No. 11-24-80085-CR

IN THE TEXAS COURT OF APPEALS
TWENTY-FIRST DISTRICT
AT MIDESSA, TEXAS

BANDIT HEELER, Appellant

v.

STATE OF TEXAS, Appellee

On Appeal in Cause No. 2828
981st Judicial District
Lanark County, Texas
Honorable Calypso Shepherd, Judge Presiding

OPINION

Delivered and Filed: December 25, 2024

OPINION

After a jury trial, Bandit Heeler was convicted of Aggravated Assault with a Deadly Weapon and Possession of a Prohibited Weapon. Heeler appeals his conviction, arguing: (1) the trial court erred by admitting the evidence from the doorbell camera; (2) the trial court erred by denying his motion to suppress the search warrant; (3) the trial court erred by allowing Winton Bulldog to testify; and (4) the evidence is legally insufficient to support his convictions. We affirm Heeler's convictions and affirm the judgment of the trial court.

BACKGROUND

a. Factual History

On October 1, 2023, Rusty Kelpie was playing cricket in his front yard with his friend, Jack Terrier. Rusty's house is located at 391 Gregory Terrace, two houses away from the intersection of Gregory Terrace and Park Street, at which there is a four-way stop sign. At 5:35 p.m., an orange SUV drives by and three shots are fired out the passenger window at the pair. Rusty is hit in the left thigh by one of the three shots. The orange SUV then drives away and turns north onto Park Street at the stop sign.

Jack calls 911 and after giving his description of the events, an APB[1] is immediately put out regarding an orange SUV. Three blocks north of Rusty's house a couple is spotted by police getting out of an orange SUV, which is parked on the street in front of a residence at 51 Burnett Lane, and proceeding towards the residence. The police immediately detained the two individuals, later identified as married couple Bandit and Chili Heeler, and placed them in the back seats of two different patrol cars. It is also later determined that the SUV is registered to Chili Heeler and the residence is titled under Bandit Heeler's name. The couple was taken downtown to the police station for questioning at 8:06 p.m.

During their interrogation, the police decided to collect gunshot residue (GSR) swabs from both of the suspects as potential evidence of their involvement in the shooting of Rusty Kelpie. Both Bandit and Chili consented to the taking of these swabs, and the swabs were later sent off for testing at the local Department of Public Safety laboratory. The suspects were both released due to lack of probable cause to arrest either one of them at that time.

Officer Pat Retriever drafted a search warrant on October 2, 2023, looking for the firearm alleged to have been used in this shooting. An excerpt from the search warrant is included below:

> The undersigned Affiant, being a Peace Officer under the laws of Texas and being duly sworn, on oath makes the following statements and accusations:

[1] All-points Bulletin

1. There is in Lanark County, Texas, a suspected place, premises, and curtilage described as follows:

   A house located at 51 Burnett Lane, Midessa, Texas 77777, Lanark County. This house is a single-story home, facing west, comprised of red brick, brown and gray composition shingles, a tan garage door, and the numbers "51" engraved into the brick on the south side of the porch.

   The premises, in addition to the foregoing description, also includes all other buildings, structures, places, and vehicles on the premises and within the curtilage, if this premises is a residence, which are found to be under the control of the suspected party named herein, and in, on, or around which the suspected party may reasonably reposit or secrete property which is the object of the search requested herein.

2. There is at said suspected place and premises personal property concealed and kept in violation of the laws of Texas and described as follows:

   Evidence relating to the offense of Aggravated Assault with a Deadly Weapon including, but not limited to, forensic evidence including blood, saliva, DNA, firearms, ammunition, cell phones and other electronic devices, writings or paperwork concerning firearms, and clothing.

