No. 14-24-00866-CR

In the
Court of Appeals
for the
Fourteenth District of Texas
at Houston

No. 1829372
In the 179th District Court
Harris County, Texas

ROBERT CRUNK
Appellant
V.
THE STATE OF TEXAS
Appellee

APPELLANT'S BRIEF

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ORAL ARGUMENT IS NOT REQUESTED

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to TEX. R. APP. P. 9.4(g) and TEX. R. APP. P. 39.1, Appellant does not request oral argument in this case.

IDENTIFICATION OF THE PARTIES

Pursuant to TEX. R. APP. P. 38.2(a)(1)(A), a complete list of the names of all interested parties is provided below.

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Trial Judge — Hon. Ana Martinez

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STATEMENT OF THE CASE

Appellant was charged by indictment with the offense of being a felon in possession of a firearm; the felony conviction alleged was Burglary with Intent to Commit Theft in the 209th District Court, Harris County, Texas, in Cause Number 0384318, on September 4, 1985. (CR 25). Appellant pleaded not guilty to the offense and proceeded to trial. (RR9 6-7).

The jury returned a guilty verdict, found the allegation in the enhancement paragraph true, and sentenced Appellant to 8 years confinement in the Institutional Division of the Texas Department of Criminal Justice. (CR 362, 367-68; RR9 236-38; RR10 168). Appellant filed a timely notice of appeal. (CR 373-74).

STATEMENT OF FACTS

In the early hours of July 27, 2023, a motorist was traveling southbound on the Gulf Freeway feeder road and noticed several cars swerving out of the way. (RR9 15-16). As she got closer she observed a man standing in the middle of the street, next to his sedan; it appeared he had been involved in an accident. (RR9 15-16, 20). The motorist called 911 to report the accident. (RR9 15-16; State's Exhibit No. 4).

Soon after, several individuals came upon the accident scene who provided testimony at trial. Jeremy Gordon, a tow truck operator, noted Appellant was agitated and upset when he arrived. (RR9 22-24). It appeared to him that Appellant was involved

in a single-car accident where he hit a median. (RR9 27). Gordon became nervous when Appellant reached for something in his waistband, so he backed away from the scene until law enforcement arrived. (RR9 26-30, 35).

Harris County Sergeant Rosas arrived on the scene and observed the damaged vehicle and Appellant aggressively talking to the wrecker driver. (RR9 47-54). She described Appellant as argumentative and detained him; a pat down of Appellant revealed a revolver in his waistband. (RR9 54-59; State's Exhibit No. 6). Rosas removed the revolver from Appellant's person and waited for HPD to arrive. (RR9 60-62; State's Exhibit No. 24). She noted it appeared to be an antique gun that was loaded. (RR 59-60, 64-66; State's Exhibit No. 26). Rosas also discovered a second black powder cylinder in Appellant's sock. (RR9 64-66; State's Exhibit No. 27).

HPD Officers Bradley and Perales were dispatched to the traffic hazard. (RR9 94-96, 162-63; State's Exhibit No. 7). Bradley conducted a criminal background check and learned that Appellant had a prior felony conviction for burglary with intent to commit theft. (RR9 95-101; State's Exhibit No. 5). He then took possession of the revolver and carried it to his patrol vehicle; when he attempted to clear the gun, the cylinder fell out and multiple .45 caliber cartridges came out. (RR9 102-105, 108; State's Exhibit No. 7).

Bradley gave the revolver to HPD Officer Netro, who logged it into the HPD property room. (RR9 173-74). It is HPD policy to test fire all weapons that are

submitted to the lab. (RR9 140, 170). However, the revolver was not submitted for testing. (RR9 137, 142, 167). And there was no explanation for this error in procedure.

SUMMARY OF THE ARGUMENT

The evidence is legally insufficient to support Appellant's conviction for felon in possession of a firearm. The evidence presented by the State did not satisfy that he possessed a "firearm" under the definition in the Texas Penal Code.

SOLE ISSUE ON APPEAL

THE EVIDENCE IS INSUFFICIENT TO SUPPORT THAT APPELLANT POSSESSED A "FIREARM," AS DEFINED BY THE TEXAS PENAL CODE.

Standard of Review

The standard of review for sufficiency of the evidence is whether any rational trier of fact could have found the appellant guilty beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 315-16 (1979). In reviewing the sufficiency of the evidence to support a conviction, this Court considers the evidence in the light most favorable to the verdict to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Id* at 319; *Stahmann v. State*, 602 S.W.3d 573, 577 (Tex. Crim. App. 2020).

This Court may consider both direct and circumstantial evidence, as well as all reasonable inferences that may be drawn from the evidence. *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007). Circumstantial evidence is as probative as direct evidence in establishing guilt, and circumstantial evidence alone can be sufficient to

establish guilt. *Nisbett v. State*, 552 S.W.3d 244, 262 (Tex. Crim. App. 2018); *Temple v. State*, 390 S.W.3d 341, 359 (Tex. Crim. App. 2013). This Court resolves any evidentiary inconsistencies in favor of the verdict, keeping in mind that the jury is the exclusive judge of the facts, the credibility of the witnesses, and the weight to give their testimony. *Walker v. State*, 594 S.W.3d 330, 335 (Tex. Crim. App. 2020).

