether there was an attempt to flee or delay the detention. *Baines v. State*, 418 S.W.3d 663, 670 (Tex. App.—Texarkana 2010, pet. ref'd). Courts may consider the speed, distance, and duration of a pursuit in determining whether a defendant intentionally fled. *See Griego v. State*, 345 S.W.3d 742, 751 (Tex. App.—Amarillo 2011, no pet.). "Fleeing" is anything less than prompt compliance with an officer's direction to stop. *See Horne v. State*, 228 S.W.3d 442, 446 (Tex. App.—Texarkana 2007, no pet.). Even if there is no intent ultimately to evade, intent to evade arrest or detention even for a short time is sufficient to support a conviction for evading arrest with a motor vehicle.

See id. at 445-46; *see also Mayfield v. State*, 219 S.W.3d 538, 541 (Tex. App.—Texarkana 2007, no pet.) (law does not require high-speed fleeing or even effectual fleeing; it requires an attempt to get away from a known officer of the law).

At trial, appellant testified that, although he recognized that the officers were trying to stop him, he was afraid. When Neville waved his hands out the window, appellant believed he was waving a gun at him. When the officers pulled their patrol unit in front of appellant's vehicle, he believed they were trying to run him off the road. Appellant panicked. He testified that he had a flashback to a 2013 incident in California, when law enforcement officers there pulled him from his vehicle, beat him, took him to jail, beat him again, and eventually released him without providing any explanation or filing any charges. Frightened and anxious because of this prior experience, appellant decided to drive back toward Lubbock to find a safe place to stop. He testified, "My intent was to find an area where – that I – there would be other people to kind of monitor that interaction with [the troopers]. That's what I was thinking."

Appellant explained that he reduced his speed to convey that he was not trying to run. He said, "I know it was very well below the speed limit. I'm basically trying to communicate to them that, 'Look I know you're back there. I'm not trying to get away from you, but I don't feel comfortable stopping on the side of the road where no one is around . . . .'" He added, "So it wasn't like I was attempting to escape from them. That was never my intention to do that." According to appellant, once the officers fired shots at him, he was in the worst fear of his life. At that point, he said, "[I]t was almost like I was in a paralyzed state of mind where I just couldn't stop."

On cross-examination, appellant admitted that he did not have a valid driver's license at the time of the incident. He testified that he kept driving because he did not want to stop in an isolated area; however, he could not recall whether there were places to stop in the towns of Littlefield and Shallowater, which he drove through on the way back to Lubbock, where shots were first fired. Appellant acknowledged that he had the ability to pull off to the side of the road and stop, but stated that, because of his state of mind, "it wasn't that simple."

Appellant also presented expert testimony from Dr. Philip Davis, who testified that appellant suffered from post-traumatic stress disorder (PTSD). Dr. Davis believed that, due to appellant's PTSD, appellant was not going to stop driving until he felt he was safe. He did not believe that evading arrest crossed appellant's mind.

Viewing the evidence in the light most favorable to the verdict, we conclude that a rational trier of fact could find beyond a reasonable doubt that appellant intended to evade arrest. Appellant testified that his intent was to stop once he found an area that he considered suitable, which is an acknowledgement that he intentionally chose not to promptly comply. Although he urges that he was not attempting ultimately to escape, intent to evade arrest or detention even for a short time is sufficient. *See Horne*, 228 S.W.3d at 445-46. The jury could have reasonably concluded that appellant intentionally delayed complying with the efforts of law enforcement officers who were attempting to lawfully arrest or detain him. *See* TEX. PENAL CODE ANN. § 38.04(a). We overrule appellant's challenge to the sufficiency of the evidence.

Admission of Evidence of Drugs

In his second issue, appellant contends that the trial court erred when it allowed evidence of alleged controlled substances and paraphernalia found in appellant's vehicle to be admitted before the jury.