3. Said suspected place and premises are in charge of and controlled by each of the following persons:

   Bandit Heeler, DOB 12/28/1989

The search warrant is signed by District Court Judge Calypso Shepherd on October 2, 2023, at 12:06 p.m. The search warrant is executed on October 3, 2023, at 8:35 a.m. Upon execution of the search warrant, a firearm is located in the trunk

of the orange SUV, which is still parked on the street in front of the residence, and is described in the search warrant return as follows:

> AR-style firearm, black in color, with a barrel length of approximately 20 inches, including a suppressor of 6 inches in length, caliber of 5.56 mm.

The GSR swabs were tested by Mackenzie Collie and a lab report was issued on October 15, 2023, stating that particles of lead, antimony, and barium, the elements typically found in GSR, were located on the hands and forearms of Bandit Heeler and on the chest and face of Chili Heeler, but not on the hands of Chili Heeler. Due to the location of the firearm in the vehicle from which Bandit Heeler had just exited at the time he was detained by police and the presence of GSR on his hands but not the hands of Chili Heeler, the police decided to arrest Bandit Heeler.

b. Procedural History

The State indicted Bandit Heeler for the second-degree felony offense of Aggravated Assault with a Deadly Weapon and the third-degree felony offense of Possession of a Prohibited Weapon on November 1, 2023.

Bandit Heeler filed a pretrial motion to suppress the search warrant. Heeler argued that the search of the SUV was outside the scope of the warrant for two reasons: a) because it was parked on the public street in front of the residence and therefore not on the premises, and b) because it was registered to Chili and was therefore not under the control of Bandit, who was the sole subject of the search warrant. The State argued that the vehicle was still considered to be "on the

premises" if it was specifically parked on the street right in front of Bandit's residence, and that it was still under his control because a) he's married to the registered owner, and b) he was seen in possession of the vehicle in the moments immediately prior to his detention by police. The trial court denied the motion to suppress.

The case was set for trial on October 1, 2024. On September 20, 2024, the prosecution informed Bandit Heeler's counsel that it had just received from Officer Pat Retriever footage from Rusty Kelpie's doorbell camera that showed the shooting take place. That same day the prosecutor promptly turned over to defense counsel the video footage for review prior to trial commencing.

The jury trial proceeded as scheduled on October 1. At trial, Mackenzie Collie was unavailable to testify so his supervisor, Winton Bulldog, was called by the State to testify about the testing of the GSR swabs and the laboratory report's issued findings. Bandit Heeler objected to the relevance of Mr. Bulldog's testimony as he was not the person who performed the testing or issued the report. The State argued that as Mr. Collie's supervisor, Mr. Bulldog was imbued with the same knowledge of the testing protocols and performance of the scientific testing in this case. The trial court overruled Heeler's objection and allowed Mr. Bulldog to testify as an expert witness.

Winton Bulldog testified that particles of lead, antimony, and barium were located on the hands of Bandit Heeler. He further testified that he cannot conclusively say that gunshot residue was found on the hands of Bandit Heeler, but that lead, antimony, and barium are only found in combination in circumstances where an explosion or ignition takes place, such as the firing of a bullet from a gun. Therefore, the presence of all three elements could reasonably be found after the discharge of a bullet but could also be present if Bandit Heeler had been participating in other activities typically associated with the presence of all three elements, such as welding or detonating explosives.

At trial, the State offered into evidence the doorbell camera footage that had been turned over to Bandit Heeler's counsel on September 20. Heeler objected to the admission of this evidence as it had been improperly withheld in violation of Texas Code of Criminal Procedure Article 39.14. The trial court overruled Heeler's objection and allowed the State to admit and publish the video to the jury.

After three days of testimony, the jury deliberated for one hour and found Bandit Heeler guilty of both Aggravated Assault with a Deadly Weapon and Possession of a Prohibited Weapon.

DISCUSSION

Heeler raises four issues on appeal challenging his convictions. None have merit.

I. The trial court did not err in allowing the admission of the doorbell camera video.

Article 39.14(a) of the Texas Code of Criminal Procedure mandates that the State turn over "as soon as practicable" any discoverable items. Here, the prosecution represented to the trial court that it received the doorbell camera video footage from Officer Pat Retriever on September 20, 2024, and turned it over to Bandit Heeler's counsel later that same day.

