2005 S.W.3d (LWC-3409); Spielman v. State (Tex.App.);

EARL SEAN SPIELMAN, Appellant v. THE STATE OF TEXAS, Appellee

In The Court of Appeals For The First District of Texas

NO. 01-04-00692-CR

May 19, 2005

On Appeal from the County Criminal Court at Law No. 4 Harris County, Texas

Trial Court Cause No. 1215093

MEMORANDUM OPINION

The State charged appellant, Earl Sean Spielman, with committing the misdemeanor offense of unlawfully carrying a handgun by a license holder. *See* Tex. Pen. Code Ann. § 46.035(a) (Vernon 2003). A jury found him guilty of the offense, and the trial court assessed his punishment at one year of community supervision. In three points of error, appellant argues that (1) the evidence is legally and factually insufficient and (2) the trial court erred by admitting hearsay testimony. We affirm.

Background

On December 4, 2003, Alice Holt drove her two children, Chaunetta and Chad, to a local Social Security office. After parking in a reserved space in a parking garage, Holt left Chaunetta and Chad in the car while she went into the Social Security office. Chad was in the front seat, and Chaunetta was in the back seat, sleeping. Shortly thereafter, appellant arrived in his car to find his parking space occupied by Holt's car. Appellant approached the car and demanded that Chad move the car. Chad, who did not have a driver's license, woke up Chaunetta, who had been sleeping in the back seat. Chaunetta testified that, as she got out of the car, she told appellant that she would move it. Appellant returned to his car and got in briefly. He then got out of his car and moved toward Chaunetta, making threatening remarks. As appellant approached, Chaunetta noticed that he had his hand in his right pocket. She saw appellant pull out his handgun far enough from his pocket so that she knew it was a handgun. Chad testified that, because he was worried about Chaunetta's safety, he got out of the car and started to approach appellant. Chaunetta restrained him and told him that appellant had a handgun. Chad also testified that he saw the black handle of the handgun sticking out of appellant's pocket and saw appellant grab it and state, "You gonna assault me? Come on, come on. Move in closer." Chaunetta said that she too saw appellant grab the handgun again. The episode ended when a security officer arrived at the scene. Two other persons who witnessed the incident in the garage heard words being exchanged between appellant, Chaunetta, and Chad. These witnesses testified that appellant kept his hand in his right pocket and they did not see a gun. One witness also testified that she did not hear appellant mention having a gun.

Analysis

Legal Sufficiency

In his first point of error, appellant argues that the evidence is legally insufficient to support the verdict. Specifically, appellant argues that the evidence does not show that he intentionally failed to conceal the handgun. Rather, he contends that he inadvertently showed the handgun.

When reviewing legal sufficiency of the evidence to support a verdict, we view all of 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, 319, 99 S. Ct. 2781, 2789 (1979).

The jury found appellant guilty of unlawfully carrying a handgun by a license holder. *See* Tex. Pen. Code Ann. § 46.035(a). Section 46.035(a) provides,

> A license holder commits an offense if the license holder carries a handgun on or about the license holder's person under the authority of Subchapter H, Chapter 411, Government Code, and intentionally fails to conceal the handgun.

Id. A person acts intentionally, or with intent, with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result. Tex. Pen. Code Ann. § 6.03(a) (Vernon 2003).

The State had the burden to show that appellant intentionally failed to conceal his handgun. The evidence shows that Chaunetta saw appellant pull a handgun from his pocket. She could not see the entire handgun, but she saw enough of it to recognize that it was a handgun. She testified that she saw the handgun on two occasions. Chaunetta's brother, Chad, also testified he could see a handgun in appellant's right pocket. Chad testified that he saw appellant grab the handle of the handgun, which was black. Based on this evidence, we conclude that a rational trier of fact could conclude that appellant intentionally failed to conceal his handgun.

We overrule appellant's first point of error.

Factual Sufficiency

In his second point of error, appellant argues that the evidence is factually insufficient to support the verdict. Similarly to his argument under his first point of error, appellant argues that the evidence is factually insufficient to show that he intentionally failed to conceal his handgun. He points out that no eyewitnesses testified that he made any express mention of the handgun or that he produced and aimed the handgun at Chaunetta. Thus, he argues that his act of showing the handgun was inadvertent.

In a factual sufficiency review, we view all the evidence in a neutral light and set the verdict aside only if the evidence is so weak that the verdict is clearly wrong and manifestly unjust or the contrary evidence is so strong that the standard of proof beyond a reasonable doubt could not have been met. *Escamilla v. State*, 143 S.W.3d 814, 817-18 (Tex. Crim. App. 2004). In conducting a factual sufficiency review, we must discuss the evidence that appellant asserts is most important in allegedly undermining the jury's verdict. *See Sims v. State*, 99 S.W.3d 600, 603 (Tex. Crim. App. 2003). We must not substitute our judgment for that of the factfinder. *Zuniga v. State*, 144 S.W.3d 477, 481-82 (Tex. Crim. App. 2004). Unless the available record clearly reveals that a different result is appropriate, we must defer to the factfinder's determination concerning the weight given contradictory testimonial evidence because resolution often turns on an evaluation of credibility and demeanor. *Johnson v. State*, 23 S.W.3d 1, 8 (Tex. Crim. App. 2000).

