

Affirmed and Opinion filed October 19, 2000.



In The

Fourteenth Court of Appeals

NO. 14-99-01222-CR

THADDEUS EVANS BURNS, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the 56th District Court
Galveston County, Texas
Trial Court Cause No. 90CR0658**

OPINION

Thaddeus Burns, appellant, was convicted by a jury of the offense of unauthorized use of a vehicle while exhibiting a deadly weapon. After finding an enhancement paragraph true, the jury sentenced Burns to twenty years confinement in the Institutional Division of the Texas Department of Criminal Justice on September 14, 1990.¹ In three points of error appellant Burns challenges both his conviction and the deadly weapon finding. We affirm. On the morning of May 2, 1990, Pat Martin called the Galveston Police Department to report that her vehicle had been stolen from the parking lot of her place of

¹ The Court of Criminal Appeals granted Appellant an out-of-time appeal in 1999.

employment. Police officer Bryan Gately proceeded to the crime scene, and after taking information from Martin, began to search for the stolen vehicle in the surrounding area. After spotting a vehicle matching the description given to him by Martin, Officer Gately drove by and observed appellant and a passenger through the front windshield of the stolen vehicle. The driver of the vehicle then turned onto another road, with Gately following, when a chase ensued. Officer William Scott subsequently responded to Gately's request for help, ultimately heading off the parties to the chase and parking his squad car so as to block one avenue of escape. Having parked the car, Scott then exited it and stood with his revolver drawn in an attempt to shoot out the tires of the stolen vehicle.

While Scott aimed his weapon, the driver of the stolen vehicle then veered at an angle directly toward Scott, causing him to quickly retreat behind the squad car to avoid being struck. After passing within a few feet of Scott, the vehicle continued in another direction. The stolen vehicle proceeded to turn a corner where both the driver and passenger bailed out while still in motion. Moments later Officer Gately arrived at the scene of the abandoned vehicle which came to rest after crashing into a parked tow truck. Galveston Police separately apprehended appellant and his passenger near the scene of the wreck. Officers Gately and Scott then returned appellant, handcuffed and in the car, to the scene of the collision where the owner of the tow truck, Mark Droge, and his employee, Robert Silva, identified Appellant. Appellant now raises three points of error.

Identification Testimony

In his first point of error, appellant argues that the trial court erred in admitting the identification testimony of two witnesses resulting in a violation of his State and Federal Due Process Rights. Under both the Texas and Federal Constitutions, an in-court identification is inadmissible when (1) it has been tainted by an impermissibly suggestive pre-trial procedure, and (2) it creates a substantial likelihood of irreparable misidentification. *See Simmons v. United States*, 390 U.S. 377, 384, 88 S.Ct. 967, 971 (1968); *In re G.A.T.*, 16 S.W.3d 818, 827 (Tex. App.– Houston [14th Dist.] 2000, pet. denied). An appellant challenging a trial court decision to admit identification testimony has a difficult and heavy burden in that he must prove each element by clear and convincing evidence. *In re G.A.T.*, 16 S.W.3d at 827.

Determinations as to the admissibility of identification testimony require an examination of both the totality of the circumstances surrounding the particular case and the reliability of the identification. *See Loserth v. State*, 963 S.W.2d at 770, 772 (Tex. Crim. App. 1998). Finally, we apply a de novo standard in reviewing this question. *See id.* at 771. Regarding the first prong of this analysis, Texas courts recognize that a suggestive pre-trial identification procedure is not necessarily impermissibly so. *See Barley v State*, 906 S.W.2d 27, 33 (Tex. Crim. App. 1995). In the instant case, an officer drove Appellant back to the crime scene in handcuffs so that witness Droge might confirm whether Appellant was the driver of the stolen vehicle. However suggestive this showup identification procedure may have been, this Court has recently held that such a pre-trial identification procedure is not impermissibly suggestive. *See In re G.A.T.*, 16 S.W.3d at 827.

