

Affirmed and Opinion filed September 23, 1999.



In The

Fourteenth Court of Appeals

NO. 14-92-01293-CR

URFAN S. MALIK, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the County Criminal Court at Law No. 7
Harris County, Texas
Trial Court Cause No. 92-31490**

OPINION ON REMAND

This cause is before us on remand from the Court of Court of Criminal Appeals with a mandate to review the sufficiency of the evidence to support appellant's condition based on a "hypothetically correct" jury charge. Appellant, Urfan S. Malik, was convicted by a jury of the misdemeanor offense of unlawfully carrying a handgun. *See* TEX. PEN. CODE ANN. § 46.02 (Vernon Supp. 1999). The trial court assessed punishment at 90 days in the Harris County Jail, probated for one year, and a \$300 fine. We will affirm.

Factual Background

The facts in this case are undisputed. On the night of June 29, 1992, Deputy Ybarbo of the Harris County Sheriff's Department was making his usual patrol of a subdivision known to him as an area of frequent criminal activity. During his patrol, he observed a car back up in an intersection and go the opposite direction from which it had come. Perceiving this maneuver to be suspicious for the time of night and the neighborhood, Deputy Ybarbo turned his vehicle around to follow. Four or five blocks later the deputy activated his lights to pull the vehicle over to investigate. He asked the vehicle's driver, appellant, if he was lost, and appellant answered that he was not. At this point, Deputy Ybarbo saw the passenger in the car attempting to hide something, and he asked the passenger to step out of the car. Deputy Ybarbo then saw that the passenger had been sitting on a screwdriver. He took the screwdriver, and looked in the passenger compartment of the car for any further items that could be used as weapons. His flashlight illuminated a shiny item under appellant's seat. When he reached into the car to see what was causing the reflection, he saw the handle of a gun and retrieved a firearm described at trial as a semiautomatic handgun. Deputy Ybarbo placed the two men in handcuffs and took them to Cypresswood jail. A more thorough search of appellant at the jail revealed that he was wearing a shoulder holster. Appellant was charged with the misdemeanor offense of unlawful carrying of a handgun.

No pre-trial motion to suppress evidence was filed and the case proceeded to trial before a jury. At the close of the State's evidence, appellant moved for an instructed verdict based on lack of probable cause or reasonable suspicion to justify Deputy Ybarbo's detention. Appellant's motion was denied. At the close of all of the evidence, appellant once again moved for an instructed verdict, which was also denied by the trial court. The jury then returned a verdict of guilty, and appellant perfected his appeal.

Procedural Background

On appeal, the appellant challenged the sufficiency of the evidence to support his conviction. On November 10, 1994, we reversed the judgment of the trial court, finding the evidence insufficient to support appellant's conviction, and remanded the cause to the trial court for an entry of an order of acquittal. *See Malik v. State*, No. 14-92-01293-CR (Tex. App.—Houston [14th Dist.] Nov. 10, 1994) (unpublished) (“*Malik I*”). The State filed its motion for rehearing on November 15, 1994, and we overruled that motion on November 23, 1994.

On November 28, 1994, the State filed its petition for discretionary review. The Court of Criminal Appeals granted the State's petition, and in an opinion issued on March 29, 1995, found that we had employed an improper standard of review when addressing appellant's sufficiency issue. *See Malik v. State*, No. 1369-94 (Tex. Crim. App., Mar. 29, 1995) (unpublished) (“*Malik II*”). The Court of Criminal Appeals, therefore, remanded the cause with instruction for us to apply the correct standard of review in analyzing the sufficiency of the evidence.

On remand, in an opinion delivered on February 15, 1996, we again reversed and remanded for entry of an order of acquittal. *See Malik v. State*, No. 14-92-01293-CR (Tex. App.—Houston [14th Dist.] Feb. 15, 1996) (unpublished) (“*Malik III*”). The State filed no motion for rehearing, but filed its petition for discretionary review on March 18, 1996. On September 11, 1996, the Court of Criminal Appeals once again granted the State's petition, and, in a published opinion issued on September 10, 1997, vacated our opinion and remanded the case for us to again apply the correct standard of review in analyzing the sufficiency of the evidence. *See Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997) (“*Malik IV*”).

The Holding of *Malik IV*

The Court of Criminal Appeals opinion in *Malik IV* overturned a long and very well recognized line of Texas cases. Prior to *Malik IV*, it was well established in Texas that the sufficiency of the evidence was to be measured by the indictment as incorporated into the jury charge. See *Malik*, 953 S.W.2d at 235; *Benson v. State*, 661 S.W.2d 708, 715 (Tex. Crim. App. 1982)(opinion on State's second motion for r'hrng), *cert. denied*, 467 U.S. 1219 (1984). In effect, this meant that the State's failure to object to an unnecessary broadening of its burden of proof in the jury charge required that the State offer evidence which was sufficient to meet this increased burden. See *Malik*, 953 S.W.2d at 235; *Boozer v. State*, 717 S.W.2d 608, 610-12 (Tex. Crim. App. 1984). Failure to do so would result in the evidence being insufficient to support a conviction. See *Malik*, 953 S.W.2d at 235; *Benson*, 661 S.W.2d at 715-16. Thus, there evolved a long line of cases which mandated that the sufficiency of the evidence be measured by the jury charge if that charge is more favorable to the defendant than the law requires and if the State fails to object. See *Malik*, 953 S.W.2d at 235.