An appellant's intent to commit an offense generally must be established by circumstantial evidence and may be inferred from appellant's acts, words, and conduct. *Hernandez v. State*, 819 S.W.2d 806, 810 (Tex. Crim. App. 1991). The evidence in this case shows that (1) Chaunetta and Chad testified that appellant removed his handgun far enough out of his pocket so that they could determine that it was a handgun; (2) appellant used a rough voice in speaking to Chaunetta and Chad; and (3) appellant yelled obscenities at Chaunetta and Chad. Specifically, Chaunetta testified that, when he approached her,

appellant stated, "You scum of the earth. Why are you even here. That's my parking space. I paid - - I paid money for that parking space. . . . Why don't you people go back to where you came from?" Chad also testified that, as appellant was holding the handgun in his pocket, appellant stated, "You gonna assault me? Come on, come on. Move in closer."

The evidence also shows that two witnesses testified that they did not see a gun. Chaunetta and Chad both testified, however, that they saw appellant partially pull out a gun from his right pocket. A jury has the sole province of deciding what weight to give contradictory testimony because its decision turns on the evaluation of demeanor and credibility. *Cain v. State*, 958 S.W.2d 404, 408-09 (Tex. Crim. App. 1997). A jury's verdict is not manifestly unjust when it resolves conflicting views in favor of the State. *Id.* at 410. It is clear by the verdict that the jury chose to give more weight to Chaunetta's and Chad's testimony.

Although appellant did not point the handgun at Chaunetta or specifically refer to the handgun, the jury could have reasonably believed that appellant's act of partially removing the handgun from his pocket, together with his conduct and words, demonstrated that he intentionally failed to conceal his handgun. Based on all the evidence presented, we conclude that the evidence is factually sufficient to support the verdict.

We overrule appellant's second point of error.

Hearsay

In his third point of error, appellant argues that the trial court admitted inadmissible hearsay testimony. Specifically, appellant argues that the trial court erred in admitting Officer Vo's testimony that repeated Chaunetta's statements that appellant had purposefully revealed his handgun to her. Appellant objects to the following testimony:

> She said he pulled out a gun and showed it to her. Showed it out from his front pocket, front right pocket. He didn't pull it out all the way, but he pulled it partially out where--where her brother and her can see his hand on his--his finger on the trigger.

Appellant objected to Officer Vo's testimony on hearsay grounds. On appeal, appellant argues that the State sought to admit this testimony under the excited utterance exception to the hearsay rule. *See* Tex. R. Evid. 803(2), 802. Appellant argues that this testimony was not an excited utterance because the record fails to show that Chaunetta was still excited at the time she spoke with Officer Vo.

In determining whether a trial court erred in admitting evidence, the standard for review is abuse of discretion. *Mozon v. State*, 991 S.W.2d 841, 846-47 (Tex. Crim. App. 1999). "A trial court abuses its discretion when its decision is so clearly wrong as to lie outside that zone within which reasonable persons might disagree." *Foster v. State*, 909 S.W.2d 86, 88 (Tex. App.--Houston [14th Dist.] 1995, pet. ref'd).

An excited utterance, which is a "statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition," is not excluded by the hearsay rule. Tex. R. Evid. 803(2). To qualify as an excited utterance, the following criteria must be met: (1) the statement must be the product of a startling event; (2) the declarant must be dominated by the emotion, excitement, fear or pain of the event; and (3) the statement must relate to the circumstances of the startling event. *See Jackson v. State*, 110 S.W.3d 626, 633 (Tex. App.--Houston [14th Dist.] 2003, pet. ref'd) (citing *McFarland v. State*, 845 S.W.2d 824, 846 (Tex. Crim. App. 1992)).

Appellant argues that the record fails to show that Chaunetta was still excited at the time she spoke with Officer Vo. Appellant asserts that, after the confrontation between appellant and Chaunetta occurred, the following events took place: (1) Officer Vo separated Chaunetta and appellant; (2) appellant moved his vehicle; (3) Chaunetta reparked her vehicle; (4) appellant parked his vehicle; and (5) appellant left the garage and went to his office.

The lapse of time between the event and declaration, and whether the statement is made in response to a question, are considerations in determining whether the statement is admissible as an excited utterance, but they are not dispositive. *Lawton v. State*, 913 S.W.2d 542, 553 (Tex. Crim. App. 1995). The critical factor is whether the emotions, excitement, fear, or pain of the event still dominated the declarant at the time of the statement. *Zuliani v. State*, 97 S.W.3d 589, 596 (Tex. Crim. App. 2003). If the statement is made while the declarant is still in the grip of emotion, excitement, fear, or pain and the statement relates to the exciting event, it is admissible even after an appreciable amount of time has elapsed. *Penry v. State*, 691 S.W.2d 636, 647 (Tex. Crim. App. 1985); *Jones v. State*, 772 S.W.2d 551, 555 (Tex. App.--Dallas 1988, pet. ref'd).

Here, the record does not reflect how much time passed after the confrontation between appellant and Chaunetta. However, Officer Vo testified that Chaunetta was very, very upset and had tears coming down her face. Moreover, on cross-examination, Chaunetta testified that she was emotional when she spoke to the security officer. We conclude that Officer Vo's testimony as to Chaunetta's statement after her confrontation with appellant satisfied the excited utterance exception to the hearsay rule. *See* Tex. R. Evid. 803(2). The trial court did not abuse its discretion in admitting Officer Vo's testimony.

We overrule appellant's third point of error.

Conclusion

We affirm the judgment of the trial court.

Evelyn V. Keyes Justice

Panel consists of Justices Nuchia, Keyes, and Bland.
