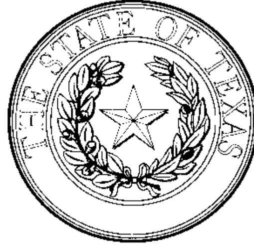
Opinion Issued April 22, 2010



In The

Court of Appeals

For The

First District of Texas

No. 01-08-00768-CR

No. 01-08-00769-CR

WILLIAM ALBERT MURPHY, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 185th District Court
Harris County, Texas
Trial Court Case Nos. 1138167 and 1138168

MEMORANDUM OPINION

Appellant, William Albert Murphy, appeals a judgment convicting him for the third-degree felony offenses of evading arrest in a motor vehicle and failure to stop and render assistance.[1] *See* TEX. PENAL CODE § 38.04(a), (b)(2)(B) (Vernon Supp. 2009); TEX. TRANSP. CODE §§ 550.021(c)(2) (Vernon Supp. 2009), 550.023 (Vernon 1999). Appellant pleaded not guilty to both offenses. A jury found appellant guilty for both offenses, made affirmative deadly weapon findings for both offenses, found the enhancement paragraphs true for both offenses, and assessed his punishment at 29 years in prison for each offense. In eight issues, appellant contends (1) he was improperly classified as a habitual offender for the failure to stop and render assistance offense, (2) the evidence was legally insufficient to sustain either the evading arrest or the failure to stop and render assistance conviction, (3) the evidence was factually insufficient to sustain either the evading arrest or the failure to stop and render assistance conviction, (4) the State violated the constitutional protection against double jeopardy, (5) the evidence was legally insufficient to support a deadly weapon finding for both causes, (6) the evidence was factually insufficient to support a deadly weapon finding for both causes, (7) the trial court erred by first discussing the facts of the

[1] The evading arrest offense was trial court number 1138168 and is appellate number 01-08-0769-CR. The failure to stop and render assistance offense was trial court number 1138167 and is appellate number 01-08-0768-CR.

case during voir dire and then by denying a mistrial, and (8) the identification procedure was unduly suggestive and all subsequent identifications should have been excluded. We conclude that (1) appellant was properly classified as a habitual offender, (2) the evidence was legally sufficient to sustain his conviction for both causes, (3) the evidence was factually sufficient to sustain his conviction for both causes, (4) the State did not violate the constitutional protection against double jeopardy, (5) the evidence was legally sufficient to support a deadly weapon finding only in the evading arrest offense, (6) the evidence was factually sufficient to support a deadly weapon finding only in the evading arrest offense, (7) appellant did not adequately brief the issue regarding mistrial, and (8) appellant failed to preserve error regarding the identification procedure.

We modify the judgment to remove the deadly weapon finding in the failure to render assistance conviction, and, as modified, affirm both convictions.

Background

One night in October 2007, Joe Morales heard a car alarm in the parking lot of the funeral home where he worked and lived. When he walked outside appellant approached him and began yelling. Morales returned to the funeral home to call the police, and during his emergency phone call, he heard appellant start one of the funeral home's work vans. Morales ran back outside in time to see appellant drive the van through the gates of the funeral home. When officers arrived in

response to the theft, Morales described appellant and his clothes, noting that he had a light beard and short hair. Morales testified that he saw appellant from approximately eight feet away in a well-lit parking lot for nearly 20 seconds.

Approximately 20 hours after the van was stolen, Officer Aaron King, who was in a marked patrol car, saw the van. He ran the plates and discovered the van was reported stolen. He then radioed for backup. When Officer King activated his lights and siren, appellant refused to pull the van over and instead fled at a "high rate of speed." Appellant ran stop lights and drove the wrong way down one-way streets in both commercial and residential areas at speeds of up to 60 miles per hour. Other officers joined in the pursuit; however, appellant drove the van so erratically that the officers scaled down the pursuit and tried to redirect traffic.

Officer Peters was involved in the police chase by helping redirect traffic at an intersection near the chase. Officer Peters saw the van come through the intersection and crash directly into a Pontiac carrying four passengers. He testified, "It was a horrific accident . . . just like a train hit it and the van the [appellant] was driving came almost completely off the ground at the force of the impact, T-boned [the Pontiac, and] pushed it all the way across the intersection into a light pole." Officer Peters testified that he then saw appellant "jump out of the . . . van, [and] take off running." When appellant exited the van, he turned around, made eye contact with Officer Peters, and then fled the scene of the accident. As

Officer Peters began to pursue appellant, he looked into the van to ensure no one else was inside. He testified that “there was nobody in the van.”

Other people also witnessed the collision. John Sanchez had just picked up his younger brother, Isaias Sanchez, when they both saw the van collide with the Pontiac at the intersection. They testified they saw both the van and the Pontiac go “airborne” and land about 20 feet from the point of impact. They both testified that as they rushed to the Pontiac to help, they saw appellant jump out of the van and run from the scene.

Although Officer Peters began the pursuit of appellant, it was Officer King who apprehended him. Officer King began pursuing appellant after he exited the van and ran from it. Officer King pursued appellant, apprehended him, and returned him to the accident scene in a patrol car within 30 minutes of the collision.

When Officer King and appellant arrived at the accident scene, Officer King removed appellant from the patrol car to see if witnesses could confirm whether this was the same man they saw flee the van. The officers collectively shined light on appellant and allowed witnesses to view him one at a time from across the street at a distance of approximately 15 feet. The officers did not tell the witnesses that they needed to identify the man but they did ask them if they had seen the man

before. John and Isaias each identified appellant as the man they had just seen run from the van.