Heeler objected at trial to the admission of this evidence as a violation of the Michael Morton Act codified in the Texas Code of Criminal Procedure. The prosecutor argued that because there had been no showing of bad faith by the State, the appropriate remedy for the delayed disclosure would have been to grant a continuance to give the defense more time to review the evidence rather than to exclude the evidence. However, the defense did not make such a request at the time of the disclosure of this evidence on September 20. The State argued that the defense therefore waived its right to object to the admission of the evidence at trial.

The trial court had the authority to exclude any evidence not timely disclosed by the State, but we do not believe that to be the case here. Because the State provided the evidence as soon as reasonably possible after receipt of the evidence from law enforcement, the State complied with its legal obligations under Article 39.14. Therefore, the trial court did not err in overruling Heeler's objection and allowing the admission of this video footage during trial.

II. The trial court did not err in denying Heeler's motion to suppress the search warrant.

Heeler filed a motion to suppress the search warrant arguing that the search of the SUV was outside the scope of the warrant because it was not included within the description in the warrant of the place to be searched. The subject description reads as follows:

> The premises, in addition to the foregoing description, also includes all other buildings, structures, places, and vehicles on the premises and within the curtilage, if this premises is a residence, which are found to be under the control of the suspected party named herein, and in, on, or around which the suspected party may reasonably reposit or secrete property which is the object of the search requested herein.

Heeler argues that the vehicle was not "on the premises and within the curtilage" because it was parked on the public street. Heeler also argues that it was not "under the control of the suspected party named herein" because the warrant was issued under his name and the SUV was registered under his wife's. However, Heeler ignores the second part of the above paragraph regarding a vehicle that is "in, on, or around which the suspected party may reasonably reposit or secrete property which is the object of the search requested herein." Under that clause, evidence of the Aggravated Assault is reasonably likely to be found in the vehicle that Heeler was seen exiting immediately after the incident. The vehicle was properly within the scope of the warrant, and the trial court properly denied Heeler's motion to suppress.

III. The trial court did not err in allowing the testimony of Winton Bulldog as an expert witness.

Heeler's argument regarding Bulldog at trial was that his testimony was not relevant since he was not the testing expert. Texas Rule of Evidence 401 states that evidence is relevant if: "(a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." TEX. RULES OF EVID. 401. The trial court ruled that when indicted for an Aggravated Assault with a Deadly Weapon, it is relevant to hear from a laboratory expert regarding the potential presence of GSR on the suspect's hands and allowed such testimony at trial.

However, on appeal to this Court, Heeler now argues that it is a violation of the Confrontation Clause to allow Bulldog to testify to Collie's out-of-court statement, being the lab report. We find that Heeler waived his right to object to a violation of the Confrontation Clause by not raising the issue at the trial-court level and is thus not properly before this Court for its consideration. Since Heeler did not raise the issue on appeal of the relevance of Bulldog's testimony, we overrule this issue and affirm the trial court's decision.

IV. The evidence is legally sufficient to uphold both of Heeler's convictions.

In assessing the sufficiency of the evidence to support a criminal conviction, we consider all the evidence in the light most favorable to the verdict and determine whether, based on that evidence and reasonable inferences to be drawn therefrom, a

rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Brooks v. State*, 323 S.W.3d 893, 912 (Tex. Crim. App. 2010). This standard gives full play to the responsibility of the trier of fact to resolve conflicts in testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007).

We may not substitute our judgment for that of the factfinder by reevaluating the weight and credibility of the evidence. *Isassi v. State*, 330 S.W.3d 633, 638 (Tex. Crim. App. 2010). Rather, we defer to the responsibility of the factfinder to fairly resolve conflicts in testimony, weigh the evidence, and draw reasonable inferences from basic facts to ultimate facts. *Id*. This standard applies equally to both circumstantial and direct evidence. *Id*. Each fact need not point directly and independently to the appellant's guilt, as long as the cumulative effect of all incriminating facts is sufficient to support the conviction. *Hooper*, 214 S.W.3d at 13.

