PD-1354-15

NO.

TO THE COURT OF CRIMINAL APPEALS
OF THE STATE OF TEXAS

NO. 10-15-0067-CR

IN THE COURT OF APPEALS

FOR THE

TENTH SUPREME JUDICIAL DISTRICT OF TEXAS

AT WACO, TEXAS

CHRISTOPHER DAVID HARVEY,
Appellant

V.

THE STATE OF TEXAS,
Appellee

RECEIVED IN
COURT OF CRIMINAL APPEALS

October 16, 2015

ABEL ACOSTA, CLERK

PETITION FOR DISCRETIONARY REVIEW

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ORAL ARGUMENT REQUESTED

SUBJECT INDEX

PAGE

Identification of the parties ii

Statement Regarding Oral Argument ii

List of Authorities iii

GROUND FOR REVIEW

Whether the evidence was legally insufficient to prove that Harvey caused the injury.

Statement of the Case 1

Statement of the Procedural History of the Case 1

Statement of Facts Pertinent To Petitioner's Ground for Review 2

Ground for Review (Restated) 3

Reasons for Review as to Ground for Review 3

Arguments and Authorities in Support of Petitioner's Ground for Review 3

Conclusion 5

Prayer 5

Certificate of Service 6

Certificate of Compliance 7

APPENDIX - Opinion of 10th Court of Appeals . . . . . end

STATEMENT REGARDING ORAL ARGUMENT

Petitioner respectfully asserts that this Court would be aided in the resolution of the matters which are the subject of this Petition for Discretionary Review if oral argument were granted. Therefore, Petitioner respectfully requests that this Court set this case for oral argument.

IDENTIFICATION OF THE PARTIES

Pursuant to Tex.R.App. 68.4(a), a complete list of the names of all interested parties is provided below:

Abelino "Abel" Reyna - District Attorney of McLennan County, Texas
Robert Moody, Evan O'Donnell - Assistant District Attorneys
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Felipe "Phil" Martinez - Counsel for Appellant in trial court
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John Donahue - Counsel for Appellant on appeal
204 N. 6th St., Waco, TX 76701

Hon. Ralph T. Strother - Presiding Judge

LIST OF AUTHORITIES

CASES PAGE

Stone v. State, 919 S.W.2d 424 (Tex. Crim. App. 1996) 4

Breaux v. State, 16 S.W.3d 854 (Tex. App. Houston 14th Dist. 2000, pet ref'd) . 4

Johnson v. State, 978 S.W.2d 703 (Tex. App. Corpus Christi 1998), *aff'd* 23 S.W.3d 1 (Tex. Crim. App. 2000) 4

STATUTES

Tex. Penal Code §22.01 3

TEX. CODE CRIM. PROC. ANN. art. 1.15 (Vernon Supp. 2013) 4

STATEMENT OF THE CASE

This is an appeal from a jury trial in the 19th District Court, McLennan County, Texas, the Honorable Ralph T. Strother, presiding, Cause Number 2013-840-C1. The State instituted proceedings against the Appellant, Christopher David Harvey, for the offense of assault on a public servant, a third degree felony. Tex. Penal Code §22.01. There were two enhancement allegations which made the range of punishment 25 years to life in prison. Tex. Penal Code §12.42(d). Harvey pleaded not guilty and a jury trial commenced. Harvey was convicted and punishment was assessed by the jury at 65 years in TDC. No fine was imposed.

STATEMENT OF THE PROCEDURAL HISTORY OF THE CASE

On February 25, 2015, Mr. Harvey timely filed his Amended Notice of Appeal. His brief was filed on July 21, 2015. The State's reply brief was filed on August 18, 2015. On September 17, 2015, the Tenth Court of Appeals issued an opinion overruling Harvey's points of error and affirming his conviction.

No motion for rehearing was filed. This petition for discretionary review is being filed within 30 days of the Court of Appeal's opinion.

