Affirmed and Opinion filed August 2, 2001.

In The

Fourteenth Court of Appeals

NO. 14-00-00844-CR
NO. 14-00-00845-CR

ADRIAN HAYWOOD, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 183rd District Court
Harris County, Texas
Trial Court Cause Nos. 833,904 & 833,902

O P I N I O N

Following a plea of not guilty, appellant was convicted of aggravated sexual assault (cause number 833,904), and official oppression (cause number 833,902), and was sentenced to twenty years' confinement for the aggravated sexual assault, and one year confinement for the official oppression charge.

Under cause number 833,904, appellant raises six points of error complaining of the legal and factual sufficiency of the evidence to support his conviction. Under cause number 833,902, appellant raises two points of error complaining of the legal and factual

sufficiency of the evidence to support his conviction. All eight of appellant's points of error, reduced to their simplest form, are dependent upon a determination by this Court whether the evidence was legally and factually sufficient to support a finding that appellant used or exhibited a firearm during the commission of the sexual assault, and whether the evidence was legally and factually sufficient to support a finding that appellant coerced the complainant into engaging in sexual activity. We affirm.

I. Background

On December 12, 1999, appellant, a Houston Police Officer, stopped the complainant, Nickolonoria McCullough, for an alleged traffic offense. In the car with the complainant at the time of the stop, was her infant daughter and her sister, Cathy Howard. Appellant ran a check on the complainant and discovered that she had six outstanding warrants. Appellant then instructed Cathy Howard to leave with the complainant's infant daughter in her vehicle. Appellant then put the complainant in the back of his patrol car. Appellant testified that at the moment he placed the complainant in the back of his patrol car, he was undecided if he was going to arrest her. While driving the complainant around, appellant kept asking her what she was going to do about the tickets, and if she wanted to go to jail. She responded "no." Eventually, appellant drove behind an abandoned church located near Lockwood and Crosstimbers streets. Again, appellant began asking the complainant if she wanted to go to jail, stating that she would be in jail for two weeks on the tickets. Additionally, appellant repeatedly told her to be creative about what she could do so that he would not have to take her to jail. The complainant testified that by this point she realized appellant was alluding to sex, and she told him to take her to jail. After a few minutes, the complainant heard appellant doing something with his pants in the front seat, at which point she told appellant she was not going to have sex with him. Appellant then took out his gun, got into the back seat, and asked the complainant if she thought it was fair for her to perform oral sex on him in exchange for him not taking her to jail. With his gun in his left hand, appellant grabbed the complainant's hair and forced her to perform oral sex on him. Appellant then got back into the driver's seat, and took the complainant

to her friend's house.

Appellant disputes this account of the facts. Appellant testified at trial that the complainant suggested that they engage in oral sex, to which he agreed, and at no time did he coerce the complainant into engaging in sexual activity.

II. Legal Sufficiency Challenges

The essence of appellant's legal sufficiency challenges are, 1) the evidence was legally insufficient to establish that he used or exhibited a firearm during the commission of the sexual assault (first point of error); and 2) the evidence was legally insufficient to establish that he coerced the complainant into engaging in sexual activity (third and fifth points of error under cause number 833,904 and first point of error under cause number 833,902).

In reviewing legal sufficiency challenges, appellate courts are to view the evidence in the light most favorable to the prosecution, overturning the lower court's verdict only if a rational trier of fact could not have found all elements of the offense beyond a reasonable doubt. *Lacour v. State*, 8 S.W.3d 670, 671 (Tex. Crim. App. 2000); *Santellan v. State*, 939 S.W.2d 155, 160 (Tex. Crim. App. 1997) (citing *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2871, 2879, 61 L.Ed.2d 560 (1979)). "[I]f any evidence establishes guilt beyond a reasonable doubt, the appellate court may not reverse the fact finder's verdict on grounds of legal insufficiency." *Arthur v. State*, 11 S.W.3d 386, 389 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd).

A. Used or Exhibited a Firearm

Appellant contends the evidence was legally insufficient to support the finding that he used a firearm during the commission of the sexual assault. Specifically, appellant asserts that the State failed to prove that the gun used or exhibited was a firearm. We disagree.

The complainant testified that she heard the gun holster unsnap, and observed the

gun in appellant's left hand. Furthermore, the complainant testified that when appellant climbed into the back seat with her, he motioned for her to come over to him by waving his gun at her. Lastly, the complainant testified that while performing oral sex on appellant, the gun was in appellant's left hand and she could see down the barrel. Appellant complains this evidence is legally insufficient because the term "gun" does not necessarily implicate the use of a firearm. Appellant reasons that he could have been holding a BB gun or a Pellet gun. We recognize that a gun is not always synonymous with a firearm, but the record in this case fails to demonstrate that the "gun" described by the complainant was anything other than a firearm. In fact, appellant testified to the following:

> Q. It was here in Harris County, Texas, where oral sex was performed on you?
>
> A. Yes, sir.
>
> Q. There's no question at the time this happened, you were a Houston police officer?
>
> A. Yes, sir.
>
> Q. In uniform, on duty?
>
> A. Yes, sir.
>
> Q. With a deadly weapon, a firearm, strapped to your hip?
>
> A. Yes, sir.