The elements of Aggravated Assault with a Deadly Weapon under the Texas Penal Code as alleged in this Indictment are that Bandit Heeler 1) intentionally, knowingly, or recklessly 2) caused bodily injury to Rusty Kelpie 3) while using or exhibiting a deadly weapon. TEX. PENAL CODE §22.02(a). A firearm is included within the definition of a deadly weapon. TEX. PENAL CODE §1.07(a)(17).

The elements of Possession of a Prohibited Weapon under as alleged in this Indictment are that Bandit Heeler 1) intentionally or knowingly 2) possessed a short-barrel firearm 3) and the firearm is not registered in the National Firearms Registration and Transfer Record maintained by the Bureau of Alcohol, Tobacco, Firearms and Explosives or otherwise not subject to that registration requirement and is not classified as a curio or relic by the United States Department of Justice. TEX. PENAL CODE §46.05(a)(1)(C). A "short-barrel firearm" includes a rifle with a barrel length of less than 16 inches. TEX. PENAL CODE §46.01(10).

Heeler argues that because the trial court should not have allowed the doorbell camera footage, because the trial court should not have allowed the testimony of Winton Bulldog, and because the trial court should have suppressed the search warrant that led to the discovery of the firearm, there was insufficient evidence to support his convictions. However, Heeler does not get to choose the world in which he lives. The truth of the matter is that the jury did get to consider the doorbell camera footage, the firearm, and the expert testimony in its deliberations. We therefore cannot summarily remove those items from the equation and rewrite the record of what took place in the 981st District Court.

Based on the evidence reflected in the record, we find that a rational trier of fact could have found the above-listed elements of these crimes beyond a reasonable doubt. Therefore, we overrule Heeler's fourth point of error.

CONCLUSION

We overrule all four issues. The judgment of the trial court is affirmed.

CONCURRENCE

With respect to the second issue on appeal regarding Heeler's motion to suppress the search warrant and the evidence found therefrom, I am not persuaded that the vehicle was included within the defined area in the search warrant. Based on our prior holding in *Hughes v. State*, the vehicle in question was firmly outside the curtilage of Bandit Heeler's residence by virtue of its presence on the curb of a public roadway. *Hughes v. State*, 843 S.W.2d 591 (Tex. Crim. App. 1992).

However, under the good faith exception codified in Texas Code of Criminal Procedure Article 38.23(b), evidence that is otherwise inadmissible may still be admitted if the evidence was obtained by a police officer acting in objective good faith reliance on a warrant issued by a neutral magistrate based on probable cause. If we were to find that the vehicle was in fact outside the scope of the search warrant contrary to the trial court's ruling, I believe that the evidence would have still been admissible under Officer Retriever's good faith execution of the same. Thus, although I do not agree with the road we travelled on, I do still agree with the destination we reached.

DISSENT

I disagree that the Confrontation Clause issue cannot be raised for the first time on appeal. A defendant's Sixth Amendment right to confront his accuser is one of the most fundamental constitutional rights that a citizen can hold. It is of utmost importance that our Court enforce this right and undergo an analysis of the testimony of Winton Bulldog as it pertains to the Confrontation Clause.

There is an entire line of case law from the Supreme Court of the United States regarding the admission of a lab report without the testimony of testing expert. The Confrontation Clause implicates testimonial statements that are offered for the truth of the matter asserted. There is no question that Mackenzie Collie's lab report was testimonial in nature and offered for the truth of the matter asserted, despite the State's arguments that it was offered for the context of explaining the basis of Winton Bulldog's testimony.

