Affirmed and Memorandum Opinion filed July 9, 2009.

In The

Fourteenth Court of Appeals

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NO. 14-08-00702-CR

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TRAVIS PRUNTY, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 176th District Court
Harris County, Texas
Trial Court Cause No. 1121157

M E M O R A N D U M O P I N I O N

A jury found appellant, Travis Prunty, guilty of aggravated robbery and assessed punishment at thirty-five years' confinement. The trial court sentenced appellant accordingly. In two issues, appellant contends the trial court erred by denying his requested jury instruction on the lesser included offenses of (1) theft and (2) unauthorized use of a motor vehicle. Because all dispositive issues are clearly settled in law, we issue this memorandum opinion and affirm. *See* Tex. R. App. P. 47.4.

I. BACKGROUND

On the morning of June 15, 2007, appellant approached David Mireles at Mireles's used car lot and asked about purchasing a car for his daughter. Mireles showed appellant some vehicles. Appellant eventually narrowed his interest to two vehicles, a white car and a gold or tan 1995 J-30 Infinity. Mireles unlocked the Infinity and started the engine. After looking at the Infinity, appellant told Mireles he had changed his mind and was more interested in the white car because it got better gas milage. Mireles then began walking away from the Infinity to get the white car and show it to appellant.

As Mireles was walking away, appellant got in the Infinity, shut the door, put the car in drive, and drove over the curb. Mireles chased appellant. When Mireles reached appellant, appellant stopped the car with two tires resting on the street and two on the curb. Mireles put his hands on the car door and asked appellant what he was doing. Mireles then observed appellant's left hand resting on the steering wheel and his right hand on a semi-automatic pistol in his lap. Appellant looked up at Mireles, down toward the gun, and back at Mireles. At that point, Mireles backed away from the window and let appellant drive away because Mireles feared for his life and feared appellant might use the gun on him.

After Mireles lost sight of the vehicle, he called 911. City of Houston Police Officer Warren Hayward arrived within minutes. Mireles told Hayward what happened and provided a description of the vehicle and the suspect. Approximately twenty-four minutes later, Hayward spotted the vehicle with the suspect inside. Hayward conducted a felony traffic stop and apprehended appellant. The police called Mireles to the location of the stop, and Mireles identified the car and appellant. Despite searching several areas, the police never found the pistol. Appellant was arrested and charged with aggravated robbery.

Trial was to a jury. Appellant requested the lesser included offenses of theft and unauthorized use of a motor vehicle. The trial court denied both requests. The jury found appellant guilty of the charged offense of aggravated robbery.

II. ANALYSIS

In issues one and two, appellant contends the trial court erred by denying his requested jury instructions on the lesser included offenses of theft and unauthorized use of a motor vehicle, respectively. We apply a two-prong test to determine whether a defendant is entitled to a jury instruction on a lesser included offense. *Stadt v. State*, 182 S.W.3d 360, 363 (Tex. Crim. App. 2005); *Rousseau v. State*, 855 S.W.2d 666, 672–73 (Tex. Crim. App. 1993). First, the lesser included offense must be included within the proof necessary to establish the offense charged. *Stadt*, 182 S.W.3d at 363; *Rousseau*, 855 S.W.2d at 672–73; *see* Tex. Code Crim. Proc. Ann. art. 37.09 (Vernon 2006) (providing, *inter alia*, offense is lesser included offense if established by proof of same or less than all facts required to establish commission of charged offense). Second, some evidence must exist in the record that would allow a reasonable jury to find, if the defendant is guilty, he is guilty only of the lesser offense. *Stadt*, 182 S.W.3d at 363; *Rousseau*, 855 S.W.2d at 672–73.

The State concedes the offenses of theft and unauthorized use of a motor vehicle are included within the proof necessary to establish the offense of aggravated robbery. *See Jacob v. State*, 892 S.W.2d 905, 909 (Tex. Crim. App. 1995) (regarding theft and citing *Campbell v. State*, 571 S.W.2d 161, 162 (Tex. Crim. App. 1978)); *Griffin v. State*, 614 S.W.2d 155, 158 n.4 (Tex. Crim. App. 1981) (regarding unauthorized use of motor vehicle). Therefore, we must determine whether there was any evidence in the record from which a reasonable jury could find appellant guilty only of theft or only of unauthorized use of a motor vehicle. *See Bignall v. State*, 887 S.W.2d 21, 23 (Tex. Crim. App. 1994). In making this determination, we must consider all the evidence presented at trial. *Id.* If evidence in the record, from any source, raises the issue of a lesser included offense and the defendant

properly requests a jury charge on that issue, the trial court must submit the issue to the jury. *See Flores v. State*, 245 S.W.3d 432, 439 (Tex. Crim. App. 2008). Because appellant's issues are substantially similar, we address them together.