Appellant argues that a second suggestive aspect of the show-up identification procedure occurred when the police told witness Droge that “they really wanted to find [the driver and passenger of the stolen car] because they almost ran down a police officer.” We disagree. While the police officer’s statement may have been suggestive in some incidental way, appellant fails to show by clear and convincing evidence that it was impermissibly suggestive. Moreover, appellant fails to cite any authority indicating that such a statement is impermissibly suggestive. Having determined that no impermissibly suggestive procedure was employed on witness Droge, we need not evaluate whether the procedure created a substantial likelihood of misidentification as to his in court identification of appellant. *See Barley*, 906 S.W.2d at 34.

Appellant also contends that the in-court identification by witness Silva was likewise tainted by the same impermissibly suggestive pretrial procedure as Droge. However, because appellant failed to object or otherwise preserve this complaint at trial, nothing is preserved for review. *See TEX. R. APP. P.* 33.1(a). Accordingly, appellant’s first point of error is overruled.

Improper Jury Argument

In his second point of error appellant argues that the State engaged in six areas of impermissible jury argument, thus violating his right to an impartial jury under the State and Federal Constitutions. Specifically, appellant contends that the prosecutor: struck at the appellant over the shoulder of defense

counsel; bolstered the testimony of an identification witness; interjected his own personal opinion, which was derogatory, as to appellant's character; repeatedly inflamed the jury and introduced new facts outside the record; and made an improper community expectation argument.

At the outset, we note, as pointed out by the State, that the appellant failed to object at trial to any of the alleged improper jury argument by the prosecution. Under the current Rules of Appellate Procedure, a complaining party fails to preserve anything for review absent a timely request, objection or motion coupled with a trial court ruling on the request, objection, or motion. TEX. R. APP. P. 33.1(a). Appellant acknowledges this but contends that at the time of trial, September 1990, Texas law allowed for an exception to the preservation of error requirement.² This exception, outlined in *Romo v. State*, allowed an appellate court to deviate from the preservation requirement where the argument of the prosecutor was so prejudicial that an instruction to disregard would not cure the harm. *See* 631 S.W.2d 504, 505 (Tex. Crim. App. 1982), *overruled by* *Cockrell v. State*, 933 S.W.2d 73, 89 (Tex. Crim. App. 1996). Later, in 1996, the Court of Criminal Appeals overruled the exception in *Romo*, holding that, with the enactment of Rule of Appellate Procedure 52(a), the exception was overruled by statute.

Realizing that appellant's trial occurred prior to *Cockrell*, we nevertheless hold that his second point of error has not been preserved for review via the *Romo* exception. *See* TEX. R. APP. P. 33.1(a). In *Fowler v. State*, the appellant was convicted in 1996 and filed an appellate brief for his conviction in February 1997 with oral argument occurring on October 1, 1997. *See Fowler v. State*, 991 S.W.2d 258, 260 (Tex. Crim. App. 1999). In the interim, on September 1, 1997, current Rule of Appellate Procedure 44.2 became effective, with the result being that the court applied the more restrictive harm analysis of the current Rule despite Appellant's conviction and filing of his appellate brief prior to the effective date of the new Rule. *See id.* at 260 n.4. Concluding that only the right to appeal a conviction was a vested and substantive right, as opposed to the application of a procedural mechanism for its review,

² Former Rule of Appellate Procedure 52(a), the predecessor to current Rule 33.1(a), provided that “[i]n order to preserve a complaint for appellate review, a party must have presented to the trial court a timely request, objection, or motion stating the specific grounds for the ruling he desired for the court to make . . . [and] obtain a ruling on the party's request objection or motion.”

the *Fowler* Court upheld the Tenth Court of Appeals's application of Rule 44.2. *See Fowler*, 991 S.W.2d at 261.

