

NO. 14-24-00102-CR

**IN THE COURT OF APPEALS
FOR THE
FOURTEENTH DISTRICT OF TEXAS
HOUSTON, TEXAS**

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TONNERRIOUS MCGEE, APPELLANT

VS.

THE STATE OF TEXAS, APPELLEE

BRIEF FOR THE APPELLANT

**TRIAL COURT CAUSE NUMBER 23CR0270
IN THE 122ND DISTRICT COURT OF
GALVESTON COUNTY, TEXAS**

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ORAL ARGUMENT WAIVED

LIST OF PARTIES

Presiding Judge	Honorable John Ellisor
Appellant	Tonnerrious McGee
Appellee	The State of Texas
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TONNERRIOUS MCGEE, Appellant

v.

THE STATE OF TEXAS, Appellee

Appealed from the 122ND District Court
of Galveston County, Texas
Cause No. 23CR0270

BRIEF FOR APPELLANT

TO THE HONORABLE COURT OF APPEALS:

Now comes Tonnerrious McGee, by and through his attorney of record Joel H. Bennett, of Sears, Bennett, & Gerdes, LLP, and files this brief.

STATEMENT OF THE CASE

Appellant was charged by indictment with Evading

Arrest/Detention in a Vehicle C.R.-6. Appellant pled not guilty to the charge and a trial by jury began on January 9, 2024. CR-67; RR2-5-6. After hearing the evidence and argument of counsel, the jury found Appellant "guilty" as alleged in the indictment. RR3-152, CR-80. Appellant elected to have the trial court assess punishment. CR-65. After hearing evidence and argument of counsel on the issue of punishment, the trial court sentenced Appellant to three (3) years in the Texas Department of Criminal Justice-Institutional Division, but probated the sentence and place Appellant on three (3) years of community supervision. RR4-38. Judgment and Sentence was entered and signed on January 11, 2024, as well as the Trial Court's Certification of Defendant's Right to Appeal. CR-81-87, 88. Notice of Appeal was timely filed on the same day. CR-92.

APPELLANT'S SOLE ISSUE

**THE EVIDENCE PRESENTED IN THE CASE IS
LEGALLY INSUFFICIENT TO SUPPORT THE
CONVICTION.**

STATEMENT OF FACTS

The State's sole witness during its case in chief was Samantha Alexander. RR3-15. She is a patrol

officer for the Friendswood Police Department; she is a certified peace officer. RR3-15. On January 16, 2023, she was patrolling in the Galveston County portion of Friendswood, Texas checking for speeders. RR3-16-17. About 6:25 pm, she noticed a gray Charger and estimated that the vehicle was traveling over the 30 miles an hour speed limit. RR3-17. She turned on her radar and clocked the vehicle at 43 miles an hour. RR3-17. Officer Alexander turned around and then caught up to the vehicle; once she caught up to the vehicle, she activated her emergency lights to make the traffic stop. RR3-18.

The driver immediately hit the brakes and changed over to the right lane from the left lane. RR3-18. The driver stopped in the middle of the roadway and she instructed the driver to pull into the parking lot, a Shell gas station. RR3-18-19. It was dark outside but there were lights on at the gas station. RR3-19.

When Officer Alexander makes a traffic stop, she inputs into her computer her location and the license plate information of the stopped vehicle. RR3-19. Officer Alexander testified that license plate of the

vehicle she pulled over was "Paul, Charles, Tom 4552" (PCT 4552). RR3-20. She got out of her patrol car and approached the vehicle from the driver's side. RR3-20. The driver's window was down about four (4) inches and the back windows had very dark tint. RR3-21. She asked the driver to roll down the back window for officer safety. RR3-21. The driver did not roll down the window. RR3-21. After repeatedly asking the driver to roll down the window, the driver turned on the overhead light. RR3-21. She could see the outline of a car seat but she was unable to tell if a child was in the vehicle. RR3-21.

She then approached the driver's window and explained the reason for the traffic stop. RR3-21. She asked for the driver's license and insurance. RR3-21. The driver did not produce either; the driver was mumbling and she was unable to hear him. RR3-21-22. She also asked the driver for anything with his name on it, a credit card, if he was the owner of the vehicle, or any kind of identification; she then asked him to spell his name. RR3-22.

