File: 080736F - From documents transmitted: 07/14/2009
AFFIRM; Opinion issued July 14, 2009

In The
Court of Appeals
Fifth District of Texas at Dallas
.....
No. 05-08-00736-CR
.....
WILLIE BERNARD CAMPBELL, Appellant
V.
THE STATE OF TEXAS, Appellee
.....
On Appeal from the 292nd Judicial District Court
Dallas County, Texas
Trial Court Cause No. F06-66409-V
.....
OPINION
Before Justices Morris, Wright, and Bridges
Opinion By Justice Morris

A jury convicted Willie Bernard Campbell of harassing a public servant and found that appellant used or exhibited a deadly weapon during the offense. Appellant now challenges the sufficiency of the evidence supporting the deadly weapon finding as well as his conviction. He further complains the trial court erred in permitting the prosecution to amend the indictment after appellant rejected the State's plea offers and in overruling his objection to opinion testimony by the complainant in the case. Concluding appellant's arguments are without merit, we affirm the trial court's judgment.

Factual Background

At approximately 4:00 a.m., a paramedic for the Dallas Fire Department responded to a call reporting an "unconscious person" near the Federal Reserve Bank. The paramedic found appellant at the scene. Appellant's vital signs were within normal limits, but he was uncooperative, so the paramedic contacted the Dallas Police Department. Dallas Police Officer Daniel Waller reported to the scene and found appellant "very intoxicated," lying on the ground and smelling of vomit and alcohol.

When appellant became "testy" and "confrontational," Waller decided to arrest him for public intoxication. Waller seat-belted appellant into the front passenger seat of his squad car and proceeded to the Dallas Marshall's office, where appellant could get sober. After Waller had driven for approximately one block, appellant "went totally berserk." He began kicking the car's dashboard, its onboard computer, and Waller. At the same time, appellant screamed at Waller using profanity. He knocked Waller's hands off the car's steering wheel. At that point, Waller stopped the car, pulled appellant out of the car, and sprayed him with pepper spray. He called for police backup and for paramedics to flush the spray out of appellant's eyes. Waller explained on cross-examination that pepper spray is a "pain compliance" that burns the lungs and causes the subject to cough.

When backup officers arrived, Waller attempted to place appellant in the back seat of the squad car. Appellant then spat at Waller, hitting him in the eyes and mouth. Waller believed appellant intended to spit in his face and "try to get some of that stuff on [him] as best he could." Using a "guttural sound," appellant informed the officer that he had AIDS. Waller immediately began trying to flush out his eyes and get any of appellant's saliva out of his mouth. Eventually, he assisted other officers in loading appellant into a squad car with a cage in the back, and another officer took appellant to jail.

Waller later went to Parkland Hospital to be tested for HIV. The results were negative. Waller testified that, based on his personal knowledge and education about HIV, the virus "takes a long time to build up in your system" and he could contract HIV "within the next couple or three years." Waller admitted he was "not a doctor by any means."

Dr. Laura Armas testified for the State. Armas works at Parkland Hospital in the HIV Services division. She is also the Clinical Director for the Texas/Oklahoma AIDS Education and Training Center. After reviewing appellant's files at Parkland, Armas confirmed he is HIV positive. Armas stated that HIV, and the disease it can produce - AIDS - is transmitted through bodily fluids, either through sexual contact, needle sticks, or exposure to bodily fluids through a mucus membrane. Armas testified that HIV is capable of causing serious bodily injury or death and can be transmitted by saliva. She explained there is a "very low risk" of HIV transmission through saliva, but she could not say there was no risk of HIV transmission through saliva. She agreed that, hypothetically, it was possible for an HIV-positive person to transmit the disease by spitting into another individual's mouth.

On cross-examination, Armas disagreed that there are no known cases of transmission of the AIDS virus through saliva; she testified that there are "nonpublished cases" of such transmission. She admitted she had never personally seen a patient who had contracted AIDS through saliva, but she noted that national statistics "cover about two percent of unknown risk factor cases."

Appellant elected to testify in his defense. He admitted he is HIV positive but denied spitting on Waller. He stated that he has been HIV positive for fourteen years. Asked his opinion about whether HIV could be transmitted via saliva, appellant testified, ". . . I would have to be very . . . sickly. My T-cells would have to be below 200. I would have to be considered full-blown AIDS. If I had bleeding gums, there's a great possibility, but just through - just through saliva, saliva by itself, it's a small risk. I know saliva may contain germs and bacteria, but the HIV virus, no."