Because the funeral home was only four miles from the scene of the accident, the police asked Morales to come to the scene to see if appellant was the man who had taken the van the night before. When Morales arrived, he told the officers he "recognized [appellant] because of his facial features and his size and stature" and noted that appellant was wearing the same clothes that he had worn when he confronted Morales the night before at the funeral home.

At trial, Morales again identified appellant as the man who took the van from the funeral home. Morales noted that appellant had "longer hair" and had "gained some weight" since the night he first identified him, but he explained that appellant had a face Morales "couldn't forget." Morales also told the jury that appellant was alone when he took the van from the funeral home and that he would not have identified appellant if "he had not been the man who took the van."

Officer Peters identified appellant in court as the man who "jump[ed] out of the . . . van [and took] off running." He reiterated that no one else was in the van when he checked it just moments after the collision. He testified about the conditions of the Pontiac's passengers, and noted that he believed appellant used the van as a deadly weapon.

Officer King also identified appellant at trial. He testified that a motor vehicle can be a deadly weapon and that he believed appellant used the van as a deadly weapon. Officer King further testified that appellant appeared different at trial than at the time of his arrest. He noted, however, that appellant was the man in the photograph labeled as State Exhibit 26. Officer King testified that the severity of the damage to the Pontiac would make it obvious that its occupants needed medical attention.

John and Isaias each testified they saw the van collide with the Pontiac. Although they could not identify appellant in court, they both testified that State Exhibit 26, the photograph of appellant near the time of his arrest, was the same man they saw flee the van after the accident. John and Isaias both noted that they clearly saw appellant's face when he exited the van, that the area where they saw appellant exit the van was well-lit, and that appellant was the only person that exited the van.

Finally, the passengers of the Pontiac testified. Geoffrey Stephens testified that he was the driver of the Pontiac when the collision occurred. He testified that the collision left him in a coma for four weeks, that every bone in his face and every rib on his left side was crushed, that his lungs were punctured, and that his "brain [leaked] fluid." He testified that since the accident, he has suffered significant memory loss, his spleen has been removed, and 13 titanium plates and

screws have been put in his head. Derek Brown, the front passenger in the Pontiac, testified that as a result of the collision, he suffered from "a cracked skull . . . three [broken] ribs . . . [three] cracked vertebrae . . . [and] neurological problems." Brown testified that he lost sensation in the left side of his face and some of his hearing.

Legal and Factual Sufficiency

In four issues, appellant challenges the sufficiency of the evidence. In his second and third issues, appellant challenges the legal and factual sufficiency of his two convictions for evading arrest and failure to stop and render assistance. In his fifth and sixth issues, appellant challenges the legal and factual sufficiency of the deadly weapon finding.

A. Law Pertaining to Legal Sufficiency

In a legal sufficiency review, we consider the entire trial record to determine whether, viewing the evidence in the light most favorable to the verdict, a rational jury could have found the accused guilty of all essential elements of the offense beyond a reasonable doubt. *See Jackson v. Va.*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979); *Williams v. State*, 235 S.W.3d 742, 750 (Tex. Crim. App. 2007). We "may not re-evaluate the weight and credibility of the record evidence and thereby substitute our judgment for that of the [factfinder]." *Williams*, 235 S.W.3d at 750. We give deference to the responsibility of the factfinder to fairly resolve conflicts

in testimony, to weigh evidence, and to draw reasonable inferences from the facts. *Id.*

B. Law Pertaining to Factual Sufficiency

We begin our factual sufficiency review with the assumption that the evidence is legally sufficient. *Laster v. State*, 275 S.W.3d 512, 518 (Tex. Crim. App. 2009). Evidence that is legally sufficient, however, can be deemed factually insufficient if (1) the evidence supporting the conviction is "too weak" to support the factfinder's verdict or (2) considering conflicting evidence, the factfinder's verdict is "against the great weight and preponderance of the evidence." *Id.* We consider all of the evidence in a neutral light, as opposed to in a light most favorable to the verdict. *Id.*

In reviewing the factual sufficiency of the evidence, we should afford almost complete deference to a jury's decision when that decision is based upon an evaluation of credibility. *Lancon v. State*, 253 S.W.3d 699, 705 (Tex. Crim. App. 2008). The jury is in the best position to judge the credibility of a witness because it is present to hear the testimony, as opposed to an appellate court who relies on the cold record. *Id.* The jury may choose to believe some testimony and disbelieve other testimony. *Id.* at 707.

C. Evading Arrest

Appellant contends that the evidence at trial was legally and factually insufficient to support the evading arrest conviction because the evidence failed to prove that appellant, rather than another person, committed the crime. Specifically, appellant only challenges the sufficiency of the evidence that he was the driver of the van that evaded the police. Appellant contends no one identified him as the driver and that no forensic evidence, inculpatory statements, or videotape connects him to the van. Appellant also asserts that at least one of the identifying witnesses said he lost sight of the driver, two of the witnesses could not identify him in court, and the owner of the van was unduly influenced by appellant's presence near the accident scene.

1. Applicable Law

Appellant was specifically charged with evading arrest using a vehicle, a third-degree felony. *See* TEX. PENAL CODE ANN. § 38.04(a), (b)(2)(A). To convict him of the charged offense, the State had to prove that appellant, while using a vehicle, intentionally fled from a person he knew to be a peace officer attempting lawfully to arrest or detain him. *See id.* A person commits a crime under section 38.04 if he knows a police officer is attempting to arrest him but nevertheless refuses to yield to a show of authority. *See Brooks v. State*, 76 S.W.3d 426, 434 (Tex. App.—Houston [14th Dist.] 2002, no pet.); *see also Hobyl v. State*, 152

S.W.3d 624, 627 (Tex. App.—Houston [1st Dist.] 2004) ("[T]he accused must know that the person from whom he flees is a peace officer attempting to arrest or detain him.") (emphasis removed), *pet. dism'd, improvidently granted*, 193 S.W.3d 903 (Tex. Crim. App. 2006).