She positioned herself next to the driver's side

mirror to see anybody in the front of the vehicle. RR3-23. She testified she got a good look at the person driving the vehicle. RR3-23. She leaned in closer to try to hear him, but still could not; but she could see him clearly. RR3-23.

Officer Alexander was in her police uniform at the time of the stop. RR3-23. Her patrol car has Friendswood Police down the side of it; it also has overhead lights and lights on the side and the back. RR3-23-24. She had detained the person driving the vehicle. RR3-24. Since she was unable to communicate with the driver and the person's behavior was unusual, she called for a second unit. RR3-24. Shortly after asking for the second unit, the driver of the vehicle tilted his head down, looked up through his eyebrows, smiled, and then aggressively pulled away. RR3-24.

State's Ex. # 1 is a copy of Officer Alexander's body camera video. RR3-26. Officer Alexander testified that she got a good look at the person driving the vehicle. RR3-27-28. The State asked the officer if she gave a description of the driver as a white shirt, the type of shorts, Black male, and child in the back of the

car and Officer Alexander agreed. RR3-28. In the video admitted as State's Ex. # 1, Officer Alexander gets on the radio and describes the driver as a Black male, red shirt, basketball shorts, and she believed there was a child in the backseat. State Ex. # 1 at 5:30. Her supervisor told her to terminate the pursuit due to the danger posed to the child possibly getting injured. RR3-28.

Officer Alexander pulled to the side of the road and immediately researched the owner of the vehicle. RR3-28. She was able to obtain a driver's license photo of the registered owner. RR3-28. Once she pulled up the driver's license of the registered owner, the photo matched the person that was driving the vehicle. RR3-29. She looked at it immediately after the traffic stop. RR3-29. In court, Officer Alexander identified Appellant as the driver of the vehicle. RR3-29.

During cross-examination, Officer Alexander testified that she did not feel there were any issues with the initial detention/stop by the driver of the vehicle. RR3-39. When she walked up to the vehicle, she was unable to see into the backseat of the vehicle due

to the tint. RR3-39. She saw an infant seat in the back of the vehicle. RR3-40. She documented in her report that there was a high likelihood that there was a child in the seat. RR3-40. She assumed there was, but she did not see a child. RR3-40.

At some point the person in the vehicle turned on the overhead light in the vehicle; the driver's window was down about 4 inches. RR3-43. The back seat windows were heavily tinted but the front windows were not. RR3-44. She could see through the driver's window. RR3-44. She described the clothing the driver was wearing as red shirt and basketball shorts. RR3-45. She does not believe that the driver was wearing glasses. RR3-46. When asked if she was making an assumption, she testified that it was in January and she did not remember that far back. RR3-46. She did not write in her report that the driver was wearing glasses. RR3-47.

Officer Alexander testified that she used the driver's license photo of the registered owner of the vehicle to identify the driver. RR3-47. She testified that she believes, but could be wrong, that he was not wearing glasses in his driver's license photo. RR3-47.

Appellant testified he was arrested on January 17, 2023 as he was leaving his apartment. RR3-61. He had not done anything to be arrested. RR3-62. After he was told that he was arrested for evading arrest, he was shocked because he had not done anything like that. RR3-64-65.

Appellant denied he was the driver in the video (State's Ex. # 1). RR3-65. Appellant testified that multiple people had access and keys to his vehicle. RR3-66. He said that multiple people, including a law enforcement agency, could have been driving the vehicle. RR3-66. On June 9, 2022, there was an accident in Pearland he was involved in and his vehicle was towed by law enforcement. RR3-67-68. He denied evading on the day of that accident, but he was accused of it. RR3-68. That case is still pending in Brazoria County. RR3-68.