Appellant claimed he was taken into custody at a man's apartment, rather than on a sidewalk. He admitted to drinking "about a couple of drinks of Crown Royal" and taking "a couple of sleeping pills." He admitted he "may" have vomited before his arrest but he did not remember vomiting. He denied kicking Waller and the squad car and claimed he "remained silent the whole time" he was in the car. Appellant claimed he was wearing nothing but a pair of borrowed underwear and no shoes at the time of the arrest; he showed the jury there were no scars on his feet to demonstrate that he had not kicked the car as Waller had claimed. Appellant admitted he did not remember being pepper sprayed by Waller. He denied that it was possible he had forgotten details of the confrontation with Waller because he was too intoxicated at the time of the events. Appellant acknowledged he had several previous criminal convictions.

Discussion

In his first two issues, appellant complains the evidence against him was legally and factually insufficient to prove his saliva was used as a deadly weapon during the offense. Our inquiry in reviewing the legal sufficiency of the evidence to support a criminal conviction is whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt after viewing the evidence in a light most favorable to the prosecution. *See Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979). For evidence to be legally sufficient to sustain a deadly weapon finding, the appellate record must demonstrate that: (1) the object meets the statutory definition of a deadly weapon; (2) the deadly weapon was used or exhibited during the charged offense; and (3) someone was put in actual danger. *See Drichas v. State*, 175 S.W.3d 795, 798 (Tex. Crim. App. 2005).

In a factual-sufficiency analysis, we view the evidence in a neutral light. *See Clewis v. State*, 922 S.W.2d 126, 134 (Tex. Crim. App. 1996). Although we may disagree with the jury's conclusions, we must also exercise appropriate deference to avoid substituting our judgment for that of the jury, particularly in matters of credibility. *See Drichas*, 175 S.W.3d at 799. There are two ways in which we may conclude the evidence supporting a deadly weapon finding to be factually insufficient: the evidence supporting the finding, considered alone, is too weak to support the jury's finding beyond a reasonable doubt; or the contravening evidence is so strong that the State could not have met its burden of proof. *See id*.

Here, appellant challenges the evidence showing he used his HIV-positive saliva as a deadly weapon against Waller. He argues that cases from other jurisdictions

cast doubt on whether HIV may be transmitted by saliva alone and argues that the State's expert "acknowledged that she had no knowledge of one single case in which it had been shown medically that HIV had been initiated by the transference of saliva." In fact, Dr. Armas, testified that there was a "very low risk" of HIV transmission through saliva. She stated that it was hypothetically possible for an HIV-positive person to transmit the disease by spitting into another individual's mouth.

Moreover, on cross-examination, Armas testified there are "nonpublished cases" of HIV transmission through saliva. She admitted she had never personally seen a patient who had contracted AIDS through saliva, but she noted that national statistics "cover about two percent of unknown risk factor cases." Based upon the testimony in this specific case, we cannot say the evidence was legally or factually insufficient to support the deadly weapon finding. We resolve appellant's first and second issues against him.

In his third issue, appellant complains the trial court erred in permitting the prosecution to amend the indictment to add an enhancement offense and a deadly weapon allegation following appellant's rejection of plea offers by the State. Several months before appellant's trial, and after extensive plea negotiations, the State filed notice of intent to enhance the punishment range for the charged offense with a previous conviction and notice of intent to seek a deadly weapon finding in the case. The record contains no written objections to the notices, nor does it contain any motions to quash the indictment on those grounds. During the jury selection phase of trial, defense counsel orally objected to the enhancement offense as follows, outside the presence of the prospective jurors:

The other objection, Judge, is that . . . this document . . . came about when Mr. Campbell refused to accept plea bargains in the court, back time. He was offered twice in open court back time pleas. And I would submit that if the prosecutor was willing to give him a plea bargain of back time, then it's vindictive to enhance him to a 25-year minimum because he wouldn't accept the earlier light plea bargain, so to speak, or whatever word you want to use.

So I would say that it's a violation of due process against Mr. Campbell to use that.

The trial court overruled appellant's objection, noting that the State was "fully within its rights" to add the enhancement offense to the indictment.