"Identification of the defendant as the person who committed the offense charged is part of the State's burden of proof beyond a reasonable doubt." *Wiggins v. State*, 255 S.W.3d 766, 771 (Tex. App.—Texarkana 2008, no pet.) (citing *Miller v. State*, 667 S.W.2d 773, 775 (Tex. Crim. App. 1984)). "When a defendant contests the identity element of the offense, we are mindful that identity may be proven by direct evidence, circumstantial evidence, or even inferences." *Id.* "The test for sufficiency of an in-court identification is whether we can conclude 'from a totality of the circumstances the jury was adequately apprised that the witnesses were referring to appellant.'" *Id.* "The use of a photographic representation of a person's image has historically been sufficient to identify the person." *Id.* (citing *Flowers v. State*, 220 S.W.3d 919, 925 (Tex. Crim. App. 2007)) (trial court could use picture to compare to person standing before him); *Littles v. State*, 726 S.W.2d 26, 32 (Tex. Crim. App. 1987) ("it has long been an accepted practice to identify the accused by means of a photograph"). "[T]he absence of an in-court identification is merely a factor for the jury to consider in assessing the weight and credibility of the witnesses' testimony." *Id.* Moreover, the testimony of one

eyewitness may be sufficient to prove the State's case. *See Davis v. State*, 177 S.W.3d 355, 359 (Tex. App.—Houston [1st Dist.] 2005, no pet.) ("It is well established that a conviction may be based on the testimony of a single eyewitness.") (citing *Aguilar v. State*, 468 S.W.2d 75, 77 (Tex. Crim. App. 1971)); *Harmon v. State*, 167 S.W.3d 610, 614 (Tex. App.—Houston [14th Dist.] 2005, pet. ref'd) (holding witness's testimony identifying defendant is sufficient, standing alone, to support conviction).

2. Analysis

From the evidence produced at trial, we hold a rational jury could find, beyond a reasonable doubt, that appellant was the driver of the van. Officer King testified that he concluded appellant was driving the van based upon the statements of five witnesses and upon the statements of Officer Peters. Officer King testified that after the accident, appellant told him a "white guy" was driving the van. However, Officer King further testified that he did not find another person at the scene or in the van who matched the description provided by appellant.

Officer Peters testified that he was involved in the police chase of the van, that he had his "lights and sirens on," and that after the van collided with the Pontiac he saw appellant jump "out of the van, [and] take off running." He further testified that he "got a good look" at appellant and that the man that exited the vehicle "looked like the man sitting [in the court room, except] a little skinnier."

He then pointed at appellant to confirm that appellant was the man he saw exit the vehicle. Officer Peters further stated that as appellant left the van, “[h]e turned around and looked at me, we made eye contact and he saw that I was getting out of my vehicle and he ran from me.” The officer testified that when appellant looked at him “there was adequate lighting at the intersection,” they were approximately “40 feet” apart, and that he clearly saw appellant’s face and clothing. Finally, Officer Peters noted that he “did not see anybody else get out of the van,” and that “as [he] began his foot pursuit, as [he] approached and got alongside the van, [he] made a point to look in the van, [and] ma[de] sure there was no other possible subjects in the van.” He confirmed that “[t]here was nobody in the van.”

John testified that after the collision, he saw one person, appellant, get out of the van and run away from it. When appellant exited the van, he was approximately eight feet from John. After appellant was apprehended, John identified him as the man he saw exit the van. John knew appellant was the same man who exited the vehicle because he recognized appellant’s face and build. John testified that appellant was also wearing the same clothing as the man who exited the vehicle. John again identified appellant’s picture in court and testified that, as appellant appeared in the picture, it was the same man who exited the vehicle after the police chase and collision.

Isaias offered similar testimony and noted that he saw only one person exit the van and that appellant was the person who exited the van and subsequently fled the scene of the collision. He testified that he saw appellant exit the van and was able to later identify appellant because his clothing and facial hair were the same as the man who exited the vehicle after the collision.

Even if we excluded the subsequent identification by Morales, the owner of the van, whose identification appellant says was prejudiced by appellant's presence near the accident scene, three witnesses identified appellant as the person who exited the van after the collision. *See Davis*, 177 S.W.3d at 359 (stating "conviction may be based on the testimony of a single eyewitness"). Furthermore, these witnesses testified that no one else was in the vehicle with him. Viewing the evidence in a light favorable to the jury's verdict, the evidence shows that a jury could reasonably find beyond a reasonable doubt that appellant was the driver of the van. We hold the evidence is legally sufficient to prove appellant's guilt of evading arrest. *See Rogers v. State*, 832 S.W.2d 442, 444 (Tex. App.—Austin 1992, no pet.) (holding circumstantial evidence presented at trial sufficient to support evading arrest conviction).

Giving due deference to the jury's weighing of the evidence, a neutral examination of the evidence shows that the evidence is not so weak that the jury's finding appellant guilty of evading arrest is clearly wrong or manifestly unjust, and

that the determination of guilt is not against the great weight and preponderance of the evidence. We hold the evidence is factually sufficient to prove appellant's guilt for evading arrest. *See id.*

D. Failure to Stop and Render Assistance

Appellant contends the evidence is legally insufficient to show he failed to stop and render assistance by asserting the same identification challenge raised in the evading arrest, as well as assertions specific to this offense.

