

Opinion issued July 14, 2020



In The
Court of Appeals
For The
First District of Texas

NO. 01-19-00274-CR

LEONARDO MILLER, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the 213th District Court
Tarrant County, Texas*
Trial Court Case No. 1543582R**

O P I N I O N

A jury found Leonardo Miller guilty of evading arrest, unlawful possession of

* Per the Texas Supreme Court's docket equalization powers, this appeal was transferred from the Second Court of Appeals to this one on April 10, 2019. *See* TEX. GOV'T CODE § 73.001; Order Regarding Transfer of Cases From Courts of Appeals, Misc. Docket No. 19-9022 (Tex. Mar. 26, 2019). We are unaware of any conflict between the precedent of that court and this one on any relevant issue. *See* TEX. R. APP. P. 41.3.

a firearm, and unlawful possession of body armor. He appeals contending that:

- (1) the trial court erred in refusing his request for a mistake of fact instruction in the jury charge; and
- (2) the State's improper closing arguments require reversal.

We affirm.

BACKGROUND

A grand jury indicted Miller for evading arrest, unlawful possession of a firearm, and unlawful possession of body armor. *See* TEX. PENAL CODE §§ 38.04(a), 46.04(a), 46.041(b). The unlawfulness of his possession of the firearm, a pistol, and the body armor was based on his alleged status as a felon. He pleaded not guilty to all three charges and was tried by a jury.

At trial, Officer L. Rollins of the Fort Worth Police Department testified that, while he was on patrol one night in July 2017, he received a police broadcast about a vehicle that had been reported stolen at gunpoint. The broadcast included the vehicle's description—a 2013 Kia Soul—as well as its license plate number.

Rollins later found the Kia Soul in a parking lot. It was occupied by a single person, later identified as Miller. Rollins activated his marked patrol vehicle's lights and initiated a felony traffic stop. Rollins got out of his vehicle, drew his sidearm, pointed it at Miller, and told him to show his hands. Miller initially complied but then sped off.

A high-speed chase ensued. Miller drove through a residential area at speeds between 50 and 60 miles per hour. He disregarded stop signs and veered into oncoming traffic, forcing another driver off the road. Rollins eventually used his patrol vehicle to push the Kia Soul into a curb, which disabled one of its rear tires. About a block later, Miller crashed into a parked vehicle. He then fled on foot but was eventually apprehended by Rollins and other officers.

When the officers apprehended Miller, he was wearing body armor. Another peace officer recovered a loaded pistol from the Kia Soul.

The State introduced a prior judgment of conviction. It showed that Miller had been convicted of assault causing bodily injury to a family member or member of his household, a third-degree felony, in 2010.

Miller also testified. It was undisputed that Miller had worked as an informant for the Tarrant County Sheriff's Office. As an informant, he interacted with people associated with a Mexican drug cartel. He testified that after a disagreement with these associates, "people from Mexico" had him assaulted in April. The cartel later had Miller assaulted a second time in May or June. Miller testified that he was "threatened constantly" by telephone, including a threat to harm his daughter.

Miller testified that there were "dirty cops" who protected the cartel and gave it information. The cartel had informed Miller that it was going to have these cops kill him. Miller did not know the identities of these allegedly corrupt cops. He

thought his contact in the sheriff's office was the only law enforcement officer he could trust. Miller said he sought help from his contact after he was assaulted but did not receive any. So he bought a bulletproof vest and a pistol to protect himself.

When Rollins signaled for Miller to stop his vehicle, Miller initially did so. But based on the information he had received about cops working for the cartel and the behavior of Rollins, who had drawn his gun, Miller fled in the Kia Soul. Miller testified that he did not believe he could trust the cops under the circumstances. Miller eventually crashed the Kia Soul during the ensuing pursuit and fled on foot. He left his pistol in the vehicle, testifying that he did so because he did not "know for sure" whether the peace officers pursuing him were working for the cartel.

