Opinion filed June 4, 2020

In The

Eleventh Court of Appeals

No. 11-18-00150-CR

MONTE DEAN CARPENTER, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 385th District Court
Midland County, Texas
Trial Court Cause No. CR50982

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

The jury convicted Appellant, Monte Dean Carpenter, of robbery and assessed his punishment at confinement for a term of ten years in the Institutional Division of the Texas Department of Criminal Justice. *See* TEX. PENAL CODE ANN. § 29.02(a) (West 2019). The trial court sentenced Appellant in accordance with the jury's assessment. In two issues on appeal, Appellant argues (1) that the trial court erred when it denied Appellant's request to include a jury instruction on the lesser included

offense of theft and (2) that the evidence presented at trial was insufficient to support his conviction. We affirm.

Background Facts

Paul Matthew Barnett is a frequent customer of Main Street Market, a large store in Midland, Texas, that carries groceries and other items. Appellant was a panhandler who lived in a homeless camp near the store. On the evening of November 15, 2017, Barnett went to Main Street Market where he encountered Appellant.

While Barnett was walking into the store, Appellant told Barnett that he was hungry. After Barnett offered to take Appellant into the store to buy him a meal, Appellant informed Barnett that Appellant was no longer welcome in the store due to a prior incident. At that point, Barnett decided to go into the store alone to purchase Appellant a sandwich. After delivering the sandwich to Appellant, Barnett went back into the store to complete his shopping.

Afterwards, as he was entering his vehicle to leave the store, Barnett witnessed Appellant enter Main Street Market. Concerned that Appellant was not supposed to be inside, Barnett stayed for a while to watch Appellant. As he watched, Barnett noticed that Appellant was exhibiting odd behavior. Then, as Appellant went to exit the store without paying, Barnett observed a yellow package tucked inside Appellant's jacket. Barnett testified that he immediately recognized the yellow package as being a meat item from the store. Barnett informed the assistant general manager of the store, Jennifer Wheeler, of the theft and moved to confront Appellant while Wheeler contacted law enforcement.

After Barnett demanded that Appellant turn over the stolen property, Appellant opened up his jacket so Barnett could remove a package of steaks. Barnett then ordered Appellant to sit and wait for law enforcement to arrive; Appellant briefly complied. Then, as Barnett had his back turned, Appellant took off on foot.

Barnett chased after Appellant across the parking lot where he tackled Appellant to the ground. Barnett then attempted to place Appellant's hands behind his back until law enforcement arrived. During the struggle, Appellant managed to get ahold of one of Barnett's fingers. Appellant then told Barnett that he was going to break Barnett's finger and proceeded to bend the finger backwards. At that point, law enforcement arrived and placed Appellant under arrest; no permanent damage was done to Barnett's finger. During a subsequent search of Appellant, officers discovered another package of meat inside Appellant's jacket.

Appellant was eventually indicted for robbery. During his jury trial, Appellant argued that the theft and assault were separate events and requested that the jury be charged on the lesser included offense of theft. The trial court denied the request, and Appellant was convicted of robbery. This appeal followed.

Lesser Included Offense Jury Instructions

In his first issue, Appellant claims the trial court erred when it denied his request to instruct the jury on the lesser included offense of theft. We apply a two-step analysis to determine whether a defendant is entitled to a lesser included offense in the jury charge. *Hall v. State*, 158 S.W.3d 470, 473 (Tex. Crim. App. 2005). First, we "determine whether the lesser offense actually is a lesser-included offense of the offense charged as defined by article 37.09." *Id.* (citing TEX. CODE CRIM. PROC. ANN. art. 37.09 (West 2006)).

An offense is considered a lesser included offense if "it is established by proof of the same or less than all the facts required to establish the commission of the offense charged." CRIM. PROC. art. 37.09(1). In this case, the indictment alleged that Appellant committed robbery "in the course of committing theft." In such cases, "[t]heft, by whatever method committed, is necessarily included in the alleged elements of the greater offense of robbery." *Earls v. State*, 707 S.W.2d 82, 84–85

(Tex. Crim. App. 1986). Accordingly, in this case, theft is a lesser included offense because the indictment included theft as an alleged element.