1. Applicable Law

A person commits the offense of failure to stop and render assistance if (1) a driver of a vehicle, (2) involved in an accident, (3) resulting in injury or death of any person, (4) intentionally and knowingly, (5) fails to stop and render reasonable assistance. *Goar v. State*, 68 S.W.3d 269, 272 (Tex. App.—Houston [14th Dist.] 2002, pet ref'd.); *see also* TEX. TRANS. CODE ANN. §§ 550.021, 550.023. Circumstantial evidence is sufficient evidence to prosecute for failure to stop and render assistance. *Clausen v. State*, 682 S.W.2d 328, 332 (Tex. App.—Houston [1st Dist.] 1984, pet ref'd).

2. Analysis

Appellant first asserts the evidence is insufficient to support the failure to stop and render assistance conviction because no witness specifically testified that he was the driver of the van. He contends that if he was not the driver of the van,

then he was not required to render assistance after the van collided with the Pontiac. As noted earlier, three witnesses testified that after they observed the van collide with the Pontiac, appellant was the only person to exit the vehicle. Officer Peters testified that he checked the van seconds after the collision and did not find any other person in the van. We conclude a reasonable jury could find beyond a reasonable doubt that appellant was the driver of the vehicle based upon the testimony presented.

Appellant next asserts he was not required to render assistance because the driver of the Pontiac was intoxicated from illegal drug use. However, the negligence of the other driver or victim is not a defense to the action or non-action of a defendant that fails to stop and render assistance after an accident. *Rowell v. State*, 308 S.W.2d 504, 509, 165 Tex. Crim. 507, 516 (Tex. Crim. App. 1957) (Davidson, J., dissenting) (noting that contributory negligence on part of injured party is no defense and avails defendant nothing).

Appellant also asserts that because police and medical personnel were present and were able to render assistance, he did not need to do so himself. Specifically he asserts that because the officers "had supposedly secured the scene almost instantly, [ ] their own actions negated the requirement of anyone [to] 'mak[e] arrangements' for medical attention[.]" Contrary to appellant's assertion, a defendant is not excused from complying with the requirements of section

520.021 simply because medical personnel or police are already at the scene. *Sheldon v. State*, 100 S.W.3d 497, 504 (Tex. App.—Austin 2003, pet. ref'd) (determining that other motorist's assistance did not relieve defendant of statutory duty to stop and render reasonable assistance to victim).

Finally, appellant asserts that there is no evidence that he failed to get help. Specifically, he asserts that there is no proof that when he ran from the scene of the accident that he was not running to get help. The jury could have reasonably rejected this argument because if he had been running to get help, the evidence would show that he ran towards those able to help the injured, the police, rather than run from them.

Because appellant was the only person that exited and ran from the van after the collision, the evidence demonstrates appellant was the driver of the van. It is undisputed that the van crashed directly into the Pontiac and that the collision resulted in multiple life-threatening injuries. Multiple witnesses testified that after the collision, appellant knew of the collision, the victims, and the police, and instead of rendering assistance or running to those who could help him render assistance, he intentionally and knowingly chose to run away from the scene of the accident.

Viewing the evidence in a light favorable to the jury's verdict, the evidence shows that the jury could reasonably find beyond a reasonable doubt that (1)

appellant was the driver of the van, (2) he was involved in the collision between the van and the Pontiac, (3) the collision resulted in injury, and (4) he intentionally and knowingly, (5) failed to stop and render reasonable assistance. We hold the evidence is legally sufficient to prove appellant's guilt of failing to stop and render assistance. *See Goar*, 68 S.W.3d at 272–73.

Giving due deference to the jury's weighing of the evidence, a neutral examination of the evidence shows the evidence is not so weak that the jury's finding appellant guilty for failing to stop and render assistance is clearly wrong or manifestly unjust, and that the determination of guilt is not against the great weight and preponderance of the evidence. We hold the evidence is factually sufficient to prove appellant's guilt of failing to stop and render assistance. *See id.*

We overrule appellant's third and fourth issues.

E. Deadly Weapon Finding

Appellant challenges the legal and factual sufficiency of the evidence indicating that he used the van as a deadly weapon during the commission of these offenses. Both of the jury charges in the case included a special issue in the guilt phase of trial that asked the jury to determine whether appellant "used or exhibited a deadly weapon, namely, a motor vehicle, during the commission of the offense for which he has been convicted or during the immediate flight therefrom[.]" The jury answered affirmatively in both cases.

1. Applicable Law

A deadly weapon is "anything that in the manner of its use or intended use is capable of causing death or serious bodily injury." TEX. PENAL CODE ANN. § 1.07(a)(17)(B) (Vernon Supp. 2009); *Sullivan v. State*, 248 S.W.3d 746, 751 (Tex. App.—Houston [1st Dist.] 2008, no pet.). Objects that are not usually considered dangerous weapons may become so, depending on the manner in which they are used during the commission of an offense. *Id.* (citing *Drichas v. State*, 175 S.W.3d 795, 798 (Tex. Crim. App. 2005). A motor vehicle may become a deadly weapon if the manner of its use is capable of causing death or serious bodily injury. *Id.* Specific intent to use a motor vehicle as a deadly weapon is not required. *Id.* The deadly weapon statute does not require other motorists to be "in a zone of danger, take evasive action, or require the defendant to intentionally strike another vehicle in order to justify a deadly weapon finding" with respect to the defendant's vehicle. *Id.* at 799.

