AFFIRMED and Opinion Filed July 16, 2020

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-19-00530-CR
No. 05-19-00531-CR
No. 05-19-00532-CR

DAVID EARL SPILLMAN, JR., Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the 196th Judicial District Court
Hunt County, Texas
Trial Court Cause Nos. 31765, 31766, 31767

MEMORANDUM OPINION

Before Justices Myers, Partida-Kipness, and Reichek
Opinion by Justice Reichek

David Earl Spillman, Jr. appeals two convictions for assault of a public servant and one conviction for possession of methamphetamine in an amount of four grams or more but less than two hundred grams. In his first two issues, appellant contends the evidence is legally insufficient to support his convictions for assaulting the police officers involved in his arrest. In his third issue, appellant contends the trial court erred in denying his request for an article 38.23(a) jury instruction. Finding no merit in appellant's arguments, we affirm the trial court's judgments.

Factual Background

Officer William Carper was on patrol in Greenville, Texas when he performed a traffic stop of appellant for failing to signal and being parked illegally. When Carper approached appellant's car, appellant had the window rolled down and Carper smelled the odor of burnt marijuana. Carper went back to his patrol car and requested backup. Officer Kendall Reeves responded.

After Reeves arrived at the scene, the officers had appellant exit his vehicle and move to the back of the car. Carper performed a pat-down search of appellant to ensure appellant did not have any weapons. He then performed a search of appellant's car based on the odor of marijuana. Carper found an unlabeled pill bottle that appellant claimed contained heartburn medication. Carper also found marijuana "crumbs." When Carper asked appellant if he had smoked marijuana in the car, appellant responded he probably had earlier in the day.

Carper then conducted a search of appellant. After looking through appellant's pockets, waistband, and socks, Carper had appellant turn and face him. Carper asked appellant to remove his shoes because he stated it was common for people to store contraband in their shoes. Appellant reached down to take his shoes off and, as he did so, Reeves observed him remove a clear plastic baggie containing small colored pills from one of his shoes. Appellant then enclosed the baggie inside his fist.

When appellant inserted his fingers into his shoe instead of simply kicking the shoe off, Carper took hold of appellant's arm to see what he was doing. According to Carper, when he grabbed appellant's arm, appellant immediately began to resist. Appellant tensed up and jerked his hand forward trying to twist out of Carper's grip. Appellant raised the arm that Carper was holding up over Carper's shoulder and Reeves moved in to assist in restraining appellant.

Appellant moved between Carper and Reeves and Reeves testified appellant was able to pull away from him briefly and move to the side of the car. Carper stated appellant grabbed him with his free hand and was "pulling and jerking." Carper continued to hold on to appellant and planted his outside leg. When Carper planted his leg he felt his knee "pop" and "grind" and then felt pain. Reeves then moved to take appellant down using a "hip throw." As the men went to the ground, Reeves's elbow struck the pavement and was injured.

Carper and Reeves were eventually able to handcuff appellant and retrieve the baggie of pills. Tests showed the baggie contained 4.62 grams of methamphetamine. Carper testified that, after he returned to the police station, his leg began to swell and he could not bend his knee. An MRI showed that he had suffered a torn ACL ligament requiring surgery.

Appellant was tried before a jury. After hearing the evidence, the jury found appellant guilty of two offenses of assault of a public servant and one offense of

possession of methamphetamine in an amount of four grams or more but less than two hundred grams. On appeal, appellant challenges all three convictions.

Analysis

I. Sufficiency of the Evidence of Assault of a Public Servant

In his first two issues, appellant contends the evidence is legally insufficient to support his convictions for assault of a public servant. Specifically, appellant contends the prosecution failed to show he had the required mental state to commit the offenses. Appellant asserts his conduct constituted, at most, resisting arrest. Although the jury was given the option of convicting appellant of the lesser offense of resisting arrest, it chose not to do so.

When reviewing a challenge to the legal sufficiency of the evidence supporting a criminal conviction, we view the evidence in the light most favorable to the verdict and determine whether a rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Lucio v. State*, 351 S.W.3d 878, 894 (Tex. Crim. App. 2011). We do not resolve conflicts of fact, weigh evidence, or evaluate the credibility of the witnesses as this is the function of the trier of fact. *See Dewberry v. State*, 4 S.W.3d 735, 740 (Tex. Crim. App. 1999). Instead we determine whether both the explicit and implicit findings of the trier of fact are rational by viewing all the evidence admitted at trial in the light most favorable to the adjudication. *Adelman v. State*, 828 S.W.2d 418, 422 (Tex. Crim. App. 1992). The factfinder is

the sole judge of the witnesses' credibility and their testimony's weight. *See Bonham v. State*, 680 S.W.2d 815, 819 (Tex. Crim. App. 1984). "A court's role on appeal is restricted to guarding against the rare occurrence when the factfinder does not act rationally." *Nisbett v. State*, 552 S.W.3d 244, 262 (Tex. Crim. App. 2018).