Miller initially conceded that the Kia Soul had been stolen at gunpoint less than an hour before the chase. He also agreed that he was present when it was stolen. But his testimony was inconsistent both as to whether the Kia Soul was in fact stolen and the extent of his involvement in stealing it. At first, he denied that he stole the vehicle or had intended to do so. But he eventually conceded some responsibility:

Q. So you were involved in the theft of the vehicle?

A. Somewhat, yes.

He later disputed that he knew the vehicle was stolen. Miller testified that he came into possession of the Kia Soul via "a misunderstanding" and that he did not obtain

it in the way that its owner said things had happened. Miller conceded that he was the only person in the Kia Soul when Rollins tried to stop him.

Based on Miller's testimony that he was not sure whether the cops were working for the cartel when he fled, the defense requested a jury instruction as to his ostensible mistake of fact with respect to the charge for evading arrest. The trial court refused to include the instruction. Defense counsel objected to the absence of this instruction but did not make any other objections to the jury charge.

The jury charge included a limiting instruction as to Miller's alleged but uncharged involvement in the armed theft of the Kia Soul. The charge provided:

You have heard testimony that the defendant was involved prior to the offense he is presently being tried for in an offense where a vehicle had been stolen at gunpoint. You are instructed that if there is any such testimony before you in this case regarding the defendant having committed an offense other than the offense alleged against him in the indictment in this case, you cannot consider said testimony for any purpose unless you find beyond a reasonable doubt that the defendant committed such offenses, if any were committed, and even then you may consider the same in determining the motive, intent or knowledge of the defendant, if any, in connection with this offense, if any, alleged against him in the indictment and for no other purpose.

During closing argument, the prosecution discussed Miller's alleged involvement in the armed theft of the Kia Soul more than once. Defense counsel did not object to the prosecution's argument on this subject.

At Miller's request, the jury charge also included an instruction that necessity could constitute a defense to the charged offenses. It provided:

Now, if you find and believe from the evidence that on the occasion in question the defendant reasonably believed, viewed from the standpoint of the defendant at the time, that his conduct of evading arrest and detention, or unlawful possession of body armor or a firearm was immediately necessary to avoid imminent harm, and the desirability and urgency of avoiding the harm clearly outweighed, according to ordinary standards of reasonableness, the harm sought to be prevented by the law proscribing the conduct, then you should acquit the defendant, or, if you have a reasonable doubt as to whether or not the defendant acted reasonably or the desirability and urgency of avoiding the harm was unreasonable under the circumstances, then you should give the defendant the benefit of the doubt and say by your verdict “not guilty.”

During closing argument, Miller’s counsel urged necessity as a defense. Counsel argued that Miller’s possession of a pistol and body armor, notwithstanding his status as a felon, and his flight were reasonable because his work as an informant placed his life in danger and subjected him to threats. Miller’s counsel argued:

The officer talks about the dangers of being a confidential informant. You automatically put yourself in danger when you become a confidential informant. What happens to snitches? They get hung from bridges. They get burned in vats, 55-gallon drums of diesel fuel. They get their hands cut off. That’s the kind of people he’s dealing with. I don’t know that lifestyle. You don’t know that lifestyle, but you have to view it from his standpoint and was his actions reasonable as a result of having those things and those threats done to him.

In response to the defense’s necessity argument, the State argued that Miller’s defense was unreasonable. The State specifically argued that:

What the defense is asking you to do today is give to him a get-out-of-jail-free card. And not only are you giving him a get-out-of-jail-free card, you’re giving every single person that’s ever worked as a [confidential informant] that same card.

Miller's counsel objected that the State's rejoinder was "outside the record," and the trial court overruled this objection.

The jury found Miller guilty of all three charged offenses. Miller then pleaded true to the State's enhancement allegation that he was a habitual offender, and the jury assessed his punishment at 30 years' confinement for each offense. The trial court entered judgments of conviction consistent with the jury's verdict and ordered that his three sentences run concurrently.

Miller appeals.

DISCUSSION

I. Mistake of Fact Instruction

Miller argues that he was entitled to a mistake-of-fact instruction in the jury charge due to his belief that the police intended to kill him on behalf of a drug cartel, rather than lawfully detain or arrest him. He reasons that this mistake of fact, if credited by the jury, would have negated the mental state required to find him guilty of evading detention or arrest. Specifically, Miller argues that this mistake of fact would negate that he knew the cops were trying to lawfully detain or arrest him.