To determine whether a motor vehicle was used as a deadly weapon, "first, we evaluate the manner in which the defendant used the motor vehicle during the felony; and second, we consider whether, during the felony, the motor vehicle was capable of causing death or serious bodily injury." *Sierra v. State*, 280 S.W.3d 250, 255 (Tex. Crim. App. 2009). In considering the manner in which appellant

used the vehicle, we must also examine whether appellant's driving was reckless or dangerous. *See id.*

2. Deadly Weapon Finding for Failure to Stop and Render Assistance

Appellant challenges the legal and factual sufficiency of the evidence to support the jury's affirmative finding of use of a deadly weapon in the commission of the offense of failure to stop and render assistance. Specifically, appellant asserts the evidence does not show he used his vehicle to facilitate his failure to stop and render assistance offense because it was disabled upon impact and in addition, he was not able to use or exhibit it in a manner to place others in danger of serious bodily injury or death by the vehicle. We agree that the evidence is legally insufficient to show appellant's vehicle was used or exhibited as a deadly weapon during the failure to stop and render assistance offense.

Evidence at trial must demonstrate that the deadly weapon was used or exhibited "during the transaction from which" the felony conviction is obtained. *Cates v. State*, 102 S.W.3d 735, 738 (Tex. Crim. App. 2003). The relevant time period for determining whether appellant's vehicle was used as a deadly weapon during the offense of failure to stop and render assistance is the time period after the collision with the Pontiac. *See id.* Witnesses at the scene observed appellant driving the vehicle in a reckless and dangerous manner; however, appellant's reckless and dangerous control of the van occurred prior to the collision. After the

collision, appellant ran from the van and fled the police on foot. Appellant did not use the vehicle to flee the scene. There is no evidence that any person was endangered by appellant's vehicle once it was rendered inoperative and abandoned by appellant.

Standing alone, evidence of how a vehicle was driven before the offense of failure to stop and render assistance is not sufficient to sustain a deadly weapon finding. *See id.* Because there is no evidence that appellant's vehicle was driven in a manner that endangered lives during the offense of failure to stop and render assistance, we conclude the deadly weapon finding is not supported by legally sufficient evidence. *See id.* (holding evidence legally insufficient to support deadly weapon finding in failing to stop and render assistance offense where there was no evidence that vehicle was used or exhibited as deadly weapon). Because we hold the evidence is legally insufficient to support a deadly weapon finding for the failure to stop and render assistance offense, we do not need to discuss appellant's argument regarding the factual sufficiency of the finding.

We sustain the part of appellant's fifth and sixth issues concerning the failure to stop and render and assistance conviction and reform the judgment to omit the deadly weapon finding in that case.

3. Deadly Weapon Finding for Evading Arrest

We first consider whether appellant's driving was both dangerous or reckless. *See Sierra*, 280 S.W.3d at 255. The evidence shows that appellant stole a vehicle, and that when the police discovered the vehicle, he fled from the police in the van at a "high rate of speed." During the police chase, he ran stop signs and lights, drove the wrong way down one-way streets, and traveled at speeds of up to 60 miles per hour on downtown and residential streets where other traffic was present. Officers were forced to scale back the police pursuit because the pursuit "was becoming a public safety hazard." The police pursuit only ended when, after running a red light, appellant "T-boned" a Pontiac at an intersection, causing a "horrific" accident. Appellant struck the Pontiac with such force that both vehicles "went airborne" and landed 20 to 25 feet from the point of impact. The evidence is clear that appellant's driving was both reckless and dangerous. *See id.* at 255–56.

We next consider whether the van was capable of causing serious bodily injury during appellant's commission of the offenses of evading arrest. *See id.* The evidence shows the van caused serious bodily injury. The Pontiac's passengers were severely injured after appellant drove the van into the Pontiac, causing both vehicles to go "airborne." Three of the four were rendered unconscious from the collision. The driver, Stephens, was "completely bloody, gurgling, [and] convulsing." He suffered significant memory loss and was left in a

coma for four weeks. “Every bone in [his] face was crushed. All [of his] ribs on [his] left side were crushed.” After the impact, his brain was leaking fluid and his lungs were punctured. Brown, the front passenger in the Pontiac, suffered “a cracked skull . . . three [broken] ribs . . . [three] cracked vertebrae . . . [and] neurological problems.” He also suffered hearing loss and lost sensation in the left side of his face. The record is clear that appellant’s use of the van caused serious bodily injury to the Pontiac’s passengers. *See id.* at 256.

Viewing the evidence in a light favorable to the jury’s verdict, the evidence shows that the jury could reasonably find beyond a reasonable doubt that appellant’s use of the van was reckless and dangerous and that the manner in which appellant used the van made the van capable of causing death or serious bodily injury. *See id.* at 255–56. We hold the evidence legally sufficient to support the jury’s finding that appellant, during the commission of the offense of evading arrest, used a deadly weapon, a vehicle, that, in the manner that it was used, was capable of causing death or serious bodily injury. *See Drichas*, 175 S.W.3d at 798 (holding evidence was legally sufficient to support deadly weapon finding when there was evidence appellant drove on wrong side of road and that he endangered police and other motorists); *see also Tyra v. State*, 897 S.W.2d 796, 798 (Tex. Crim. App. 1995) (noting that anything actually used to cause death or serious bodily injury is capable of causing death or serious bodily injury).

Giving due deference to the jury's weighing of the evidence, a neutral examination of the evidence shows the evidence is not so weak that the jury's deadly weapon finding in the evading arrest conviction is clearly wrong or manifestly unjust, and that the finding is not against the great weight and preponderance of the evidence. We hold the evidence factually sufficient to support the jury's finding that appellant, during the commission of the offense of evading arrest, used a deadly weapon, a vehicle, that, in the manner it was used, was capable of causing death or serious bodily injury. *See, e.g.*, *Fleming v. State*, 987 S.W.2d 912, 919 (Tex. App.—Beaumont 1999), *pet. dism'd improvidently granted*, 21 S.W.3d 275 (Tex. Crim. App. 2000), (evidence that defendant intentionally, knowingly, or recklessly drove his vehicle into motor vehicle occupied by another driver was sufficient to find that defendant's vehicle was deadly weapon).