The court instructed the jurors in appellant's case to convict him of aggravated robbery if they found beyond a reasonable doubt appellant "unlawfully, while in the course of committing theft of property owned by David Mireles and with intent to obtain or maintain control of the property, intentionally or knowingly threaten[ed] or plac[ed] David Mireles in fear of imminent bodily injury or death, and [appellant] . . . use[ed] or exhibit[ed] a deadly weapon . . . ." *See* Tex. Penal Code Ann. § 29.03(a)(2), (3) (Vernon 2003). A person is guilty of theft if he appropriates the property of another with intent to deprive the owner of the property and without the owner's effective consent. *See* Tex. Penal Code Ann. § 31.03(a), (b)(1) (Vernon Supp. 2008). A person is guilty of unauthorized use of a motor vehicle if he intentionally or knowingly operates another's motor-propelled vehicle without the effective consent of the owner. Tex. Penal Code Ann. § 31.07(a) (Vernon 2003). Thus, for appellant to have been entitled to a jury instruction on the lesser included offense of theft or of unauthorized use of a motor vehicle there must have been some evidence from which a rational jury could conclude appellant did not intentionally or knowingly threaten or place Mireles in fear of imminent harm and did not use or exhibit a deadly weapon. *See Bignall*, 887 S.W.2d at 23; *Reyna v. State*, No. 14-98-00829-CR, 1999 WL 1080743, at *4 (Tex. App.—Houston [14th Dist.] Dec. 2, 1999, pet. ref'd) (not designated for publication).[1]

Mireles testified he observed appellant's hand on a pistol, and appellant concedes the State proved he possessed a pistol. Mireles also testified appellant looked down at the pistol and back at Mireles, causing Mireles to fear for his life. Mireles's testimony is

[1] Additionally, for appellant to have been entitled to a lesser included offense instruction on unauthorized use of a motor vehicle, there had to have been some evidence appellant did not intend to permanently deprive Mireles of his property. *Reyna v. State*, No. 14-98-00829-CR, 1999 WL 1080743, at *4 (Tex. App.—Houston [14th Dist.] Dec. 2, 1999, pet. ref'd) (not designated for publication).

uncontroverted. Nevertheless, appellant argues he did not "use or exhibit" a deadly weapon because there was no testimony he pointed the pistol, waived it at Mireles, or used it.

A person "uses or exhibits" a deadly weapon under the aggravated robbery statute if he employs the weapon in any manner that facilitates the associated felony. *McCain v. State*, 22 S.W.3d 497, 502 (Tex. Crim. App. 2000). A pistol or handgun is a deadly weapon *per se* under the Texas Penal Code. *Williams v. State*, 567 S.W.2d 507, 509 (Tex. Crim. App. 1978); *see* Tex. Penal Code Ann. § 1.07(a)(17)(A) (Vernon Supp. 2008).

Texas courts have interpreted "use or exhibit" to mean the mere display of a deadly weapon will satisfy the requirement. *See McCain*, 22 S.W.3d at 503 (holding partial exposure of butcher knife in defendant's back pocket sufficient to find deadly weapon was used); *Jones v. State*, 810 S.W.2d 824, 827 (Tex. App.—Houston [14th Dist.] 1991, no writ) (holding fact defendant pulled aside jacket and showed complainant the butt end of pistol, coupled with threat he would kill her if she did not remain quiet, was sufficient evidence for rational trier of fact to find defendant used or exhibited a deadly weapon); *Anderson v. State*, 813 S.W.2d 177, 180 (Tex. App.—Dallas 1991, no writ.) (holding possession of gun was sufficient to find defendant used or exhibited gun, even though appellant did not make any threats or point gun at complainant). Therefore, Mireles's testimony he observed the pistol in appellant's lap under his hand and the pistol caused him to fear for his life was sufficient to support a finding that the pistol was "used or exhibited" under Texas Penal Code section 29.03(a)(2).

Before an instruction on a lesser included offense is warranted, there must be some evidence directly germane to a lesser included offense for the fact finder to consider. *See Bignall*, 887 S.W.2d at 24. A jury instruction on a lesser included offense is not required if the defendant presents no evidence, and there is no evidence otherwise showing he is guilty only of the lesser included offense. *See Aguilar v. State*, 682 S.W.2d 556, 558 (Tex. Crim. App. 1985). Here, appellant did not testify or offer any evidence, and there was no evidence

from any source contradicting Mireles's testimony appellant possessed a gun and the gun caused Mireles to fear for his life.[2]

For the foregoing reasons, we overrule appellant's two issues and affirm the judgment of the trial court.

/s/ Charles W. Seymore
Justice

Panel consists of Justices Seymore, Brown, and Sullivan.

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[2] Thus, the fact the pistol was not found, without more, does not warrant the instruction. *Cf. Bignall v. State*, 887 S.W.2d 21, 23–24 (Tex. Crim. App. 1994) (holding lesser included offense of theft warranted when there was affirmative testimony no one involved in offense had a gun and gun was not found).