A. Standard of review and applicable law

A person commits the offense of evading detention or arrest "if he intentionally flees from a person he knows is a peace officer or federal special investigator attempting lawfully to arrest or detain him." TEX. PENAL CODE

§ 38.04(a). Thus, the elements of the crime are (1) intentionally (2) fleeing (3) from a person whom the defendant knows is a peace officer (4) trying to lawfully detain or arrest him. *See id.*; *Farrakhan v. State*, 263 S.W.3d 124, 133–34 (Tex. App.—Houston [1st Dist.] 2006), *aff'd*, 247 S.W.3d 720 (Tex. Crim. App. 2008).

It is a defense to prosecution that the defendant “through mistake formed a reasonable belief about a matter of fact if his mistaken belief negated the kind of culpability required for the commission of the offense.” TEX. PENAL CODE § 8.02(a). For this defense to apply, the defendant must have been mistaken about a specific historical fact that, if true, would negate the mental state required for conviction. *See Mays v. State*, 318 S.W.3d 368, 382 (Tex. Crim. App. 2010). A defendant’s mistaken belief that his conduct was lawful is not a mistake of fact for purposes of this defense. *Plummer v. State*, 426 S.W.3d 122, 128 (Tex. App.—Houston [1st Dist.] 2012), *aff’d as modified*, 410 S.W.3d 855 (Tex. Crim. App. 2013); *Vitiello v. State*, 848 S.W.2d 885, 887 (Tex. App.—Houston [14th Dist.] 1993, *pet. ref’d*).

If the evidence raises mistake of fact and the defendant requests an instruction on this defense, the defendant is entitled to one regardless of the strength of the evidence. *Flores v. State*, 573 S.W.3d 864, 868 (Tex. App.—Houston [1st Dist.] 2019, *pet. ref’d*). But if the evidence, when viewed in the light most favorable to the defendant, does not establish this defense, the instruction is not required. *Id.*

B. Analysis

The parties agree that the viability of Miller's mistake-of-fact defense turns on whether the State had to prove he knew Rollins was trying to lawfully detain or arrest him. The State argues that it merely had to prove that Miller knew that a peace officer was trying to detain or arrest him and that the detention or arrest was lawful. That is, the State maintains that it did not have to prove that Miller knew the detention or arrest was lawful. Thus, the State reasons, Miller's ostensible mistake of fact does not provide a defense because, even if credited by the jury, it would not negate the culpability required by the offense of evading arrest.

In interpreting a prior version of the statute criminalizing evasion of detention or arrest, the Court of Criminal Appeals agreed with the State's position. *See Jackson v. State*, 718 S.W.2d 724, 726 (Tex. Crim. App. 1986). But the text and structure of the current version of the statute is different. *See Nicholson v. State*, 594 S.W.3d 480, 484–85 (Tex. App.—Waco 2019, pet. granted). The proper interpretation of the current version of the statute is before the Court of Criminal Appeals. *See Nicholson v. State*, No. PD-093-19 (Tex. Crim. App. Dec. 18, 2019) (review granted to decide if offense requires proof of knowledge that detention or arrest is lawful).

We need not decide which interpretation of the current statute is correct, however, because Miller's position is without merit even if the offense of evading detention or arrest requires proof that he knew a peace officer was lawfully trying to

arrest him. Miller’s argument—that he mistakenly believed the cops were working for a drug cartel and therefore were not trying to lawfully detain or arrest him—fails for two independent reasons. First, the lawfulness of a detention or arrest on a given set of facts is a question of law, not fact, and thus cannot serve as a basis for a mistake-of-fact defense. Second, even if the cops pursuing Miller had been working for the cartel and thus had an ulterior motive or illicit purpose, this would not affect or negate the lawfulness of an otherwise lawful detention or arrest.

The lawfulness of a warrantless detention or arrest turns on reasonable suspicion and probable cause, respectively. *See Neal v. State*, 256 S.W.3d 264, 280 (Tex. Crim. App. 2008). Whether reasonable suspicion or probable cause exist under a given set of circumstances so as to render a detention or arrest lawful is a question of law. *See Madden v. State*, 242 S.W.3d 504, 510–11 (Tex. Crim. App. 2007); *Horhn v. State*, 481 S.W.3d 363, 368 (Tex. App.—Houston [1st Dist.] 2015, pet. ref’d). In essence, Miller posits that his mistaken belief as to the possible unlawfulness of his detention or arrest by the police rendered his flight lawful. But Miller’s mistaken belief about the lawfulness of his flight was a mistake about the law, not fact, and thus cannot serve as the basis for a mistake-of-fact defense. *See Plummer*, 426 S.W.3d at 128; *Vitiello*, 848 S.W.2d at 887.