We overrule that portion of appellant's fifth and sixth issues concerning the charge of evading arrest.

Classification of Offense

In his first issue, appellant contends that the failure to stop and render assistance offense was "improperly enhanced" as a "habitual" felony. At trial, appellant objected and maintained that the offense was a "special" felony with a "special" punishment range. The trial court overruled his objection. On appeal,

appellant asserts that the offense of failure to stop and render assistance is a "hybrid" offense that is not eligible for enhancement to a habitual offense.

The offense of failing to stop and render assistance is defined by sections 550.021 and 550.023 of the Texas Transportation Code. *See* TEX. TRANSP. CODE §§ 550.021, 550.023. Although section 550.021(c)(2) provides that the offense, not involving serious bodily injury or death, is punishable by imprisonment in the institutional division of the Texas Department of Criminal Justice for not more than five years or confinement in the county jail for not more than one year, the Texas Transportation Code does not specifically assign a felony classification to the offense in accordance with the classification system referred to in section 12.04 of the Texas Penal Code. *See* TEX. PENAL CODE ANN. § 12.04 (Vernon 2003) (classifying felony offenses as capital felonies, felonies of first degree, felonies of second degree, felonies of third degree, and state jail felonies); *see also Ramirez v. State*, 90 S.W.3d 884, 885 (Tex. App.—San Antonio 2002, pet. ref'd).

Nevertheless, the statutory construction of the Texas Penal Code makes the offense a third degree felony. Section 1.03 of the Texas Penal Code makes provisions of Titles 1, 2, and 3 of the Penal Code applicable to offenses defined by other Texas laws, unless the statute defining the offense provides otherwise. *See* TEX. PENAL CODE. ANN. § 1.03(b) (Vernon 2003); *Ramirez*, 90 S.W.3d at 885. Section 12.41 is contained in Title 3 of the Penal Code. Section 12.41 is entitled

"Classification of Offenses Outside this Code" and provides, in pertinent part, "For purposes of this subchapter, any conviction not obtained from a prosecution under this code shall be classified as follows: (1) 'felony of the third degree' if imprisonment in the Texas Department of Criminal Justice or another penitentiary is affixed to the offense as a possible punishment . . . ." TEX. PENAL CODE ANN. § 12.41 (Vernon Supp. 2009) (emphasis added). As the Transportation Code does exclude the application of 1.03(b), section 12.41 applies to sections 550.021 and 550.023 of the Texas Transportation Code per section 1.03. *See id.* §§ 1.03, 12.41; TEX. TRANSP. CODE §§ 550.021, 550.023; *Ramirez*, 90 S.W.3d at 885. Because imprisonment in the Texas Department of Criminal Justice or other penitentiary is affixed to the offense as a possible punishment, the offense of failing to stop and render assistance is a third degree felony offense under section 12.41. *See* TEX. PENAL CODE ANN. § 12.41; *Childress v. State*, 784 S.W.2d 361, 365 (Tex. Crim. App. 1990) (holding offense of failure to stop and render assistance should be classified pursuant to section 12.41 because it is offense defined outside Code that was to be enhanced); *Ramirez*, 90 S.W.3d at 886 (holding that the language of section 12.04, altered by the 1993 amendment adding "state jail felony" did not call validity of *Childress* holding into question).

In this case, the State enhanced appellant's failure to stop and render assistance with two prior felony convictions: a robbery in which appellant was

finally convicted on January 13, 1999, and a possession of a firearm in which he was finally convicted on June 13, 2005. *See* TEX. PENAL CODE ANN. § 12.42(d) (if it is shown during trial of felony offense that defendant has "previously been finally convicted of two felony offenses, and the second previous felony conviction is for an offense that occurred subsequent to the first previous conviction having become final, on conviction he shall be punished by imprisonment in the Texas Department of Criminal Justice for life, or for any term of not more than 99 years or less than 25 years.") Because failing to stop and render assistance is a third degree felony offense, and appellant had two prior felony convictions, we hold the trial court properly enhanced appellant's offense as a habitual felony. *See* TEX. PENAL CODE § 12.42(d); *Childress*, 784 S.W.2d at 365–66 (stating that failure to stop and render assistance offense was properly enhanced with two prior felony convictions to sentence range of 25 to 99 years or life in prison).

We overrule appellant's first issue.

Double Enhancement

In appellant's fourth issue, appellant contends that the State's use of the same conduct to prove an essential element of the offenses and to support deadly weapon findings violates the constitutional protection against double jeopardy. Specifically, he asserts he was subject to multiple punishments for the same conduct and that his constitutional right under the United States Constitution

against double jeopardy was therefore violated. Because we have determined the evidence legally insufficient to support the deadly weapon finding for the failure to stop and render assistance offense, we only review this issue for the evading arrest offense.

The Double Jeopardy Clause of the Fifth Amendment, applicable to the states through the Fourteenth Amendment, protects an accused against a second prosecution for the same offense for which he has been previously acquitted or previously convicted. *Littrell v. State*, 271 S.W.3d 273, 275 (Tex. Crim. App. 2008) (citing *Brown v. Ohio*, 432 U.S. 161, 164–65, 97 S. Ct. 2221, 2225 (1977)). It further protects an accused from being punished more than once for the same offense. *Id.*

Appellant acknowledges he is raising this issue for the first time on appeal and he does not otherwise assert that he raised this double-jeopardy claim at trial. Appellant, however, contends that he can raise his double-jeopardy complaint for the first time on appeal because (1) the undisputed facts show that a double-jeopardy violation is clearly apparent on the face of the record; and (2) enforcement of the usual rules of procedural default serve no legitimate state interest. *See Gonzalez v. State*, 8 S.W.3d 640, 643 (Tex. Crim. App. 2000). We agree that this legal standard applies to determine if appellant preserved error.

