Affirmed and Opinion filed July 19, 2001.

In The

Fourteenth Court of Appeals

NO. 14-00-00411-CR

HENRY LAWRENCE WILLIAMS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 337th District Court
Harris County, Texas
Trial Court Cause No. 815,336

O P I N I O N

Upon a plea of not guilty, a jury found appellant, Henry Lawrence Williams, guilty of the felony offense of escape. The trial court assessed punishment at seven years confinement in the Institutional Division of the Texas Department of Criminal Justice. In three points of error, appellant contends that the evidence was legally insufficient to prove he was under arrest at the time of his escape, the evidence was legally insufficient to cure a variance in the indictment, and that the trial court erred in failing to strike surplus language in the indictment regarding the underlying felony. We affirm.

FACTUAL BACKGROUND

On June 9, 1999, Officers Kevin Morgan and William H. Cowles, Jr., of the Houston Police Department , went to an apartment complex in southwest Houston to arrest appellant for the offense of robbery. The officers were acting pursuant to an arrest warrant. The officers knocked on appellant's apartment door. When appellant answered the door, the officers identified themselves as police officers. Officer Morgan asked if "Henry Williams" was in the apartment, and appellant said, "No." Officer Morgan, however, recognized appellant because he matched the description of the individual they were to arrest. Officer Morgan told appellant he was under arrest for committing the offense of robbery in Bexar County, Texas, and handcuffed appellant.

Appellant and his girlfriend Virginia Sandy were uncooperative with the officers. Appellant told police he could not be arrested for the offense, told police they had no reason to arrest him, and that there were no warrants issued for his arrest. Officer Morgan repeatedly told appellant that, in fact, a warrant was issued for his arrest. Appellant, at the time he was handcuffed, was only wearing a pair of shorts. The officers were willing to allow him to put on more clothing, however, due to both appellant's and Sandy's uncooperative behavior, officers removed appellant form the apartment.

The officers escorted appellant from the apartment, walked to the front of the apartment complex, and waited for a marked patrol car to take appellant to the police station. At this time, appellant became more insubordinate to the officers. When Officer Cowles went to move the undercover patrol car, Officer Morgan had appellant sit down on a planter box near the apartment complex front office. When appellant was seated on the planter, he continued to be uncooperative and continued to insist that Officer Morgan inform him of his rights. By that time, Officer Cowles pulled the unmarked patrol car to the front of the apartment complex, and the officers looked for a card from which to read appellant his rights. Appellant was seated about three to four feet away from officer Morgan. As Morgan glanced away, appellant jumped up, while still handcuffed, and ran back toward his apartment.

Morgan pursued appellant as he ran back through the apartment complex, ran along a fence line until he reached a gap between two apartment buildings, and eventually made his way back to his apartment. Officer Morgan was concerned that appellant was attempting to retrieve a weapon. Morgan drew his weapon after he entered the apartment, and yelled for appellant to come out. Appellant eventually walked out into the living room, and Officer Morgan had to force appellant to the floor because he refused to do so willingly. Appellant continued to be combative, ultimately requiring the efforts of both Morgan and Cowles to physically subdue him. Officer Michael T. Jackson finally arrived, and he assisted Morgan and Cowles in escorting appellant out of his apartment and into a waiting patrol car. Appellant was then transported to the police station and taken before a magistrate.

I.

Sufficiency of the Evidence

In his first two points of error appellant argues that the evidence at trial was legally insufficient to support his conviction. We disagree.

When reviewing the legal sufficiency of the evidence, we must view the evidence in the light most favorable to the prosecution and determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia,* 433 U.S. 307, 319 (1979); *Garrett v. State,* 851 S.W.2d 853, 857 (Tex. Crim. App. 1993). On appeal, we do not reevaluate the weight and credibility of the evidence, but rather, we consider only whether the jury reached a rational decision. *Muniz v. State*, 851 S.W.2d 238, 246 (Tex. Crim. App. 1993).

II.

Legally Insufficient Evidence of Arrest

In his first point of error, appellant contends that because the officers never successfully restricted his movement and since he never submitted to their authority, the State

failed to prove a completed arrest as contemplated by the escape statute.[1] Therefore, at most, appellant resisted transportation or arrest and the conviction should be reversed and a judgment of acquittal ordered.

For purposes of the escape statute, an "arrest" is complete when a person's liberty of movement is successfully restricted or restrained, whether this is achieved by an officer's physical force or the suspect's submission to the officer's authority. *Medford v. State,* 13 s.W.3d 769, 773 (Tex. Crim. App. 2000). Furthermore, an arrest is complete only if "a reasonable person in the suspect's position would have understood the situation to constitute a restraint on freedom of movement of the degree which the law associates with formal arrest." *Id.; United States v. Corral-Franco,* 848 F.2d 536, 540 (5th Cir. 1988). The court in *Medford* concluded that, it is necessary to focus the fact finder's application of the reasonable person standard into the context of an arrest to prevent a conviction based upon some less intrusive type of seizure, like a *Terry* stop, also known as an investigative detention. 13 S.W.3d at 773; *see also,* e.g., *LaFave, Israel, & King,* Criminal Procedure 2nd ed., § 3.5(a) ("Because making the issue turn upon either the subjective intent of the police officer or the subjective perception of the suspect would mean that the matter would 'be decided by a swearing contest,' courts are now inclined to use an objective test.").

