

**2007 TXCA4 04-06-00864 - 121907; Gabriel Thomas v. State;**

Gabriel THOMAS, Appellant

v.

The STATE of Texas, Appellee

No. 04-06-00864-CR

Court of Appeals of Texas, Fourth District, San Antonio

December 19, 2007

DO NOT PUBLISH

From the 81st Judicial District Court, Wilson County, Texas Trial Court No. 06-01-033-CRW Honorable Stella Saxon, Judge Presiding

Rebecca Simmons, Justice

AFFIRMED

Appellant Gabriel Thomas was charged with possession of a prohibited weapon on a school or educational premises. The trial court found Thomas guilty and sentenced him to three years confinement, probated for a term of three years. Thomas raises two general issues on appeal: the evidence was insufficient to support the trial court's findings and a mistake of fact defense. We affirm the judgment of the trial court.

**Sufficiency of the Evidence**

Thomas argues the State failed to prove two necessary elements of the offense: the prohibited weapon and the location of the offense.

***A. Standard of Review***

In a legal sufficiency review, we examine the evidence in the light most favorable to the verdict, and ask whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). For a factual sufficiency review, we look at all the evidence in a neutral light to determine if the evidence is so weak that the jury's verdict seems "clearly wrong and manifestly unjust," or that the great weight and preponderance of the evidence contradicts the jury's verdict. *Watson v. State*, 204 S.W.3d 404, 417 (Tex. Crim. App. 2006).

In a bench trial, the trial court is the trier of fact, the judge of the credibility of the witnesses and of the weight to be given their testimony. *See Joseph v. State*, 897 S.W.2d 374, 376 (Tex. Crim. App. 1995). Accordingly, the trial court is free to accept or reject any or all of any witness's testimony. *Id.*

***B. Texas Penal Code Section 46.03***

Thomas was charged with intentionally and knowingly possessing a spring release knife on the physical premises of an educational institution. Tex. Pen. Code Ann. § 46.03 (Vernon 2003) (provides it is unlawful for a person to "intentionally, knowingly, or recklessly possesses . . . a prohibited weapon listed in Section 46.05(a) . . . on the physical premises of a school or educational institution"); Tex. Pen. Code Ann. § 46.05(a) (Vernon 2003) (prohibited weapons include switchblade knives).

***1. Prohibited Weapon***

The Texas Penal Code defines a switchblade knife as "any knife that has a blade that folds, closes, or retracts into the handle or sheath, and that: (A) opens automatically by pressure applied to a button or other device located on the handle; or (B) opens or releases a blade from the handle or sheath by the force of gravity or by the application of centrifugal force." Tex. Pen. Code Ann. § 46.01(11) (Vernon 2003). Although the Penal Code does not define "automatic," Webster's dictionary defines "automatic" as "acting or done spontaneously or unconsciously," or "having a self-acting or self-regulating mechanism." Webster's Ninth New Collegiate Dictionary 118 (1983).

At the bench trial, Officer George Ortiz testified the knife had a lever on its side and applying pressure to the lever automatically opened the blade.

Well, it has like a little button. It's a lever that's on the blade. And all you have to do is barely just touch it and it opens . . . Any time you can just go like this and it opens, it has a spring and that springs it into action and that's what makes it prohibited.

He demonstrated the use of the knife for the court, showing that it was a pressure sensitive knife which is resistant to closing. Moreover, during cross-examination, he explained "what makes this knife a dangerous knife is because you can open a knife so quickly and go into an assault."

Ortiz did acknowledge that he could not testify whether Thomas was aware that the knife was illegal. In his defense, Thomas testified that the knife was not spring-loaded, but instead had a "gravity torsion bar" and that the knife did not have a spring. The evidence substantiated that the blade was spring-loaded and swings into an extended and locked position with the push of a button or lever. The handle is equipped with a clip in order that the knife can be attached to a belt or the lip of a pocket and be easily accessed. After viewing all the evidence in the light most favorable to the verdict, we hold that a rational trier of fact could have found that the knife was a "switchblade" as defined by Penal Code Section 46.01(11). Tex. Pen. Code Ann. § 46.01(11); *see Flores v. State*, 716 S.W.2d 505, 507 (Tex. Crim. App. 1986). Additionally, viewing all of the evidence in a neutral light, the evidence was not so weak that the jury's verdict seems "clearly wrong and manifestly unjust." *Watson*, 204 S.W.3d at 417.

## 2. Location

During trial, the State alleged Thomas was on the grounds of the Floresville Boot Camp, an educational facility. Thomas argues that proof the offense occurred at the Floresville Boot Camp is absent from the record. Raymond Robinson, the at-risk coordinator for the Floresville School District, explained that the "Choice Program," in which Thomas was enrolled, is an alternative "computer-based program that allows students who have been out of school for a while" to reclaim or recapture school credits. On November 5, 2005, the students from the Choice Program were asked to leave the building so that a narcotics task force could sweep the building. The students were standing behind the building, as directed, when Robinson noticed a "clip hanging on [Thomas'] left front pocket." Thomas acknowledged the knife was his and Robinson took possession of the knife and gave it to a member of the Floresville Police Department.

Robinson described the facilities as "two different portable buildings that sit side by side separated by a [ten to fifteen foot] deck that's built between the two. And there is a boot camp component in one of the buildings and then the Choice Program in the other part of the building." He continued that the students were different, but the complex was the same.

A rational trier of fact could have found the Choice Program and the Floresville Boot Camp were on the same premises and thus the evidence was sufficient to substantiate this element of the offense.

Accordingly, we overrule Thomas' issues with regard to the sufficiency of the evidence.

### **Mistake of Fact**

Thomas' mistake of fact defense is twofold: he did not know the knife was in his pocket and he did not believe that it was a prohibited weapon. "It is a defense to prosecution that the actor through mistake formed a reasonable belief about a matter of fact if his mistaken belief negated the kind of culpability required for commission of the offense." Tex. Pen. Code Ann. § 8.02(a) (Vernon 2003). Mistake of fact, however, does not lie where the "mistaken belief is not reasonable." *Gant v. State*, 814 S.W.2d 444, 452 (Tex. App.--Austin 1991, no pet.). A reasonable belief is one that would be held by an ordinary and prudent man in the same circumstance as the actor. Tex. Pen. Code Ann. § 1.07(a)(42) (Vernon 2003).

In a nonjury trial, we give deference to the trial judge's rulings as the exclusive judge of the credibility of the witnesses. *Mattias v. State*, 731 S.W.2d 936, 940 (Tex. Crim. App. 1987). During trial, Thomas testified that he would not have taken the knife to school had he thought it was a switchblade. However, under cross-examination, Thomas insisted that he did not know he had *any* knife on him at the time of the incident. Taking into consideration the testimony of Robinson and Ortiz, the trial court apparently chose not to believe that Thomas was acting under a mistaken belief that his knife was not "spring-loaded." Likewise, the court did not have to accept Thomas' claim that he did not know he had the knife in his possession. The evidence was sufficient for the trier of fact to reasonably find against Thomas on the alleged mistake of fact and find beyond a reasonable doubt the instrument seized was a prohibited knife and that Thomas intentionally and knowingly possessed it. We, therefore, overrule Thomas' issue on appeal.

### **Conclusion**

The evidence was sufficient for a reasonable trier of fact to determine the knife in question was spring-loaded and therefore a prohibited weapon and that Thomas possessed the same on the premises of an educational institution. Additionally, although Thomas testified regarding his mistake of fact, the trial court was authorized to accept or reject any or all of the testimony. Accordingly, we affirm the judgment of the trial court.

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TX Slip Opinions

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