The sufficiency of the evidence is measured by the elements of the offense as defined by a hypothetically correct jury charge. *Metcalf v. State*, 597 S.W.3d 847, 856 (Tex. Crim. App. 2020) (*citing Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997)). "The hypothetically correct jury charge 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." *Walker*, 594 S.W.3d at 336.

Unlawful possession of a firearm by a felon

To prove unlawful possession of a firearm by a felon, the State was required to prove the following elements:

> (a) A person who has been convicted of a felony commits an offense if he possesses a firearm:
>
> (1) after conviction and before the fifth anniversary of the person's release from confinement following conviction of the felony or the person's release from supervision under community supervision, parole, or mandatory supervision, whichever date is later; or
>
> (2) after the period described by Subdivision (1), at any location other than the premises at which the person lives.

Texas Penal Code Ann. § 46.04(a). To support the conviction for possession of a firearm, the State must show that Appellant exercised actual care, control, or custody of the firearm, that he was conscious of his connection with it, and that he possessed the firearm knowingly or intentionally. *Hutchins v. State*, 333 S.W.3d 917, 920 (Tex. App.—Texarkana 2011, pet. ref'd); *Bollinger v. State*, 224 S.W.3d 768, 773 (Tex. App.—Eastland 2007, pet. ref'd).

A "firearm" is defined in the Penal Code as any device designed, made, or adapted to expel a projectile through a barrel by using the energy generated by an explosion or burning substance or any device readily convertible to that use. Firearm does not include a firearm that may have, as an integral part, a folding knife blade or other characteristics of weapons made illegal by this chapter and that is:

> (A) an antique or curio firearm manufactured before 1899; or
>
> (B) a replica of an antique or curio firearm manufactured before 1899, but only if the replica does not use rim fire or center fire ammunition.

Tex. Penal Code Ann. § 46.01(3).

The Texas Penal Code provides an exception for certain historical firearms under this statute. And that is the focus of Appellant's appeal. Appellant does not dispute his status as a felon or his possession of the revolver. It was a replica of an antique found on his person. Tex. Penal Code Ann. § 46.01(3)(B). Appellant challenges whether it qualified as a "firearm" under the Texas Penal Code.

The evidence was insufficient to establish the firearm element.

The type of gun that Appellant possessed was the central issue in this case. It was an antique replica of an 1851 Navy revolver, referred to as a muzzle-loader. (RR9 65, 192, 203; State's Exhibit No. 24). The cylinder in the revolver appeared to be converted to hold .45 ammunition and a second black powder cylinder was found in Appellant's sock. (RR9 60-66, 124, 130-31).

During voir dire, the venire was educated on the definition of a firearm under Section 46.01(3). (RRVII 94-100). Review of the record shows numerous potential jurors were perplexed by the definition, especially with regard to antique guns. (RRVII 97-99, 101-103, 105-107). The judge granted 11 challenges for cause because potential jurors were not able to follow the law regarding the definition of a firearm as it pertains to antique guns, almost busting the panel. (approx.. 17% of venire) (RRVII 130-143).

At the scene of the accident, Appellant attempted to explain the antique gun exception to the law enforcement officers who were present. (RR9 72; State's Exhibit Nos. 1, 7, & 8). He even asked them to call the DA's office to clarify the law. (RR9 72-73). Several officers who testified in this case—Rosas, Bradley and Perales—admitted they were not versed in the exceptions to Section 46.01(3). (RR9 73, 117, 134, 137, 153-54, 158, 168).

It seems to be settled law that the State is not required to prove that a firearm is not an antique or curio firearm, or replica thereof. *Jackson v. State*, 575 S.W.2d 567, 569 (Tex. Crim. App. [Panel Op.] 1979); *McIlroy v. State*, 188 S.W.3d 789, 798 (Tex. App.—

Fort Worth 2006, no pet.); *Cantu v. State*, 802 S.W.2d 1, 2 (Tex. App.—San Antonio 1990, pet. ref'd). Although one appellate court has called that principle into question. *Freeman v. State*, 2002 WL 31312010, *2 (Tex. App.—Dallas Oct. 16, 2002, no pet.) (not designated for publication) (assuming without deciding that the State had the burden to establish the Section 46.01(3) exclusionary language in the statute). Assuming Appellant has the burden of proving the revolver was an antique replica as defined in the Penal Code, he has met that burden. *McIlroy,* 188 S.W.3d at 798; *Cantu*, 802 S.W.2d at 2.

