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Court of Appeals of Texas, Eastland.

Andrew Jerry MUNIZ, Appellant
v.
The STATE of Texas, Appellee

No. 11–14–00012–CR
|
Opinion filed January 14, 2016

On Appeal from the 142nd District Court, Midland County, Texas, Trial Court Cause No. CR39832

Attorneys and Law Firms

Teresa J. Clingman, District Attorney, Cannon Jones, Carolyn D. Thurmond, Assistant, for The State of Texas.

Raymond Keith Fivecoat, for Andrew Jerry Muniz.

Panel consists of: Wright, C.J., Willson, J., and Bailey, J.

MEMORANDUM OPINION

JIM R. WRIGHT, CHIEF JUSTICE

***1** The jury convicted Andrew Jerry Muniz of two separate counts of manslaughter and assessed his punishment for each offense at confinement for twelve years and a $2,500 fine. The trial court sentenced Appellant accordingly and ordered that the sentences run concurrently. We affirm.

In two issues, Appellant argues that the evidence was insufficient to establish that he was guilty of manslaughter as alleged in counts one and two of the indictment. Specifically, Appellant asserts that the evidence was insufficient to prove that he was the driver of the vehicle that was involved in the fatal collision out of which the manslaughter charges arose. Therefore, Appellant reasons, the evidence was insufficient to prove that he failed to keep a proper lookout, failed to stop at a stop sign, or that he operated the vehicle at an excessive speed.

In a sufficiency review, we must review all of the evidence in the light most favorable to the verdict and determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia,* 443 U.S. 307 (1979); *Brooks v. State,* 323 S.W.3d 893, 912 (Tex.Crim.App.2010); *Polk v. State,* 337 S.W.3d 286, 287–89 (Tex.App.–Eastland 2010, pet. ref d). Evidence is insufficient under this standard in four circumstances: (1) the record contains no evidence probative of an element of the offense; (2) the record contains a mere "modicum" of evidence probative of an element of the offense; (3) the evidence conclusively establishes a reasonable doubt; and (4) the acts alleged do not constitute the criminal offense charged. *Brown v. State,* 381 S.W.3d 565, 573 (Tex.App.–Eastland 2012, no pet.).

Under the Texas Penal Code, a person commits manslaughter if he recklessly causes the death of an individual. TEX. PENAL CODE ANN. § 19.04(a) (West 2011). "A person acts recklessly, or is reckless, with respect to circumstances surrounding his conduct or the result of his conduct when he is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur." *Id.* § 6.03(c). "The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint." *Id.*

On the evening of November 8, 2011, a winch truck owned by Texas Energy Services, LLC, and allegedly driven by Appellant, collided with a Chevrolet pickup at the intersection of FM 1787 and FM 1788. Law enforcement personnel determined that the pickup had the right-of-way. Both the driver and a passenger in the pickup died at the scene.

Trooper Robert Manley was dispatched to the location of the wreck. Trooper Manley testified that, when he arrived at the scene of the collision, he first checked on the occupants of the pickup and then made contact with the driver of the winch truck. Appellant identified himself as the driver and presented his **commercial driver's license** to Trooper Manley. At trial, Appellant contended that he was not the driver of the winch truck.

***2** Kenneth Westbrook was the yard manager for Texas Energy Services at the time of the collision. Westbrook testified that Appellant phoned him and told him about the collision. At the time, Texas Energy Services had one winch truck, and Appellant was the winch truck driver most of the time. Further, Westbrook explained that winch truck drivers were required to have a **commercial driver's license** and that the driver usually had a "swamper" ride along to help with general labor and cable hookups. It is against company policy for an employee who does not have a **commercial driver's license** to drive the winch truck.

Javier Aguirre was the "swamper" who was with Appellant at the time of the collision. Westbrook confirmed that Appellant had a **commercial driver's license**, but that Aguirre did not.

Trooper Manley testified that, at the scene of the collision, Appellant told him that the brakes on the winch truck "wouldn't catch." Appellant testified that the reason he told Trooper Manley that the brakes did not work was because he was scared.

Trooper Manley and Trooper Robert Guebara, a commercial vehicle enforcement officer, performed a Level 1 DOT vehicle inspection. After the inspection, the troopers determined that there were no brake malfunctions on the winch truck. The troopers concluded that both vehicles were in working order prior to the accident. Additionally, Luis Bejarano, Jr., the shop foreman and mechanic for Texas Energy Services at the time of the collision, testified that, about one or two months before the accident, the winch truck was taken out of service for about four days. At that time, mechanics replaced the brakes and tires on the winch truck. Bejarano explained that the brakes on the winch truck were air-operated and that, if the brakes failed, the brakes would lock and the truck would not move.

Maxwell Burden Windle testified that he was driving on the same highway as Appellant shortly before the collision occurred. He stated that, as Appellant passed him, Windle and his passenger, Kody Young, noticed the speed of the winch truck. Windle said that he and Young made a comment similar to, "He's got somewhere to be." Young testified that the winch truck looked like it was traveling at a high rate of speed. Young guessed that the truck was "doing about 70."

Accident reconstructionist Jacob Baker reconstructed the circumstances of the collision. Baker testified that Appellant began his "perception response" approximately three seconds before impact. Baker determined that a perception response of three seconds before impact is not enough time to "perceive, respond, steer, or brake." Baker explained that, in a normal situation, a person would need "900–plus feet" to stop. However, Baker concluded that Appellant was traveling at sixty-four miles per hour until "point-three [0.3] seconds" before impact, which would be "[j]ust around 20 feet from impact." Trooper Manley testified that, "when you have a frontal impact, the speedometer sometimes will lock in the position of the speed the vehicle was traveling at point of impact." Here, the speedometer on the winch truck was locked at sixty miles per hour. Baker also testified that there were three advisory signs outside the normal stopping distance. Those signs were a "Highway Intersection Ahead" sign, "Junction, Farm Road 1788" sign, and a "stop-sign-ahead" sign. Baker stated that it was his opinion that there were adequate warnings of a stop sign ahead. Trooper Manley testified that, based on the complete investigation, it was his belief that "[s]peed and basically not paying attention" were the causes of the collision.

***3** In support of his claim that the evidence was insufficient to support a finding that he was the driver of the winch truck, Appellant took the position that his injuries were more consistent with injuries received by a passenger than those that would have been received by a driver. However, Dr. Kyungho Choi, the emergency room physician who examined Appellant after the accident, testified that Appellant told him that he was the driver and that he applied the brakes on the truck but that they were not working. Additionally, Dr. Choi testified that Appellant's injuries were consistent with "anybody in the car."

When we view the evidence in the light most favorable to the verdict, we hold that a rational jury could have found beyond a reasonable doubt that Appellant acted recklessly when he failed to keep a proper lookout, or drove at an excessive speed, or failed to stop at the stop sign at the intersection where the collision occurred, or any combination of the three, as charged in the indictment. We overrule Appellant's first and second issues on appeal.

We affirm the judgments of the trial court.

All Citations

Not Reported in S.W. Rptr., 2016 WL 197336