We review a trial court's ruling admitting or excluding evidence under an abuse of discretion standard. *Henley v. State*, 493 S.W.3d 77, 82-83 (Tex. Crim. App. 2016). A trial court abuses its discretion when its decision falls outside the zone of reasonable disagreement. *Id.* at 83. If the trial court's decision was within the bounds of reasonable disagreement, the appellate court should not disturb the ruling. *Shuffield v. State*, 189 S.W.3d 782, 793 (Tex. Crim. App. 2006).

The gist of appellant's argument is that the trial court erroneously admitted evidence that the search of appellant's vehicle following the chase allegedly revealed drugs and paraphernalia. According to appellant, the trial court allowed this evidence to come before the jury because of assertions made in opening statements, which was error.

Our examination of the record reveals that it was appellant who introduced evidence that methamphetamine and a pipe were allegedly found in his vehicle after the chase ended. For clarity, we will recount the relevant sequence of events as reflected by the record.

During his opening statement, counsel for appellant asserted that appellant "will tell you he had no intent to run away" and "will tell you he never had the intent, he was still looking for somewhere safe . . . ." Immediately after the conclusion of this opening

statement, the State requested a bench conference, where the following exchange occurred:

> Counsel for the State: I believe the Defendant opened the door to extraneous offenses. He said it wasn't his intent, he didn't know what he was doing. I believe that has opened the door for us to get into his history.
>
> The Court: Which one?
>
> Counsel for the State: The fact that there was methamphetamine in the car.
>
> The Court: I agree.

Counsel for appellant objected, later adding, "If the State is going to go forward with that, your Honor, then I'm going to have to ask for a mistrial . . . ." The trial court denied the motion for a mistrial.

During the State's case-in-chief, before any testimony on the issue was elicited, the trial court cautioned the attorneys not to broach the subject until it had ruled on the matter. Later, following a review of the caselaw, the trial court informed counsel that "opening statements can open the door." However, he again admonished both attorneys to approach the bench before raising the matter.

The State rested its case without making any reference to the methamphetamine and pipe allegedly found during the search of appellant's vehicle.

The first time that drugs were mentioned before the jury occurred when the defense called appellant to the stand. Appellant's trial counsel asked, "Are you aware, John, that there's an allegation against you that there was methamphetamine in that car?" Appellant acknowledged that he was aware of the allegation, but denied that he had any methamphetamine in his possession. Appellant then recalled Trooper Briseno, who testified about the discovery of a pipe and a white crystallized substance in appellant's

vehicle. Briseno testified that the officers "believed [the substance] to be methamphetamine." After appellant presented this evidence, the State called a forensic scientist, who testified that the substance tested positive for methamphetamine. Appellant made no objection to her testimony.

Generally, a complaint regarding improperly admitted evidence is waived if the same evidence is introduced by the defendant himself. *See Cisneros v. State*, 290 S.W.3d 457, 468 (Tex. App.—Houston [14th Dist.] 2009, pet. dism'd) (citing *Rogers v. State*, 853 S.W.2d 29, 35 (Tex. Crim. App. 1993)). Here, it was appellant, not the State, who introduced the methamphetamine evidence. While appellant may have done so in an effort to take the sting out of questions anticipated by the State, such preemptive efforts nonetheless opened the door to the evidence. Having opened the door himself, appellant is in no position to complain about the State's questions on the matter. *See, e.g., Ohler v. United States*, 529 U.S. 753, 760, 120 S. Ct. 1851, 146 L. Ed. 2d 826 (2000) (stating that "a defendant who preemptively introduces evidence of a prior conviction on direct examination may not on appeal claim that the admission of such evidence was error"); *Chamberlain v. State*, 998 S.W.2d 230, 235 (Tex. Crim. App. 1999) ("It is well established that questions regarding the admission of evidence are rendered moot if the same evidence is elsewhere introduced without objection; any error in admitting evidence over a proper objection is harmless if the same evidence is subsequently admitted without objection.").

Therefore, we overrule appellant's second issue.

Conclusion

Having overruled both of appellant's issues on appeal, we affirm the judgment of the trial court.

Judy C. Parker
Justice

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