Officer Rosas initially confiscated the revolver from Appellant's waist and the black powder cylinder from his left sock. (RR9 60-66). She explained to the jury that a cylinder is a round like barrel object that goes in the gun and is where you put the projectiles in. (RR9 62-63). As they revolve and the weapon is shot, the cylinder rotates to the next round; thus, giving the weapon the name revolver. (RR9 76). Rosas told the jury that the firing pin was an important component, because it strikes the cartridge, sending it down the barrel to fire. (RR9 77-78). Rosas could not say whether the revolver had a firing pin, and she was unaware if the revolver would fire. (RR9 80-84).

It was the opinion of Sgt. Bradley that because Appellant traded out the cylinder in the revolver, it then became a "firearm" within the meaning of the penal code. (RR9 104-106). He also testified the revolver did not have a firing pin, but it was a firearm regardless of functionality. (RR9 111, 114, 121-22). Officer Amato testified the revolver with the cylinder as carried by Appellant did not have a firing pin and would not be able to fire. (RR9 195). Bradley was unaware if the revolver could fire, re-iterating he was

not a firearms expert. (RR9 153-55). Perales was similarly unaware. (RR9 170). Bradley was unable to say whether the cartridges were centerfire or rimfire, but Rosas, who claimed she "sorta" knew the law, testified they were centerfire.[1] (RR9 73, 81, 141).

It is generally not necessary under Texas law for the firearm to be operable at the time of arrest for the felon in possession offense. *See Hutchins*, 333 S.W.3d at 922*; Bollinger*, 224 S.W.3d at 775–76; *Lewis v. State*, 852 S.W.2d 667, 669 (Tex. App.—Houston [14th Dist.] 1993, no pet.). However, this case presents a more critical inquiry, as the subsection of this statute requires the *use* of rimfire or centerfire ammunition. Tex. Penal Code Ann. § 46.01(3)(B). It was HPD policy for all weapons to be tested and it was not done in this case. (RR9 183). The failure to do so was significant as the there was no firing pin in the revolver and the evidence regarding centerfire or rimfire was confusing and weak. This is more vital in an antique firearms analysis because an element regarding the replica firearm requires a jury finding with regard to the *use* of rimfire or centerfire ammunition. (CR 354). Tex. Penal Code Ann. § 46.01(3).

In fact, Officer Netro testified that in order for centerfire or rimfire ammunition to be *used*, the revolver has to have a firing pin. (RR9 180). Officer Amato similarly testified the revolver was not manufactured or designed to fire rimfire or centerfire

[1] The difference in the two is where the primer (the explosive component) is located. Rimfire refers to a type of firearm cartridge where the primer is located within the rim of the cartridge casing and is ignited by striking the rim. In contrast, centerfire cartridges have the primer located in the center of the base of the casing, which is then struck by the firing pin. *See* Vincent Di Maio, Firearms Law – What Every Texas Lawyer Needs to Know, 2019 TXCLE-FL 9-VI Rimfire v. Centerfire Cartridges, State Bar of Texas 8th Annual (2019).

ammunition, and that in order for it to *use* the modified conversion cylinder, it had to have the firing pin attached to it. (RR9 195, 198). Amato added that the only way to know for sure if the revolver could *use* rimfire or centerfire ammunition would be to test fire it at the lab. (RR9 209-10).

The jury's confusion about this issue is well-documented in the record. The jury sent out a note asking whether the revolver has to fire or work to be considered a firearm. (CR 353; RR9 233-34). The judge referred them to the jury charge. (CR 353; RR9 233-34). The jury then asked to see the revolver and the cartridges. (CR 355; RR9 234). The trial court ordered the deputy to present to the jury State's Exhibit 24, and allowed them to pass the revolver around. (RR9 235). In response to a juror's further question about the revolver, the judge instructed they could only observe the exhibit and then continue their deliberations. (RR9 235).

Here, the evidence presented shows the antique replica at issue fell within the statutory exception of Section 46.01(3)(B). Without a firing pin or testing of the revolver, the jury could not have concluded it used rimfire or centerfire ammunition, and thus was a firearm under the definition in the Texas Penal Code. *See* Tex. Penal Code Ann. § 46.01(3)(B) ("firearm" does not include "a replica of an antique or curio firearm manufactured before 1899, but only if the replica does not use rim fire or center fire ammunition").

Therefore, the evidence is legally insufficient to support Appellant's conviction. *See Lovett v. State*, 523 S.W.3d 342, 346 (Tex. App.—Fort Worth 2017, pet. ref'd) (acknowledging an antique gun, a Colt 1851 Navy .44 caliber, was not a "firearm" under Section 46.01(3)(B), but could be classified as a deadly weapon under a different statute).

CONCLUSION

It is respectfully submitted that there is reversible error to justify appellant's conviction be overturned.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In accordance with the Texas Rules of Appellate Procedure, I hereby certify that appellant's brief, filed on April 7, 2025, has 3,204 words based upon a word count under MS Word.

/S/ JESSICA AKINS
Jessica Akins

CERTIFICATE OF SERVICE

Appellant has transmitted a copy of the foregoing instrument on April 7, 2025 to counsel for the State of Texas via electronic mail at:

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