In the instant case, appellant was placed in handcuffs while awaiting transport in a police vehicle to the police station. The officers had not observed appellant engage in conduct that aroused their suspicion. The officers were executing an arrest warrant. The officers did not require any information from appellant other than his name. Thus, this case is unlike other cases holding that placing a suspect in handcuffs did not constitute an arrest where the officers

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[1] Section 38.06 of the Texas Penal Code states:

> (a) A person commits an offense if he escapes from custody when he is:
> (1) under arrest for, charged with, or convicted of an offense; or
> (2) in custody pursuant to a lawful order of a court.

TEX. PEN. CODE ANN. § 38.06 (Vernon Supp. 2000).

needed to restrain the individual while more information was obtained to either justify an arrest or permit the detainee to leave.[2]

Therefore, we hold that appellant was under arrest at the time Officer Morgan placed him in handcuffs and sat him down to await an appropriate police vehicle to transport appellant to the station. Viewed for the perspective of a reasonable person, such a person would have perceived the situation to constitute restraint on freedom of movement consistent with a formal arrest. *Corral-Franco*, 848 F.2d at 540. Point of error one is overruled.

III.

Variance in the Indictment

In his second point of error, appellant asserts that the evidence is legally insufficient to prove the officer's name as alleged in the indictment. Specifically, appellant's indictment alleged he unlawfully, intentionally, and knowingly escaped from the custody of "K. Morgan." The evidence presented at trial, however, established only that appellant was taken into custody by Kevin Morgan. Therefore, appellant complains that in the absence of any proof that "K." and "Kevin" are the same person, the evidence is insufficient to prove this element of the offense.

Our law provides that "[i]n alleging the name of the defendant, or of any other person necessary to be stated in the indictment, it shall be sufficient to state one or more of the initials of the Christian name and the surname . . . " TEX. CODE CRIM. PROC. ANN. Art. 21.07 (Vernon Supp. 2000). In the instant case, Officer Morgan testified and stated his name at the time he first took the stand as "Kevin Morgan." The indictment alleges that appellant escaped from the custody of "K. Morgan." The initial "K." is the first initial of the Officer Morgan's Christian name, Kevin. We hold that the variance between "Kevin Morgan" and "K. Morgan" is not material and that the alleged variance was not prejudicial or misleading to appellant. *See*

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[2] *See Nargi v. State*, 895 S.W.2d 820, 821 (Tex. App.—Houston [14th Dist.] 1995, pet. dism'd) (holding where officer grabbed and cuffed appellant after noticing erratic driving and appellant's attempt to enter a nightclub, the handcuffing of appellant to gain control during an investigatory stop did not elevate the detention to an arrest).

TEX. CODE CRIM. PROC. ANN. Art. 21.07 (Vernon Supp. 2000); *Martin v. State*, 541 S.W.2d 605, 606 (Tex. Crim. App. 1976); *Mayfield v. State*, 649 S.W.2d 361, 362-63 (Tex. App.—Fort Worth 1983, pet. ref'd). Appellant's second point of error is without merit and is overruled.

IV.

Surplus Language in the Indictment

In his third point of error, appellant contends that the trial court erred by denying appellant's motion to strike as surplusage the words "for the offense of robbery" from the indictment. Further, appellant claims the trial court erred by failing to prohibit the State from introducing evidence of the underlying felony, which was the purpose of appellant's arrest at the time he escaped. Since the trial court admitted such evidence, appellant argues that the probative value of the evidence was substantially outweighed by its prejudicial effect.

Significantly, appellant was charged under the escape statute. TEX. PEN. CODE ANN. § 38.06(a) (Vernon Supp. 2000). Normally, escape is a class A misdemeanor. TEX. PEN. CODE ANN. § 38.06(b) (Vernon Supp. 2000). Under certain circumstances, however, an escape is elevated to a third degree felony. TEX. PEN. CODE ANN. § 38.06(c) (Vernon Supp. 2000).[3] Clearly, in order to obtain a conviction for a third degree felony, the State was required to affirmatively prove the circumstances that raised the offense from a misdemeanor to a felony. *Ex Parte Walling*, 605 S.W.2d 621, 622 (Tex. Crim. App. 1980). More importantly, inclusion of the underlying offense in the indictment is mandatory to enable the district court, with only felony jurisdiction, to hear the case. *Id.* We overrule appellant third point of error.

Accordingly, the judgment of the trial court is affirmed.

/s/ John S. Anderson

[3] For example, an escape becomes a felony in the third degree if the actor is under arrest for, charged with, or convicted of a felony. TEX. PEN. CODE ANN. § 38.06(c) (Vernon Supp. 2000).

Justice

Judgment rendered and Opinion filed July 19, 2001.

Panel consists of Justices Anderson, Hudson, and Seymore.

Do Not Publish — TEX. R. APP. P. 47.3(b).