Affirmed and Opinion filed October 26, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-98-01074-CR

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KEVIN WESLEY JORDAN, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Criminal Court at Law No. 13
Harris County, Texas
Trial Court Cause No. 98-23035

O P I N I O N

The jury found appellant guilty of resisting arrest; the trial judge assessed punishment at confinement for 180 days. Issues in this appeal concern alleged jury charge error and a contest to the legal and factual sufficiency of the evidence. We affirm.

Since appellant contests the sufficiency of the evidence, a brief recitation of the facts as heard by the jury is necessary. However, we adopt as our own the statement of facts recited in the state's brief because in appellant's reply brief he did not contest the state's version of the facts.

On June 6, 1998, Ernest Leal was employed as a police officer by the City of Houston, Texas. That night, he was working at an extra job at the Bammelwood Apartments when he received a phone call from the apartment complex's answering service about a disturbance in an apartment. The caller said that a man and woman were fighting. Officer Leal donned his gunbelt, identification, and badge and headed for the disturbance. As he neared the apartment, he could hear loud shouting: "screaming by two people." Through the window, Officer Leal saw the appellant pushing and shoving a woman, who he later identified as the appellant's girlfriend, Daphne Muenzler, and heard Daphne screaming for help. The appellant pushed Daphne against the wall, and she then fell to the floor.

Because he felt Daphne needed help, Officer Leal yelled "police" several times and slightly opened the unlocked door. Daphne ran towards the open door, but the door shut before she could escape. Again Officer Leal yelled "police" and demanded that the appellant open the door. Daphne somehow managed to crack the door open, and Officer Leal put his hand on the door and finished opening it the rest of the way.

Once face to face with the appellant, Officer Leal determined that the appellant was intoxicated, combative, and belligerent. Officer Leal separated the appellant and Daphne, and convinced the appellant to step out onto the front porch. The appellant was very belligerent towards Officer Leal and emphatically told him he was not going to jail.

Finally, Officer Leal was able to grab onto the appellant's arm and place him under arrest for the assault he had witnessed. He told the appellant that he was under arrest and began to handcuff him; the appellant was very uncooperative. The appellant pushed Officer Leal and became very combative at one point striking Officer Leal with his hand. Officer Leal fell to the ground during the struggle and received various injuries.

Finally, Officer Leal was able to get the appellant handcuffed and took him to the apartment complex leasing office where he waited for Harris County Sheriff's deputies to arrive and transport the appellant to jail. When Harris County Sheriff Deputy Eric Batton arrived at the apartment complex, the appellant was in handcuffs and seated on a curb. The appellant was yelling and screaming and was

uncooperative; he refused to do as Deputy Batton asked. The appellant would not voluntarily enter Deputy Batton's patrol car and Deputy Batton and another officer had to force him inside.

In his first point of error appellant contends that the trial court erred in instructing the jury that E.J. Leal "is a peace officer." Appellant argues that this was "a factual matter which impermissibly shifted the burden of proof to the defendant." We disagree.

Appellant never disputed that E.J. Leal was a peace officer. Under such circumstances it was permissible for the trial court to charge the jury that he was a peace officer. *Pitts v. State*, 97 Tex. Crim. 642, 263 S.W. 1059, 1060 (1924). Whether appellant *knew* Officer Leal was a peace officer was a fact question which the trial court left for the jury's resolution. Appellant's first point of error is overruled.

In his second point of error appellant contends the evidence is legally insufficient to prove beyond a reasonable doubt that he "used force contemporaneously with his allegedly resisting arrest" by Officer Leal.

It is well established that when we are called upon to weigh the legal sufficiency of the evidence, we must view it in the light most favorable to the verdict and decide whether any rational fact finder could have found the essential elements of the crime beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 320 (1979); *Johnson v. State*, 871 S.W.2d 183, 186 (Tex. Crim. App. 1993), *cert. denied*, 511 U.S. 1046 (1994). The jury, of course, is the sole judge of the *weight* of the evidence and may choose to believe all, some or none of it. *See* TEX. CODE CRIM. PROC. ANN. Art. 38.04 (Vernon 1979); *Penagraph v. State*, 623 S.W.2d 341, 343 (Tex. Crim. App. [Panel Op.] 1981).

A person commits the offense of resisting arrest if he uses force against a person he knows is a peace officer to obstruct the peace officer's efforts to effect his arrest; his use of force was directed at the peace officer, and his use of force was contemporaneous with the peace officer's effecting an arrest. TEX. PEN. CODE ANN. § 38.03 (Vernon 1994).

The facts, as detailed above, show that Officer Leal made a decision to arrest appellant when he saw appellant assault Daphne. Appellant was immediately very belligerent towards Officer Leal and emphatically told him he was not going to jail. As the officer grabbed appellant's arm to place him under

arrest, he told appellant he was under arrest and began to handcuff him. Appellant was uncooperative and struck the officer while he, the officer, was attempting to handcuff him. In the words of Officer Leal, appellant "resisted all the time from the time [he] was trying to handcuff him." This was sufficient for any rational fact finder to determine that appellant resisted Officer Leal's attempts to effect his arrest. Appellant's first point of error is overruled.

In his third point of error appellant contends the evidence is factually insufficient to prove that appellant used force contemporaneously with his allegedly resisting arrest.

Again, the rules which govern our review under this contest are well established: we are not bound to view the evidence in the light most favorable to the prosecution and we may consider the testimony of defense witnesses and the existence of alternative hypothesis. We begin our review with the assumption that the evidence supporting the jury verdict is legally sufficient. While we are authorized to disagree with the jury's determination, our review must be appropriately deferential so as to avoid the appellate court's substituting its judgment for that of the primary fact finder. The verdict should be set aside only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Finally, if we determine that the evidence is factually insufficient, we must detail why it is manifestly unjust, why it shocks the conscience or how it clearly demonstrates bias. *See* Johnson v. State, 23 SW3d 1,6-7 (Tex. Crim. App.2000).

In addition to the evidence detailed above, both appellant and Daphne denied that appellant had assaulted Daphne; denied that appellant resisted arrest and denied that Officer Leal informed appellant that he was under arrest.

This merely created a conflict in the evidence and, in his brief, appellant so admits. Appellant does not tell us why this conflict makes the guilty verdict "so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust" nor does he tell us why the verdict "shocks the conscience" or how it "clearly demonstrates bias." Neither can we make such finding on this record. These were disputed facts which the jury had to resolve, and the evidence is factually sufficient to support their resolution. We overrule appellant's third point of error.

In his fourth and fifth points of error, appellant contests the legal and factual sufficiency of the evidence to prove that appellant knew that Officer Leal was a peace officer who was attempting to arrest him. Appellant points to no evidence in support of his argument under these points that was not controverted. If, as an advocate, appellant cannot detail why the evidence was either legally or factually insufficient, such assignment of error should not be of great concern to the appellate court. We find the evidence to be both legally and factually sufficient to support the jury finding that appellant knew Officer Leal was a peace officer. Appellant's fourth and fifth points of error are overruled.

The judgment of the trial court is affirmed.

/s/ Sam Robertson
Justice

Judgment rendered and Opinion filed October 26, 2000.

Panel consists of Justices Robertson, Sears, and Dunn.*

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

* Senior Justices Sam Robertson, Ross A. Sears, and D. Cammille Hutson-Dunn sitting by assignment.