In the present case, appellant's invocation of the previously overruled *Romo* exception to the preservation of error requirement is a procedural mechanism for review. Relying on the recent decision in *Fowler*, then, we will apply Appellate Rule 33.1 and the *Cockrell* decision overruling the *Romo* exception. Accordingly, appellant's second point of error is overruled.

Legal Sufficiency

In his third point of error, appellant challenges the legal sufficiency of the jury's finding that he exhibited a deadly weapon, *i.e.*, the stolen vehicle, in furtherance of his conviction for unauthorized use of a vehicle. Legal sufficiency is the constitutional minimum required by the Due Process Clause of the Fourteenth Amendment to sustain a criminal conviction. *See Jackson v. Virginia*, 443 U.S. 307, 315-16, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). The standard of review for a legal sufficiency challenge requires that the reviewing court ask whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *See Jackson*, 443 U.S. at 320, 99 S.Ct. 2781; *Johnson v. State*, 871 S.W.2d 183, 186 (Tex.Crim.App.1993), *cert. denied*, 511 U.S. 1046, 114 S.Ct. 1579, 128 L.Ed.2d 222 (1994). During a legal sufficiency challenge, the reviewing court examines all evidence in the light most favorable to the jury's verdict. *See Johnson*, 871 S.W.2d at 186.

At the time of appellant's offense, the provision of the Code of Criminal Procedure regarding deadly weapon findings provided, in pertinent part, that "[u]pon [an] affirmative finding that the defendant used or exhibited a deadly weapon during the commission of an offense or the immediate flight therefrom, the trial court shall enter the finding in the judgment of the court." TEX. CODE CRIM. PROC. Art. 42.12 §3g(a)(2) (West 1990) (amended 1991) (current version at TEX. CODE CRIM. PROC. ANN. Art. 42.12 §3g(a)(2) (Vernon Supp. 2000)). Likewise, the offense of which appellant was convicted provided that "[a] person commits an offense if he intentionally or knowingly operates another's boat, airplane, or motor-propelled vehicle without the effective consent of the owner." Act of January 9, 1973, 63rd Legislature,

R.S., ch. 1973 Tex. Gen. Laws 932 (amended 1993) (current version at TEX. PEN. CODE § 31.07(a) (West 2000)).

Appellant's complaint of legal insufficiency argues that because his alleged attempt to hit Officer Scott did not occur during the commission of his offense or his immediate flight therefrom, the trial court erred in entering this finding in his judgment. Specifically, appellant complains that, because a "significant" period of time elapsed between the taking of the vehicle and when Officer Gately first spotted Appellant in it, the evidence adduced at trial was legally insufficient to support the jury's affirmative finding. We do not agree. Appellant was convicted of unauthorized use of a motor vehicle as opposed to robbery or theft. Contrary to appellant's position, unauthorized use of a motor vehicle can be a continuing offense. *See Medina v. State*, 962 S.W.2d 83, 86 (Tex. App.– Houston [1st Dist.] 1997, pet. ref'd).

In *Medina*, the appellant caused the deaths of three innocent victims after colliding with the car in which they were riding. *See id.* at 85. Immediately prior to the collision, the appellant had stolen the truck in which he was riding with the police in pursuit. *See id.* Appealing his conviction for felony murder, Medina argued that his offense of unauthorized use of a motor vehicle had been completed when he collided with the victims' car and that the evidence was legally insufficient to prove felony murder. *See id.* The court disagreed and held that appellant was continuing to operate the motor vehicle without the owner's consent when he collided with the victims' car. *See id.* at 86. Applying this holding to the present case, we reach the same decision and hold that appellant's offense of unauthorized use of a vehicle remained in progress at the time he attempted to hit Officer Scott. Accordingly, we hold that the evidence supporting the jury's deadly weapon finding was such that any rational trier of fact could have reached the same decision. Appellant's third point of error is overruled

/s/ Maurice Amidei
Justice

Judgment rendered and Opinion filed October 19, 2000.

Panel consists of Chief Justice Murphy, and Justices Amidei, and Hudson.

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