Affirmed and Opinion filed July 12, 2001.

In The

Fourteenth Court of Appeals

NO. 14-00-00110-CR

DANNY LEE MOORE, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 248th District Court
Harris County, Texas
Trial Court Cause No. 817,042

O P I N I O N

Appellant was found guilty by a jury of the offense of theft of a firearm, a state-jail felony. *See* TEX. PEN. CODE ANN. § 31.03 (Vernon Supp. 2001). The court found two enhancement paragraphs to be true and assessed punishment at eleven years in prison. We affirm.

In two related issues, appellant complains the evidence is legally and factually insufficient to support the verdict. Specifically, appellant maintains that because the stolen pistol was inoperable, the evidence is insufficient to show that it was a firearm at the time of the offense.

When we review the legal sufficiency of the evidence, we view 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 v. Virginia*, 443 U.S. 307, 319 (1979). When we review the factual sufficiency of the evidence, we view all of the evidence in a neutral light, rather than in the light most favorable to the prosecution, and set aside the verdict only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *See Johnson v. State*, 23 S.W.3d 1, 6-7 (Tex. Crim. App. 2000).

A firearm is any device designed, made, or adapted to expel a projectile through a barrel by using the energy generated by an explosion or burning substance or any device readily convertible to that use. TEX. PEN. CODE ANN. § 46.01(2) (Vernon Supp. 2001).

The complainant, Horace Lee Williams, testified that on the day in question, he had a pistol in his waistband. The complainant said that appellant came to his porch to talk and that during the conversation, appellant unexpectedly struck him about five or six times. Sometime during this incident, the complainant realized that appellant had taken his pistol. He testified as follows:

> I didn't realize it at the time because I was sitting there, you know, for a second I was thinking, he got to be crazy. All I have to do is hill up [sic] and shoot him. So I felt right here and I didn't feel nothing. And then I kind of looked out the corner of my eye at him and he was still standing there and he had his hands up like this, but I couldn't see what he had in it, and I heard something like a little click sound. I said, oh. He trying to get the safety off. I dived.

For his part, appellant told police that he and the complainant were involved in a disagreement because the complainant had paid appellant $20 to assault a man against whom the complainant had a grievance. Appellant testified that rather than assault the man, he convinced the man to apologize to the complainant. Appellant said that the complainant was angry because appellant had taken the money but had not assaulted the man. Appellant told police that when he went to talk to the complainant, he knew that the

complainant possessed a gun. He said he saw the complainant go to the trunk of his car and take out a pistol. At that point, appellant said, he struck the complainant and the pistol hit the ground. The appellant then struck the complainant again, picked up the pistol, and left. Appellant later sold the pistol to a third party.

Houston police officer J.D. Shelton testified that he recovered the pistol, a .380 caliber Bryco, along with live .380 caliber rounds. The officer testified that when he recovered the pistol, it was inoperative. The officer said, "There was a spring and a firing pin, I think, was loose." He testified that the pistol would not shoot in the condition in which the officer recovered it. The complainant identified the recovered pistol as his.

Here, the relevant evidence in connection with whether the pistol was operational is uncontroverted. We have found no case construing the term "firearm" in connection with the offense of theft of a firearm. Several cases have construed the term "deadly weapon," which subsumes the term "firearm."[1] A pistol, even though inoperable, can constitute a deadly weapon. *See Wright v. State*, 582 S.W.2d 845, 847 (Tex. Crim. App. 1979) (holding that no proof needed to show that "firearm" operative to prove aggravated assault); *Walker v. State*, 543 S.W.2d 634, 636-37 (Tex. Crim. App. 1976) (holding that automatic pistol, even though missing firing pin and clip, manifestly designed and made for purpose of inflicting death or serious bodily injury, and constituted "deadly weapon" for aggravated robbery purposes); *Aikens v. State*, 790 S.W.2d 66, 67-68 (Tex. App.—Houston [14th Dist.] 1990, no pet.) (holding that handgun used by aggravated robbery defendant was deadly weapon even though it was not in working order and State failed to prove that weapon was capable of causing death, or could be readily adapted to

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[1] "Deadly weapon" means:

(A) a firearm or anything manifestly designed, made, or adapted for the purpose of inflicting death or serious bodily injury; or

(B) anything that in the manner of its use or intended use is capable of causing death or serious bodily injury.

TEX. PEN. CODE ANN. § 1.07 (a)(17) (Vernon 1994)

cause serious bodily injury or death; firearm need not be serviceable to be classified as deadly weapon).

Here the plain words of the statute do not require the pistol be operable to constitute a firearm. The pistol need only be "designed" or "made" to function as a pistol. Here, the evidence shows that the handgun, although its spring and firing pin were loose, was a Bryco .380 caliber handgun. The handgun, even if inoperable, had been designed or made to function as a pistol. Appellant in his statement told police that after he struck the complainant, he carried off the pistol, which he later sold to a third party. The complainant identified the recovered pistol as his.

Here, the evidence is legally and factually sufficient to show that the item appellant took was a firearm, within the meaning of section 46.01 of the Penal Code. We overrule appellant's points of error and affirm the judgment of the trial court.

PER CURIAM

Judgment rendered and Opinion filed July 12, 2001.
Panel consists of Justices Yates, Fowler, and Wittig.
Do Not Publish — TEX. R. APP. P. 47.3(b).