STATEMENT OF FACTS

On April 9, 2013, two deputies with the McLennan County Sheriff's Office went to 2615 Bosque Blvd to serve an arrest warrant on Harvey. (R. 4, ppg. 15, 36). As the deputies were pulling up to the house, so was the homeowner, Rebekah Rosario. She gave the deputies consent to enter the house. (R. 3, pg. 37). Once inside, they told Harvey to turn around and put his hands behind his back. (R. 3, pg. 40). It appeared to the deputies that Harvey did not really want to comply, so they both grabbed hold of Harvey. Deputy Mabry grabbed her cuffs. (R. 3, pg. 40). The Deputies testified that Harvey hit Mabry with his shoulder causing her to fall to the ground. In the course of getting back up, Mabry and Ewing became entangled and Ewing lost his hold on Harvey, who was able to escape out the front door. (R. 3, ppg. 20, 41-42). Both deputies were wearing uniforms that included long, BDU type pants. (R. 3, pg. 43). After he escaped, they spent several hours looking for Harvey. Some of the search included looking into a crawl space underneath the house. (R. 3, pg. 45). Deputy Mabry testified that her pants were not torn and she did not notice at the time of the altercation that she had a scrape on her knee. It was not until she got back to office several hours later that she even noticed that she had a scrape. (R. 3, pg. 32).

Court of Appeals

As to his first point of error, the Court of Appeals held that because Harvey had knocked Deputy Mabry to the ground as he was fleeing from the deputies, that he had committed assault against a public servant since she suffered a scraped knee.

As to Harvey's second point of error, the court of appeals held that the error was waived by the failure to object un the trial court.

GROUND FOR REVIEW (RESTATED)

Whether the evidence was legally insufficient to prove that Harvey caused the injury.

REASONS FOR REVIEW AS TO GROUND FOR REVIEW

1. The Court of Appeals has decided an important question of state or federal law that has not been, but should be, settled by the Court of Criminal Appeals.

2. The Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the Court of Criminal Appeals' power of supervision.

ARGUMENTS AND AUTHORITIES IN SUPPORT OF PETITIONER'S GROUND FOR REVIEW

In order to convict Harvey of this offense, the State was required to prove that Harvey intentionally, knowingly or recklessly caused bodily injury to Deputy Mabry, who was then acting as a public servant. Tex. Penal Code §22.01. During the course

of the trial, the issue which arose was whether Harvey caused the injury.

The State is required to introduce evidence showing the defendant's guilt. See TEX. CODE CRIM. PROC. ANN. art. 1.15 (Vernon Supp. 2013). The evidence is sufficient under article 1.15 if it embraces every essential element of the offense charged and establishes the defendant's guilt. *See* ***Stone v. State***, 919 S.W.2d 424, 427 (Tex. Crim. App. 1996). ***Breaux v. State***, 16 S.W.3d 854, 857 (Tex. App. Houston 14th Dist. 2000, pet ref'd).

In this case, Deputy Mabry testified that she did not notice the scrape on her knee until she got back to the office, which by her own admission was several hours later. Further, Deputy Ewing testified that during that period of time they had looked for Harvey and the search included looking under the house in the crawl space. There was no testimony that Deputy Mabry complained of or even noticed the injury or "pain" at the time of the altercation. In essence, the testimony in this trial amounted to speculation that Harvey caused the injury.

There is no greater "manifest injustice" than to send a person to prison whose guilt has not been established beyond a reasonable doubt. ***Johnson v. State***, 978 S.W.2d 703, 707 (Tex. App. Corpus Christi 1998), *aff'd* 23 S.W.3d 1 (Tex. Crim. App. 2000). While this principle appears most often in cases of the now defunct factual sufficiency review, Harvey contends that it still applies in cases of legal

insufficiency. The evidence in this case was insufficient and his conviction should be reversed.

Conclusion

Mr. Harvey contends that his conviction should be reversed and a judgment of acquittal entered.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Mr. Harvey respectfully requests that this Honorable Court review the transcript of the proceedings in this case, and after such review, determine that the Court of Appeals improperly decided his point of error; reverse the decision of the Court of Appeals, and remand to the Court of Appeals with instructions that a judgment of acquittal be entered.

Respectfully submitted,

/S/ John Donahue

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Corrected Petition for Discretionary Review was forwarded to the following on October 16, 2015.

/S/ John Donahue
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/S/ John Donahue
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Attorney for Appellant
Dated: October 16, 2015