The second and final step in the analysis is to determine "whether the record contains some evidence that would permit a rational jury to find that the defendant is guilty *only* of the lesser-included offense." *Hall*, 158 S.W.3d at 473. In making our determination, "[a]nything more than a scintilla of evidence is sufficient to entitle a defendant to a lesser charge." *Sweed v. State*, 351 S.W.3d 63, 68 (Tex. Crim. App. 2011) (quoting *Bignall v. State*, 887 S.W.2d 21, 23 (Tex. Crim. App. 1994)). Despite this low threshold, "[i]t is not enough that the jury may disbelieve crucial evidence pertaining to the greater offense." *Skinner v. State*, 956 S.W.2d 532, 543 (Tex. Crim. App. 1997). Instead, "there must be some evidence directly germane to a lesser-included offense for the factfinder to consider before an instruction on a lesser-included offense is warranted." *Id.*

A person commits the offense of theft if "he unlawfully appropriates property with intent to deprive the owner of property." PENAL § 31.03(a). A person commits the offense of robbery if, "in the course of committing theft" and "with intent to obtain or maintain control of the property," he "intentionally or knowingly threatens or places another in fear of imminent bodily injury or death." *Id.* § 29.02(a)(2). The element of "in the course of committing theft" is defined as "conduct that occurs in an attempt to commit, during the commission, or *in immediate flight after the attempt or commission of theft*." *Id.* § 29.01(1) (emphasis added). Bodily injury is defined as "physical pain, illness, or any impairment of physical condition." *Id.* § 1.07(a)(8) (West Supp. 2019).

Appellant argues that he was entitled to an instruction on theft because there was evidence that the theft offense was completed prior to the assault of Barnett. If the theft was complete, he argues, "then any act of assault took place after the theft as a result of a separate incident and not in the course of committing theft." This

argument, however, fails to consider that "in the course of committing theft," as defined by the Texas Penal Code, includes the "immediate flight after the attempt or commission of theft." *Id.* § 29.01(1).

The term "immediate flight" is not defined in the Penal Code, but the term "immediate" can be defined as "[o]ccurring without delay; instant," "[n]ot separated by other persons or things," or "[h]aving a direct impact; without an intervening agency." *Sweed*, 351 S.W.3d at 69 n.5 (alterations in original) (quoting BLACK'S LAW DICTIONARY 751 (7th ed. 1999)). Caselaw further guides our analysis as to what is considered "immediate flight."

In *Sweed*, after the defendant was convicted of robbery, the Court of Criminal Appeals determined that the trial court erred by refusing to charge the jury on the lesser included offense of theft. *Id.* at 69–70. In that case, however, fifteen to thirty minutes passed between the theft and the subsequent threat of bodily injury. *Id.* at 69. In determining whether the threat of bodily injury occurred during the "immediate flight" from the theft, the court summarized the facts as follows:

> After stealing the nail gun, [the defendant] fled the work area and went into an apartment. He remained inside the apartment for five to twenty minutes, during which time he hid the nail gun and changed clothes. [The defendant] eventually exited the apartment and walked to another part of the complex, where he conversed with a group of individuals for five to ten minutes. Then, he was on his way back to the apartment when he spotted [the victim] and pulled a knife.

Id. Accordingly, the Court of Criminal Appeals held that a jury could have rationally interpreted the evidence as tending to show that the defendant was no longer fleeing from the theft. *Id.*

Here, Appellant's flight was far less intricate. Barnett testified that, after he asked Appellant to sit and wait for law enforcement to arrive, Appellant "sat for a moment" before his attempted getaway. There was no testimony or evidence of any kind tending to suggest that Appellant's attempt to flee was not in the immediate

aftermath of his theft attempt. To be sure, when the officers arrested Appellant—after he bent Barnett's finger backward—they found additional stolen merchandise. Accordingly, one could argue that the theft was still ongoing at the time of the assault.