Appellant now complains the trial court erred by permitting the State to increase his punishment range with the previous conviction and to impact adversely his parole eligibility with the allegation of use or exhibition of a deadly weapon. An appellant must object to any indictment error before trial or he waives the error. *Lockett v. State*, 874 S.W.2d 810, 816 (Tex. App.-Dallas 1994, pet. ref'd). Appellant did not complain about the addition of the enhancement offense until after he had announced ready for trial and jury selection was underway. By failing to object timely to this alleged defect in the indictment, appellant waived his right to complain of it on appeal. *See Neal v. State*, 150 S.W.3d 169, 176-77 (Tex. Crim. App. 2004). Furthermore, appellant waived his right to complain of the inclusion of the deadly weapon allegation by never objecting to its inclusion in the indictment. *See id*. at 175 (discussing applicability of rule of appellate procedure 33.1 to claims of prosecutorial vindictiveness). We resolve appellant's third issue against him.

Appellant complains in his fourth issue that the trial court erred by permitting Waller to give improper opinion testimony. Waller was questioned by the prosecution about whether, based on Waller's "understanding and . . . education," he could still contract HIV. Appellant's objection to the question was overruled. Then the prosecutor remarked, "You can answer based on your personal knowledge and your education that you have done yourself about HIV and AIDS. Is there still a period of time after you have done . . . the first test, that this HIV or AIDS could pop up in your system?" Waller testified,

Yes. It is my understanding that because the virus - I'm not a doctor by any means - but it takes a long time to build up in your system and it could happen - still could happen within the next couple or three years. So you are not totally out of the woods until you have had the continual testing, I guess you would say.

Appellant argues that this testimony should have been excluded because Waller was not a medical expert and therefore not qualified to give an expert opinion on the matter. We review the trial court's decision to admit evidence under an abuse of discretion standard and will not reverse that decision absent a clear abuse of discretion. *McCarty v. State*, 257 S.W.3d 238, 239 (Tex. Crim. App. 2008). Under rule of evidence 701, if a witness is not testifying as an expert, "the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." Tex. R. Evid. 701.

Waller made clear he was not testifying as an expert when he noted that he was "not a doctor by any means." He simply explained what he had learned about his chances of developing HIV or AIDS in the years following appellant's spitting in his face. This evidence illustrated the ongoing nature of the harm appellant had effected. To the extent the testimony was objectionable as hearsay, no such objection was made at trial. *See* Tex. R. App. P. 33.1(a). We conclude the trial court did not abuse its discretion in admitting the testimony. We resolve appellant's fourth issue against him.

In his fifth issue, appellant complains the evidence against him is factually insufficient to support his conviction. In a factual sufficiency review, we view all of the evidence in a neutral light to determine whether the jury's verdict of guilt was rationally justified. *See Roberts v. State*, 220 S.W.3d 521, 524 (Tex. Crim. App.), *cert. denied*, 128 S. Ct. 282 (2007). The evidence, though legally sufficient, is factually insufficient if it is so weak that the jury's verdict seems clearly wrong and manifestly unjust, or if, "considering conflicting evidence, the jury's verdict, though legally sufficient, is nevertheless against the great weight and preponderance of the evidence." *Berry v. State*, 233 S.W.3d 847, 854 (Tex. Crim. App. 2007). Unless the record clearly reveals a different result is appropriate, we must defer to the jury's determination concerning what weight to be given to contradictory testimony. *See Lancon v. State*, 253 S.W.3d 699, 705 (Tex. Crim. App. 2008).

Appellant specifically argues that he claimed he never spit into Waller's face intentionally and the State did not support Waller's testimony with testimony of the other officers who were present at the scene. Appellant also argues the State failed to present "scientific corroboration" that appellant's saliva contacted Waller's eyes or mouth. Waller's testimony showed appellant purposefully spat his saliva onto Waller's eyes and mouth as he struggled against Waller and declared that he had AIDS. Appellant, on the other hand, denied ever spitting on the officer and could not recall Waller using pepper spray during the exchange. Waller's testimony alone shows appellant committed the offense of harassing a public servant. *See* Tex. Penal Code Ann. § 22.11(a)(2) (Vernon Supp. 2008). Deferring to the jury's determination of witness credibility, we conclude the evidence was factually sufficient to support appellant's conviction. We resolve appellant's fifth issue against him.

We affirm the trial court's judgment.

JOSEPH B. MORRIS
JUSTICE

Do Not Publish
Tex. R. App. P. 47
080736F.U05

File Date[07/14/2009]
File Name[080736F]
File Locator[07/14/2009-080736F]