Under *Gonzalez*, the critical inquiry is whether the record before the appellate court clearly reflects a double-jeopardy violation. *See id.* at 643–45. We conclude the record does not clearly reflect a double-jeopardy violation, and that appellant has not satisfied the first prong of the *Gonzalez* test.

Appellant was convicted of evading arrest, which requires proof that appellant, while using a vehicle, intentionally fled from a person he knew to be a peace officer attempting lawfully to arrest or detain him. *See* TEX. PENAL CODE ANN. § 38.04(a), (b)(2)(A). It was unnecessary for the jury to make a deadly weapon finding to convict him of evading arrest. *See id.* A deadly-weapon finding may be made if a defendant used or exhibited a deadly weapon. TEX. CODE CRIM. PROC. art. 42.12 § 3g(a)(2) (Vernon Supp. 2009); *Ex Parte Huskins*, 176 S.W.3d 818, 820 (Tex. Crim. App. 2005). When the trial court makes a deadly weapon finding in its judgment under article 42.12, section 3g(a)(2) of the Texas Code of Criminal Procedure, this finding is not a separate conviction or punishment. *See* TEX. CODE CRIM. PROC. ART. 42.12, § 3g(a)(2); *Pachecano v. State*, 881 S.W.2d 537, 546 (Tex. App.—Fort Worth 1994, no pet.) (holding that jeopardy does not bar including deadly weapon finding when deadly weapon allegation is also element of offense because deadly weapon finding does not increase defendant's sentence). While a deadly-weapon finding does affect a defendant's eligibility for probation and parole, it does not alter the range of punishment to which the

defendant is subject, or the number of years assessed. *See* TEX. GOV'T CODE §§ 508.145, 508.149 (Vernon Supp. 2009); *Huskins*, 176 S.W.3d at 821. A deadly-weapon finding may affect how the sentence is served, but it is not part of the sentence. *Huskins*, 176 S.W.3d at 820–21. Because the deadly weapon finding does not affect the assessment of punishment, the trial court's deadly weapon findings did not punish appellant a second time. *See Pachecano*, 881 S.W.2d at 546.

Furthermore, even if deadly weapon findings constituted additional punishments for the evading arrest offense, this would not violate double jeopardy if the legislature intended both punishments to apply. *See Mo. v. Hunter*, 459 U.S. 359, 366, 103 S. Ct. 673, 678 (1983); *see also Martinez v. State*, 883 S.W.2d 771, 774 (Tex. App.—Fort Worth 1994, pet. ref'd). In *Hunter*, a state court tried a defendant in one trial for both first-degree robbery, which included the element of the use of a dangerous or deadly weapon, and the offense of armed criminal action, of which the defendant was guilty because of his use of such a weapon. *Hunter*, 459 U.S. at 361–62, 103 S. Ct. at 675–76. The defendant was convicted of both state-law offenses, and the trial court assessed a separate punishment for each offense. *Hunter*, 459 U.S. at 366, 103 S. Ct. at 678. The United States Supreme Court held that this did not violate the Double Jeopardy Clause because it was what the legislature intended. *Hunter*, 459 U.S. at 362, 103 S. Ct. at 676.

Likewise, the Texas Legislature has provided that, in a felony conviction, including a felony conviction in which the use of a deadly weapon is an essential element of the offense, the defendant's status regarding community supervision, parole, and mandatory supervision is affected if the defendant has used or exhibited a deadly weapon during the commission of the offense. *See Patterson v. State*, 769 S.W.2d 938, 940 (Tex. Crim. App. 1989) (under Texas law, all felonies are theoretically susceptible to affirmative deadly weapon finding); *Martinez*, 883 S.W.2d at 774 ("We see nothing that would lead us to any other conclusion but that the legislature intended for the deadly weapon provision to apply in every felony case . . . ."); *see also Huskins*, 176 S.W.3d at 820–21 (noting that deadly weapon finding is not part of sentence); *State v. Ross*, 953 S.W.2d 748, 751 (Tex. Crim. App. 1997) (same).

For these reasons, after reviewing the record before us, we find the evidence does not show that a double-jeopardy violation is clearly apparent on the face of the record. *See Gonzalez*, 8 S.W.3d at 643. Because appellant has not satisfied the first prong of *Gonzalez*, and appellant did not otherwise raise this issue at trial, we overrule appellant's fourth issue.

Mistrial

In appellant's seventh issue, appellant contends the court erred when it denied a mistrial. Appellant asserts that "the entire venire was irretrievably

damaged" from the trial court's use of hypotheticals during its voir dire that "exactly matched" the facts of appellant's cases and his criminal history. He contends the trial court's hypotheticals constituted an improper comment on the weight of the evidence.

To support his argument, appellant states that the judge made hypotheticals, the hypotheticals exactly matched both the facts and the circumstances of the offense and his criminal history, and that he objected, asked for a mistrial, and a new panel. He then cites to "Vol. II, Reporter's Record, pages 132-161."

Appellant's brief does not contain a clear and concise argument for the contention made with appropriate citations to the record. Appellant fails to show when the trial court made these hypotheticals. He fails to show how the facts and circumstances of the hypotheticals "exactly" matched "both the facts of the offense and the circumstances of [his] criminal history." He also fails to show where he objected. Finally, he has not explained how "the entire venire was irretrievably damaged."