To suggest that the "gun" which complainant described was anything other than the firearm that appellant admitted to carrying on the night of the sexual assault strains logic. The complainant testified that she heard appellant unstrap his holster, and observed a gun in his left hand. Appellant testified that he was carrying a firearm on the night in question. Accordingly, we find the evidence legally sufficient to support the finding that appellant used or exhibited a firearm during the commission of the sexual assault. We overrule

appellant's first point of error under cause number 833,904.

B. Coerced into Sexual Activity

In his third and fifth points of error under cause number 833,904 and first point of error under cause number 833,902, appellant complains that the evidence was legally insufficient to establish that he coerced the complainant into performing oral sex.

Viewing the evidence in a light most favorable to the prosecution, a rational trier of fact could have found beyond a reasonable doubt that appellant coerced the complainant into performing oral sex.

The record establishes that appellant drove the complainant to a dark, secluded spot, after threatening her with arrest a number of times. According to the complainant, appellant then removed his firearm and forced her to perform oral sex, all the while holding his firearm in his left hand. Moreover, the complainant's testimony is corroborated by testimony from another woman, Ms. Washington, who stated that two weeks earlier, appellant stopped her, placed her in his patrol car, drove her to a secluded area, and forced her to engage in oral sex in exchange for him not taking her to jail for driving without a license. Accordingly, we find the evidence legally sufficient to support the finding that appellant coerced the complainant into performing oral sex. We overrule points of error three and five under cause number 833,904, and point of error one under cause number 833,902.

III. Factual Sufficiency Challenges

With regard to his factual sufficiency challenges, appellant asserts 1) the evidence was factually insufficient to establish that he used or exhibited a firearm during the commission of the sexual assault (second point of error); and 2) the evidence was factually insufficient to establish that he coerced the complainant into engaging in sexual activity (fourth and sixth points of error under cause number 833,904 and second point of error under cause number 833,902).

In reviewing factual sufficiency challenges, appellate courts must determine "whether a neutral review of all the evidence, both for and against the finding, demonstrates that the proof of guilt is so obviously weak as to undermine confidence in the jury's determination, or the proof of guilt, although adequate if taken alone, is greatly outweighed by contrary proof." *Johnson v. State*, 23 S.W.3d 1, 11 (Tex. Crim. App. 2000). Evidence is factually insufficient if, 1) it is so weak as to be clearly wrong and manifestly unjust; or 2) the adverse finding is against the great weight and preponderance of the available evidence. *Id*. The *Johnson* court reaffirmed the requirement that "due deference must be accorded the fact finder's determinations, particularly those determinations concerning the weight and credibility of the evidence." *Id*. at 9.

A. Used or Exhibited a Firearm

Appellant, in his second point of error under cause number 833,904, argues that the evidence was factually insufficient to support a finding that he used or exhibited a firearm during the commission of the sexual assault. We disagree.

As discussed previously, the complainant testified that she heard the gun holster unsnap, she observed a gun in appellant's left hand, and she could see down the barrel of the gun as she was performing oral sex. Moreover, appellant testified that on the night in question he was carrying a firearm. Appellant asserts that this evidence is factually insufficient because, while the complainant testified that appellant had a "gun," she never testified that this "gun" was a firearm. We find such a distinction immaterial under the fact scenario of the present case. Appellant was in uniform and admitted to carrying a firearm. The complainant testified that appellant removed the gun from his holster, and she could look down the barrel of the gun as appellant held it. Accordingly, we hold that the finding that appellant used or exhibited a firearm in the commission of a sexual assault was not so weak as to be clearly wrong or manifestly unjust, nor outweighed by contrary proof. We overrule appellant's second point of error under cause number 833,904.

B. Coerced into Sexual Activity

Lastly, in his fourth and sixth points of error under cause number 833,904 and second point of error under cause number 833,902, appellant complains that the evidence was factually insufficient to establish that he coerced the complainant into performing oral sex. We disagree.

The entire basis for appellant's factual sufficiency challenge is his own testimony that the complainant suggested that they engage in oral sex and he consented. However, the complainant testified that she was coerced into performing oral sex, and another witness, Ms. Washington, testified that two weeks prior to the complainant's encounter with appellant, appellant coerced her into performing oral sex. We find appellant's assertion that the complainant consented to performing oral sex insufficient to demonstrate that the proof of appellant's guilt was so weak as to be clearly wrong and manifestly unjust, or the proof of guilt, although adequate if taken alone, was against the great weight and preponderance of the available evidence. Accordingly, we overrule appellant's fourth and sixth points of error under cause number 833,904 and second point of error under cause number 833,902.

IV. Conclusion

Having determined that the evidence was both legally and factually sufficient to support appellant's conviction, we affirm the judgment of the trial court.

/s/ Paul C. Murphy
Senior Chief Justice

Judgment rendered and Opinion filed August 2, 2001.

Panel consists of Justices Edelman, Frost, and Murphy.*

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

* Senior Chief Justice Paul C. Murphy sitting by assignment.