Appellant additionally argues that the trial court should have charged the jury on the lesser included offense of theft because there was a question as to whether he intended to assault Barnett and whether he caused bodily injury when he bent Barnett's finger backward. Appellant bolsters his assertion by suggesting that he was justified in using physical force because Barnett was not law enforcement. This argument fails for two reasons. First, it is not legally persuasive. The indictment only required the State to prove that Appellant caused bodily injury "in the course of committing theft" and "with intent to obtain or maintain control of the property." PENAL § 29.02(a)(2). The fact that Barnett was a civilian and not a law enforcement officer does not negate any element of robbery, thereby making theft a rational alternative to the charged offense. The second reason the argument fails is that it is simply not true. There was uncontroverted testimony that Appellant told Barnett he was going to break Barnett's finger. Appellant then proceeded to bend Barnett's finger backward, causing Barnett physical pain and satisfying the bodily injury element of robbery. *See id.* § 1.07(a)(8).

The record reflects that Appellant intentionally caused bodily injury to Barnett and that the assault occurred immediately after Appellant committed the offense of theft. The trial court did not err when it refused to submit a charge on the lesser included offense of theft because there was no evidence that Appellant, if guilty, was only guilty of the lesser included offense of theft. Accordingly, we overrule Appellant's first issue.

Evidentiary Sufficiency

In Appellant's second issue, he argues that the evidence presented at trial is insufficient to support his conviction for robbery. Specifically, Appellant claims that there was insufficient evidence that he intentionally, knowingly, or recklessly caused bodily injury to Barnett in the course of committing the theft. We disagree.

We review a sufficiency of the evidence issue under the standard of review set forth in *Jackson v. Virginia*, 443 U.S. 307 (1979). *Brooks v. State*, 323 S.W.3d 893, 912 (Tex. Crim. App. 2010); *Polk v. State*, 337 S.W.3d 286, 288–89 (Tex. App.—Eastland 2010, pet. ref'd). Under the *Jackson* standard, 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*, 443 U.S. at 319; *Isassi v. State*, 330 S.W.3d 633, 638 (Tex. Crim. App. 2010). The trier of fact may believe all, some, or none of a witness's testimony because the factfinder is the sole judge of the weight and credibility of the witnesses. *Sharp v. State*, 707 S.W.2d 611, 614 (Tex. Crim. App. 1986); *Isham v. State*, 258 S.W.3d 244, 248 (Tex. App.—Eastland 2008, pet. ref'd). We defer to the trier of fact's resolution of any conflicting inference raised by the evidence and presume that the trier of fact resolved such conflicts in favor of the verdict. *Jackson*, 443 U.S. at 326; *Brooks*, 323 S.W.3d at 899; *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007).

Appellant again argues that the theft was complete at the time Barnett reached into Appellant's jacket and removed some stolen merchandise from Appellant's possession. Accordingly, Appellant argues, he did not cause bodily injury "in the course of committing theft." As we explained above, however, "in the course of committing theft" is defined by the Texas Penal Code as "conduct that occurs in an attempt to commit, during the commission, *or in immediate flight after the attempt or commission of theft*." PENAL § 29.01(1) (emphasis added). Because the assault

of Barnett occurred during the immediate flight after the commission of the theft, the assault likewise occurred "in the course of committing theft."

Appellant also argues that there was insufficient evidence that he intentionally caused bodily injury to Barnett. But, as we also explained above, there was uncontroverted testimony that Appellant told Barnett he was going to break Barnett's finger and then proceeded to bend Barnett's finger backward, resulting in physical pain. Taken together, we believe that a rational trier of fact could have found all the elements of robbery beyond a reasonable doubt based on the evidence presented. Accordingly, the evidence is sufficient to support Appellant's conviction, and we overrule Appellant's second issue.

This Court's Ruling

We affirm the judgment of the trial court.

KEITH STRETCHER
JUSTICE

June 4, 2020

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

Panel consists of: Bailey, C.J.,
Stretcher, J., and Wright, S.C.J.[1]

Willson, J., not participating.

[1]Jim R. Wright, Senior Chief Justice (Retired), Court of Appeals, 11th District of Texas at Eastland, sitting by assignment.