The indictments in this case alleged that appellant committed assault on a public servant by intentionally, knowingly, or recklessly causing bodily injury to officers Carper and Reeves while the officers were lawfully discharging an official duty. *See* TEX. PENAL CODE ANN. § 22.01(a)(1), (b)(1). Under the Texas Penal Code, a person acts "recklessly" with respect to the result of his conduct when he is aware of but consciously disregards a substantial and unjustifiable risk that the result will occur. *Id*. § 6.03(c). "The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint." *Id*. The definition of "bodily injury" is purposefully broad and includes physical pain from "even minor physical contacts so long as they constitute more than mere offensive touching." *Morales v. State*, 293 S.W.3d 901, 907 (Tex. App.—Texarkana 2009, pet. ref'd). There is no requirement that the defendant exert force against the victim in any particular way to cause the injury. *Id*. at 908.

Appellant contends he could not have perceived a substantial and unjustifiable risk arising from his actions on the night of his arrest. He suggests it was Reeves's actions rather than his own that caused the officers to be injured. It was appellant's

conduct of struggling with the officers that precipitated Reeves's actions, however. Even if appellant only intended to conceal evidence and prevent his arrest, he disregarded a substantial risk that his struggling could result in bodily injury to any of the officers involved in his arrest. *Id*. at 909.

Appellant argues he could not have known there was a risk that his conduct could result in a torn ligament in Carper's leg. But knowledge and disregard of a specific kind of risk to a specific person is not required. It is enough that the actor was aware of and disregarded a risk of injury to a general class of probable victims. *See In re K.W.G.*, 953 S.W.2d 483, 487 (Tex. App.—Texarkana 1997, pet. denied). We conclude the evidence is legally sufficient to support appellant's convictions for assault of a public servant. We resolve his first two issues against him.

II. Article 38.23(a) Jury Instruction

In his third issue, appellant contends the trial court erred in denying his request for a jury instruction under article 38.23(a) of the code of criminal procedure. Article 38.23(a) states,

> No evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas, or of the Constitution or laws of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case.
>
> In any case where the legal evidence raises an issue hereunder, the jury shall be instructed that if it believes, or has a reasonable doubt, that the evidence was obtained in violation of the provisions of this Article, then and in such event, the jury shall disregard any such evidence so obtained.

A trial court must give an article 38.23(a) instruction to the jury when the evidence raises an issue of disputed fact that is material to the appellant's claim of a constitutional or statutory violation that would render evidence against him inadmissible. *Madden v. State*, 242 S.W.3d 504, 509–10 (Tex. Crim. App. 2007). But when the evidence does not raise a disputed fact issue, the trial court does not err by refusing to give the instruction to the jury. *Id*. at 510. The disputed fact issue must be created by "affirmative evidence." *Id*. at 513.

Appellant contends the evidence presented at trial raised a disputed fact issue regarding whether probable cause existed for the officers to search his car and person based on the smell of marijuana. The court of criminal appeals has held consistently that the smell of marijuana creates probable cause for a police officer to conduct a search. *Luera v. State*, 561 S.W.2d 497, 498 (Tex. Crim. App. 1978); *State v. Ensley*, 976 S.W.2d 272, 275 (Tex. App.—Houston [14th Dist.] 1998, pet. ref'd). Appellant argues Reeves's testimony created a fact issue regarding whether an odor of marijuana was present because he stated he did not smell any. Reeves further testified, however, that he did not think he was ever close enough to appellant's vehicle to be able to detect odors coming out of it. Accordingly, Reeves's testimony did not contradict Carper's testimony that he smelled burnt marijuana when he was next to the open window of appellant's car. Because there was no evidence contradicting Carper's testimony that he smelled marijuana, there was no fact issue for the jury to resolve and the trial court did not err in refusing to give an instruction

under article 38.23(a). *See Madden*, 242 S.W.3d at 510. We resolve appellant's third issue against him.

We affirm the trial court's judgments.

/Amanda L. Reichek/
AMANDA L. REICHEK
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

DAVID EARL SPILLMAN, JR., Appellant	On Appeal from the 196th Judicial District Court, Hunt County, Texas Trial Court Cause No. 31765.
No. 05-19-00530-CR V.	Opinion delivered by Justice Reichek. Justices Myers and Partida-Kipness participating.
THE STATE OF TEXAS, Appellee	

Based on the Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

Judgment entered July 16, 2020

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

DAVID EARL SPILLMAN, JR., Appellant	On Appeal from the 196th Judicial District Court, Hunt County, Texas Trial Court Cause No. 31766.
No. 05-19-00531-CR V.	Opinion delivered by Justice Reichek. Justices Myers and Partida-Kipness participating.
THE STATE OF TEXAS, Appellee	

Based on the Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

Judgment entered July 16, 2020

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

DAVID EARL SPILLMAN, JR., Appellant	On Appeal from the 196th Judicial District Court, Hunt County, Texas Trial Court Cause No. 31767.
No. 05-19-00532-CR V.	Opinion delivered by Justice Reichek. Justices Myers and Partida-Kipness participating.
THE STATE OF TEXAS, Appellee	

Based on the Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

Judgment entered July 16, 2020