Because appellant fails to show anything in the record to support or explain his contentions, and provides no argument to explain how the trial court's hypotheticals "irretrievably" damaged the "entire venire," we hold appellant has waived error on this issue. *See* TEX. R. APP. P. 38.1(i); *Harrelson v. State*, 153 S.W.3d 75, 89 (Tex. App.—Beaumont 2004, pet. ref'd) (holding that although

appellant's brief referred to eleven separate pages in reporters record, because it did not identify any statements or explain how statements were against appellant's interest, appellant waived error); *Maldonado v. State*, No. 12-03-0429-CR, 2005 WL 2862223, at *5 n.3 (Tex. App.—Tyler Oct. 31, 2005, no pet.) (mem. op., not designated for publication) (holding that although appellant cited to pages and volumes of reporter's record, "references to 'pp. 88-163,' 'pp. 4-121," and "pp. 19-26," fail to adequately apprise court of portion of record that supports [a]ppellant's argument").

We overrule appellant's seventh issue.

Identification Procedure

In appellant's eighth issue, appellant contends the trial court committed harmful error by admitting Morales's identification of him because the procedure was unduly suggestive. The only pretrial identification appellant discusses in his brief is the identification by Morales. Appellant asserts the pretrial identification procedure was unnecessarily suggestive because when Morales identified appellant, he was alone, was in handcuffs, and had police lights shining on him near the scene of the accident. Appellant also asserts that "other witnesses" were unable to identify appellant and that Morales's pretrial identification was the only identification at the scene of the accident.

When evidence is erroneously admitted, we conduct a harm analysis under section 44.2(b) of the Texas Rules of Appellate Procedure. *See* TEX. R. APP. P. 44.2(b); TEX. R. EVID. 103(a); *Sunbury v. State*, 33 S.W.3d 436, 442 (Tex. App.—Houston [1st Dist.] 2000), *aff'd*, 88 S.W.3d 229 (Tex. Crim. App. 2002). We disregard the error unless the error affects substantial rights of the appellant. TEX. R. APP. P. 44.2(b); *Sunbury*, 33 S.W.3d at 442.

Assuming the court erred by allowing into evidence Morales's pretrial identification, the error is harmless because (A) there was other, extensive evidence identifying appellant as the only driver of the van; and (B) Morales's testimony about how the van was taken was not overly prejudicial.

A. Other Identification Evidence

The record shows that besides Morales, three other witnesses identified appellant as the man who exited the van after the collision. Officer Peters identified appellate at the scene of the accident and in court as the man who exited the van after the collision and then fled the scene of the accident. John and Isaias identified appellant at the scene of the accident as the man they saw exit the van and identified appellant by a photograph in court. In light of the identification evidence admitted through three other witnesses who identified appellant as the man who exited the van after the collision, we hold that there was sufficient identification evidence. *See Davis*, 177 S.W.3d at 359 (stating "[i]t is well

established that a conviction may be based on the testimony of a single eyewitness"); *Harmon*, 167 S.W.3d at 614 (holding one witness's testimony identifying defendant is sufficient, standing alone, to support conviction).

B. Morales's Testimony Was Not Overly Prejudicial

Appellant suggests Morales's testimony harmed him because it mentioned extraneous evidence about how the van was stolen. Appellant's argument is,

> Mr. Morales not only pointed to and identified [appellant] in court AFTER the suppression was denied, he also let slip information about asset [sic] of extraneous offenses [the theft of the van, unlawful trespass, and criminal mischief of destroying the gate] which tainted the jury's perception of [appellant]. Nothing could have been more dramatic than the story he told of barely escaping from a man who broke into his business and crashed out his gate. . . . Since other witnesses by the State failed to identify the [a]ppellant at all, this false identification materially contributed to the verdict and to the punishment.

In considering the harmful impact of the admission of Morales's identification testimony, we do not agree it was overly prejudicial so that it affected appellant's substantial rights. *See* TEX. R. EVID. 403. First, we note that appellant did not object to Morales's testimony about how the van was stolen. The record shows that Morales discussed the theft of the van before appellant presented his motion to suppress the pretrial identification by Morales. During Morales' testimony regarding the theft of the van, appellant did not object to any part of Morales's testimony. To the extent appellant is complaining about the admission of the evidence about how the van was stolen, appellant's failure to object to the

admission of the evidence on the ground waives error concerning the admission of the evidence. *See* TEX. R. APP. P. 33.1(a); *Buchanan v. State*, 207 S.W.3d 772, 775 (Tex. Crim. App. 2006). The evidence about how the van was stolen, therefore, was properly before the trial court.

We also disagree with appellant that the identification of appellant became overly prejudicial when viewed in combination with the story about how the van was stolen. Appellant states that "[n]othing could have been more dramatic than the story [Morales] told of barely escaping from a man who broke into his business and crashed out his gate." Contrary to appellant's contention, the story about how the van was stolen has minor dramatic significance when compared to the dramatic evidence introduced at trial about the collision. The evidence about the collision includes pictures of the damaged Pontiac after the collision, a picture of a victim immediately after the accident that shows the victim completely bloodied and on life support equipment, and evidence about the extensive injuries suffered by the occupants of the Pontiac.

We hold Morales's identification testimony did not substantially contribute to either the finding of guilt or to the punishment. We overrule appellant's eighth issue.

Conclusion

We modify the judgment in the failure to render assistance conviction to remove the deadly weapon finding, and, as modified, affirm both convictions.

Elsa Alcala
Justice

Panel consists of Chief Justice Radack, and Justices Alcala and Higley.

Do not publish. TEX. R. APP. P. 47.2(b).