It is ludicrous for my brethren to hold that because Bandit Heeler's trial counsel was not sharp enough to object to hearsay instead of relevance at the trial-court level that we should therefore allow Heeler's constitutional rights to be not only violated but ridiculed. It was absolutely a violation of the Confrontation Clause to admit Winton Bulldog's testimony, and I am disappointed in any lawyer in this great state that disagrees.

DISSENT

I cannot agree that a rational factfinder could find Heeler guilty of the Aggravated Assault with a Deadly Weapon. I understand and believe that we cannot substitute our judgment for that of the jury in the case. However, it is our duty to determine whether, based on that evidence and reasonable inferences to be drawn therefrom, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Brooks v. State*, 323 S.W.3d 893, 912 (Tex. Crim. App. 2010). And I, for one, do not believe it is possible for the evidence presented at trial to prove either offense beyond a reasonable doubt.

The elements of Aggravated Assault with a Deadly Weapon under the Texas Penal Code as alleged in this Indictment are that Bandit Heeler 1) intentionally, knowingly, or recklessly 2) caused bodily injury to Rusty Kelpie 3) while using or exhibiting a deadly weapon. TEX. PENAL CODE §22.02(a). I do not contend that the firearm in this case properly meets the definition of deadly weapon.

I do want to take a step back and look at what evidence the State presented against Heeler regarding this offense.

1) The doorbell camera and the witnesses on scene saw the gunshots coming from an orange SUV. Debatably orange is a unique color for a vehicle, but

Midessa is a suburb of Austin where one might argue that orange is a popular color and not as rare as it might be in other areas of the state.

2) Mr. and Mrs. Heeler were both getting out of an orange SUV at a residence in close proximity to Mr. Kelpie's residence soon after the shooting. There is no proof that it is the same SUV, no comparison of license plates, just wild conjecture that it must be the same because of the proximity of their residences.

3) A firearm was located in the Heeler's SUV. There was no comparison conducted between the firearm and the bullet that injured Mr. Kelpie, and thus no proof was presented that this firearm was the one used in the shooting. Additionally, no fingerprints were taken to show that either of the Heelers had touched the gun—just because it was located in Mrs. Heeler's vehicle does not mean that someone else with access to the vehicle and firearm could not have been the shooter.

4) GSR testing was conducted on both Heelers, seeming to indicate that Mr. Heeler was in the driver's seat and fired the gun across Mrs. Heeler in the passenger seat due to the presence of GSR on his hand and her chest. However, even the laboratory supervisor that testified admitted that presence of GSR cannot be conclusively proved, but instead that the three elements that comprise GSR are all present and the inference is that it is from either

> discharging a weapon or some other combustible activity, like welding. No evidence was presented that would exclude any other reason for the presence of those elements, so I do not consider the presence of GSR to be proven.

The circumstantial evidence presented in this case cannot possibly rise to the level of allowing a rational factfinder to believe that Bandit Heeler is guilty of Aggravated Assault with a Deadly Weapon beyond a reasonable doubt. I wholeheartedly dissent and urge my fellow Justices to reconsider Heeler's fourth point of error and reverse his conviction.

The Texas Court of Criminal Appeals

No. PD-25-0001

BANDIT HEELER, Appellant

v.

STATE OF TEXAS, Appellee

From the Twenty-First Court of Appeals, No. 11-24-80085-CR
On Appeal from the 981st District Court, Lanark County, Texas
Trial Court No. 2828
Honorable Calypso Shepherd, Judge Presiding

ORDER

Bandit Heeler's petition for discretionary review is granted. We order the briefing is limited to the following issues, as the parties may fairly reframe them:

1. Did the trial court err in allowing the admission of the doorbell camera video footage?

2. Did the trial court err in denying Heeler's motion to suppress the search warrant?

3. Did the trial court err in allowing Winton Bulldog to testify as an expert witness?

4. Was the evidence legally sufficient to support Heeler's convictions for Aggravated Assault with a Deadly Weapon and Possession of a Prohibited Weapon?

IT IS SO ORDERED