As stated earlier, appellant in this case was charged with unlawfully carrying a handgun. In addition to the elements of that offense, however, the jury charge contained an unnecessary instruction which asked the jury to determine whether the evidence was sufficient to show a reasonable suspicion to justify Deputy Ybarbo's initial traffic stop of the appellant—which was not an element of the criminal offense. Therefore, following the *Benson/Boozer* line of cases, we evaluated whether the evidence was sufficient to show that Deputy Ybarbo had a reasonable suspicion to justify his stopping the appellant's car.

In *Malik IV*, the Court of Criminal Appeals expressly overruled the *Benson/Boozer* line of cases, and implemented a new test for evaluating sufficiency of the evidence. *Id.* at 239. The Court held that if the jury charge is incorrect and sufficiency of the evidence is at bar, we should no longer review the conviction under the charge that was actually given to the jury, but instead, “sufficiency of the evidence should be measured by the elements of the offense as defined by the hypothetically correct jury charge for the case.” *Id.* at 240. The Court described a “hypothetically correct jury charge” as “one that accurately sets out the law, is authorized by

the indictment, does not unnecessarily increase the State's burden of proof or unnecessarily restrict the State's theories of liability, and adequately describes the particular offense for which the defendant was tried.” *Id.* Accordingly, in applying this new standard to the present case, the Court found “that the jury instruction concerning the legality of appellant's detention should not have been used to measure the sufficiency of the evidence. The legality of appellant's detention is not an element of the offense charged but merely relates to the admissibility of evidence.” *Id.* Therefore, we must now review the sufficiency of the evidence to support the appellant’s conviction without regard to the legality of the appellant’s detention.

Standard of Review

At the close of the state’s evidence, the appellant moved for a directed verdict. A challenge to the denial of a motion for directed verdict is essentially a challenge to the legal sufficiency of the evidence. *See Madden v. State*, 799 S.W.2d 683, 686 (Tex. Crim. App. 1990). In evaluating a legal insufficiency claim, we review the evidence in the light most favorable to the judgment to determine if any rational trier of fact could have found each element of the offense beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Geesa v. State*, 820 S.W.2d 154, 157 (Tex. Crim. App. 1991). If the evidence is sufficient to sustain the conviction, then the trial judge did not err in overruling appellant's motion. *See Madden*, 799 S.W.2d at 686.

Texas Penal Code § 46.02(a) provides that “[a] person commits an offense if he intentionally, knowingly, or recklessly carries on or about his person a handgun, illegal knife, or club.” TEX. PEN. CODE ANN. § 46.02(a) (Vernon Supp. 1999). Therefore, to prove a violation of section 46.02(a), the State was required to prove that (1) the appellant, (2) intentionally, knowingly, or recklessly, (3) carried a handgun on or about his person. “On or about his person” has been interpreted to mean within such distance of appellant that he could get his hands on it without materially changing his position. *See Courtney v. State*, 424 S.W.2d 440, 441 (Tex. Crim. App. 1968) (citing *Wagner v. State*, 80 Tex. Cr. R. 66, 188 S.W.

1001 (Tex. Cr. App. 1916).

Sufficiency of the Evidence

The State's chief witness at trial was Deputy Ybarbo. Deputy Ybarbo testified that he pulled over the car that appellant was driving because he believed the appellant performed a suspicious driving maneuver. Deputy Ybarbo's suspicion was fueled by the time of night and the location of the activity—in a subdivision known as an area of frequent criminal activity. He testified that as he was in the process of investigating, he noticed a shiny object on the floor of the vehicle, directly under the driver's seat where the appellant was sitting. This shiny object was a handgun that was protruding slightly from beneath the seat. After finding the weapon, appellant was arrested and taken to the Sheriff's station.

In addition, Deputy Robert Vanwey also testified for the State. Deputy Vanwey was the booking officer at the Sheriff's station on the night appellant was arrested. He testified that in the process of booking appellant, he conducted a routine frisk and discovered that appellant was wearing a leather shoulder holster which had been concealed under appellant's shirt. He also testified that the handgun found under the seat fit the shoulder harness.

After reviewing the entire record, including the above testimony, we find that a rational trier of fact could have found each element of the charged offense beyond a reasonable doubt. Therefore, we overrule appellant's complaint as to the sufficiency of the evidence to support his conviction.

The judgment is affirmed.

/s/ Joe L. Draughn
Justice

Judgment rendered and Opinion filed September 23, 1999.

Panel consists of Justices Yates, Fowler and Draughn.¹

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¹ Senior Justice Joe L. Draughn sitting by assignment.