In addition, the tests for reasonable suspicion and probable cause are objective ones unrelated to the subjective beliefs of peace officers. *Amador v. State*, 275

S.W.3d 872, 878 (Tex. Crim. App. 2009); *Ford v. State*, 158 S.W.3d 488, 492 (Tex. Crim. App. 2005). Thus, even if a peace officer has an ulterior motive or illicit purpose in effecting a detention or arrest, the lawfulness of the detention or arrest itself cannot be vitiated by his subjective intent so long as the circumstances show the detention or arrest was lawful. *Crittenden v. State*, 899 S.W.2d 668, 674 (Tex. Crim. App. 1995); *Garcia v. State*, 827 S.W.2d 937, 943–45 (Tex. Crim. App. 1992). Miller was driving a vehicle that had been reported stolen within the hour. This gave officers probable cause to arrest him. *See Brown v. State*, 986 S.W.2d 50, 51–54 (Tex. App.—Dallas 1999, no pet.). Assuming Miller mistakenly believed that corrupt cops were targeting him for a cartel, his belief about their subjective intent has no bearing on whether they were lawfully trying to detain or arrest him.

We overrule Miller’s first issue.

II. Improper Closing Argument

Miller contends that the State made two types of improper closing argument. First, he argues that the State’s discussion of his involvement in the armed theft of the Kia Soul in which he fled from the police was improper because he was not charged with aggravated robbery. Second, Miller complains about the State’s assertion that an acquittal would be tantamount to a get-out-of-jail-free card for all informants because they all risk running afoul of the criminals on whom they inform. Miller argues that this assertion relies on facts outside the record.

A. Standard of review and applicable law

Proper closing argument is limited to summation of the evidence, reasonable deductions from the evidence, answer to the arguments of opposing counsel, and pleas for law enforcement. *Milton v. State*, 572 S.W.3d 234, 239 (Tex. Crim. App. 2019). Closing argument is limited to these general areas to ensure that the jury decides the case based on the evidence rather than unsworn assertions of lawyers. *See id.* To complain on appeal about an improper jury argument, however, the defendant must object and obtain an adverse ruling in the trial court. TEX. R. APP. P. 33.1(a); *Hernandez v. State*, 538 S.W.3d 619, 622–23 (Tex. Crim. App. 2010).

B. Analysis

Miller did not object to the State’s discussion of his involvement in the armed theft of the Kia Soul during closing argument. This alone precludes him from complaining about this aspect of the State’s closing argument on appeal. *See* TEX. R. APP. P. 33.1(a); *Hernandez*, 538 S.W.3d at 622–23. Moreover, the trial court’s charge explicitly instructed the jury that it could consider Miller’s involvement in the armed theft of the vehicle for certain purposes, provided it was convinced of his involvement beyond a reasonable doubt. Miller did not object to the inclusion of this instruction in the jury charge and does not argue on appeal that the State’s closing argument exceeded the bounds permitted by this instruction.

As to the State's argument about informants, defense counsel argued in closing that Miller's work as an informant endangered him and subjected him to threats so that it was necessary for him to possess a pistol and body armor even though it was unlawful for a felon like him to do so. Defense counsel likewise argued that his flight from the police was reasonable under the circumstances. The State's get-out-of-jail-free-card argument was made in answer to the defense's argument of necessity and was also a plea for law enforcement. It was Miller's counsel who first argued to the jury that the position of an informant is inherently dangerous. The State's answer—that Miller's argument, if accepted, would excuse lawbreaking by all informants—was not improper in this instance.

We overrule Miller's second issue.

CONCLUSION

We affirm the trial court's judgment.

Gordan Goodman
Justice

Panel consists of Justices Kelly, Goodman, and Hightower.

Publish. TEX. R. APP. P. 47.2(b).