In that case, Appellant was stopped at an intersection. RR3-68. Appellant testified that the police used emergency equipment on his vehicle to disable the driver's operation of the vehicle; he lost all control of the driving, braking, and the vehicle rolled into a minivan. RR3-68. He was driving the same car that appears in the video (State's Ex. # 1). RR3-

69. Appellant denied driving the car at the time of the video. RR3-68-69. Appellant denied he was being chased by the Pearland Police Department when they disabled his vehicle, which caused the accident. RR3-69-70. After the accident, the vehicle was impounded and the keys to the vehicle were never recovered. RR3-70-71.

In January 2023, several other people had additional keys to his vehicle, including family members and his domestic partner. RR3-71-72. When his vehicle was being driven in the video, other people had access to his vehicle. RR3-73. He used to allow others to use his vehicle. RR3-73. He does not know who was using his vehicle on January 16, 2023, but it was not him. RR3-73-74. Appellant has other vehicles he uses. RR3-75-76. After this case, no one else has access to his vehicles. RR3-76.

Appellant testified that he has to wear glasses when he drives due to his bad vision. RR3-85-86. He always wears his glasses when he drives. RR3-87. Appellant admits that the vehicle in the video (State's Ex. # 1) is his vehicle. RR3-94.

During rebuttal evidence, the State called Sgt.

Brian Whitley of the Pearland Police Department. RR3-105. He testified that Appellant evaded an attempted traffic stop. RR3-105-107. The vehicle sped off at a high rate of speed and crashed out about a mile away. RR3-107-108. Appellant was identified as the driver of the vehicle. RR3-108-109.

SUMMARY OF ARGUMENT

The evidence is legally insufficient to support the conviction that Appellant is the person who evaded arrest in a vehicle. Appellant was not arrested at the time of the incident and the officer's testimony was insufficiently reliable or accurate to sustain Appellant's conviction.

ARGUMENT AND AUTHORITIES

The evidence in this case fails to meet the standard of legally sufficient evidence. The observations of the officer were sufficiently inconsistent and inaccurate to positively identify the driver of the vehicle.

"To determine whether evidence is sufficient to support a conviction, a reviewing court views all the evidence in the light most favorable to the verdict to decide whether any rational trier of fact could have

found the essential elements of the offense beyond a reasonable doubt. See Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); Brooks v. State, 323 S.W.3d 893, 895 (Tex. Crim. App. 2010). This requires the reviewing court to defer to the jury's credibility and weight determinations because the jury is the 'sole judge' of witnesses' credibility and the weight to be given testimony. Jackson, 443 U.S. at 319; Brooks, 323 S.W.3d at 899." Garcia v. State, 367 S.W.3d 683, 686 (Tex. Crim. App. 2012).

The Fourteenth Court of Appeals described the proper legal analysis in reviewing a conviction for the sufficiency of the evidence in Lashly v. State, 401 S.W.3d 738, 742-743 (Tex. App.-Houston [14TH Dist.] 2013, no pet.). The Court wrote:

"The legal-sufficiency standard is the only standard a reviewing court should apply in determining whether the evidence is sufficient to support a guilty verdict. Brooks v. State, 323 S.W.3d 893, 912 (Tex. Crim. App. 2010). The critical inquiry is, in viewing the evidence in the light most favorable to the prosecution after a

verdict of guilt, whether any rational jury could have found the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed2d 560 (1979); Brooks, 323 S.W.3d at 912...

"Each fact does not need to directly and independently point to the guilt of the appellant as long as the cumulative force of all the incriminating circumstances is ultimately sufficient to support the conviction. Hooper v. State, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007). Circumstantial evidence is equally as probative as direct evidence in establishing guilt, and circumstantial evidence alone can be sufficient to support a conviction. *Id.*

"When performing a legal sufficiency review, courts may not reevaluate the weight and credibility of the evidence and substitute their own judgment for that of the jury. Montgomery v. State, 369 S.W.3d 188, 192 (Tex. Crim. App. 2012); see also Isassi v. State, 330 S.W.3d 633, 638 (Tex. Crim. App. 2010) ("[O]ur role is not to become a

thirteenth juror."). When faced with a record supporting contradictory inferences, we presume the jury resolved conflicts in favor of the verdict. Montgomery, 369 S.W.3d at 192."

Lashly v. State, 401 S.W.3d at 742-743.

In this case, the only contested issue at trial was the identity of the driver. The officer's body camera demonstrates that the driver of the vehicle had stopped a vehicle at a Shell gas station. State Ex. # 1 at 2:40. During the officer's involvement with the driver/vehicle, the vehicle pulls off, squealing the tires. State's Ex. # 1 at 5:05. After the car pulls away, the officer tells dispatch that she has "one taking off on me". State's Ex. # 1 at 5:07.

As Officer Alexander approached the vehicle after the initial stop, the license plate of is visible from her body camera video; the license plate was PTC 4551. State Ex # 1 at 2:40 into the video. This is not the license plate she testified to that she input into her computer. The license plate she put into her computer was PCT 4552. Officer Alexander transposed the 2nd and 3rd letters and misidentified the last number.

Officer Alexander testified that she never identified the driver of the vehicle prior to the vehicle pulling off. She started to pursue the vehicle but was instructed by her supervisor to discontinue the chase due to the potential child passenger in the back seat of the vehicle. After she discontinued the pursuit, she immediately began researching the owner of the vehicle. She pulled up the driver's license photo of the license plate she documented. She used that photo to identify Appellant as the person she saw in the vehicle.

It is undisputed that Officer Alexander's testimony proved she incorrectly documented the license plate of the vehicle she stopped. She documented the wrong license plate. Based upon this faulty information, the owner of the vehicle she looked up would not have been Appellant. The vehicle information she testified that she used was PCT 4552. The correct vehicle information was PTC 4551. Therefore, her identification of Appellant has to been incorrect because she used the wrong license plate.

The entirety of the investigation into the identity driver of the vehicle was Officer Alexander pulling up a

photograph of the owner of the wrong vehicle. Officer Alexander did identify Appellant in the courtroom. At the time of her courtroom identification, there were two female prosecutors and a male defense attorney that Officer Alexander had meet outside the courtroom prior to her testimony, and Appellant. There was only one possible person to identify.

Additionally, Officer Alexander testified during direct examination that the driver of the vehicle was wearing a white shirt. In the video and during cross examination, she stated that the driver was wearing a red shirt. She also admitted that she could not remember if the driver of the vehicle did or did not have glasses on.

There was only one witness to the evading event, Officer Alexander. This witness incorrectly documented the license plate of the vehicle involved. She also admitted during her testimony that the case was a long time ago and she did not remember specific issues. She was unable to correctly document/recollect the correct license plate and she further testified incorrectly about the clothing worn by the driver. She based her

identification of Appellant on the driver's license photograph of the owner of the wrong vehicle. This is clearly not reliable evidence.

In reviewing the sufficiency of the evidence, the standard is whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. Laster v. State, 275 S.W.3d 512, 517 (Tex. Crim. App. 2009). The evidence is viewed in the light most favorable to the verdict and assume the trier of fact resolved conflicts in the testimony, weighed the evidence, and drew reasonable inferences in a manner that supports the verdict. Hooper v. State, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007).

The facts of this case cannot meet this standard as no rational juror could believe the evidence beyond a reasonable doubt. The officer incorrectly identified the license plate of the vehicle she stopped. She then looked up the owner of the wrong vehicle and claimed that the photo matched Appellant. This evidence defies logic and is not a rational conclusion. No rational jury could have found the facts of this case support a guilty verdict beyond a reasonable doubt.

For all the foregoing reasons, Appellant's Sole Issue should be sustained, the case be reversed, and the case rendered.

CONCLUSION AND PRAYER

WHEREFORE, PREMISES CONSIDERED, the Appellant, Tonnerrious McGee, prays that the Judgment of the Trial Court be reversed and rendered, as the evidence was legally insufficient to sustain the conviction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that Appellant's Brief has been served upon the Galveston County Criminal District Attorney's Office on this the 12th day of September, 2024 by email to heather.gruben@co.galveston.tx.us.

/s/ Joel H. Bennett

Joel H. Bennett

Certificate of Compliance

In compliance with TRAP 9.4(i), I certify that the word count in this reply brief is approximately 3297 words.

/s/ Joel H. Bennett
Joel H. Bennett