COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

WILLIAM OLLIE ALEXANDER,	§	08-20-00051-CR
Appellant,	§	Appeal from the
v.	§	384th District Court
THE STATE OF TEXAS,	§	of El Paso County, Texas
Appellee.	§	(TC# 20180D03797)

OPINION

A jury convicted appellant William Ollie Alexander of the offense of sexual assault pursuant to TEX. PENAL CODE ANN. § 22.011(a)(1)(A). In four issues, Alexander complains of the legal sufficiency of the evidence. We affirm.

I. BACKGROUND

A. The disturbance call

At trial, the jury heard evidence of events occurring between complainant G.D., a 26-year-old woman, and Alexander, a former field training officer with the El Paso Police Department.[1] On March 10, 2018, G.D. met Alexander when he and Officer Pedro Trejo, then a rookie officer,

[1] In their briefing, the parties use the initials "G.D." when referring to the complainant of the case. *McClendon v. State*, 643 S.W.2d 936, 936 n.1 (Tex. Crim. App. [Panel Op.] 1982) (complainant's anonymity protected). We follow suit in this decision.

responded to a disturbance call during their graveyard shift. Just after midnight, a 911-caller reported he had seen a female hitting a male as they both ran down a street. Arriving on scene, the two officers met with the 911-caller who pointed them to a nearby apartment in the rear of a home, identifying it as the source of the late-night disturbance. Approaching that location, Officer Trejo could hear voices arguing from inside the residence. Unexpectedly, before he could knock at the door, a woman, who was later identified as G.D., opened the door while completely naked. Officer Trejo could see that she was crying and she appeared shocked by their presence. Another individual, who was later identified as Roberto Rivera, was sitting on a table to the right of the door.

Taking the lead, Alexander asked G.D. to put on clothes, then followed her into the residence. While entering, he told Rivera to step outside to talk with Officer Trejo. From Rivera, Officer Trejo learned that he and G.D. had been arguing over a text message that G.D. had seen on his phone. Rivera mentioned that he and G.D. had been drinking. Rivera denied, however, that G.D. had assaulted him. Meanwhile, while G.D. dressed in the bedroom, Alexander asked for her name, date of birth, and phone number. G.D. put on pants and a shirt but no underwear or bra. During that time, Alexander gave her a piece of paper that included the name "Mike" along with a phone number. G.D. threw the paper in her purse.

After confirming that neither party had outstanding warrants, the officers decided they would separate G.D. and Rivera for the rest of the night to prevent further arguments. The apartment belonged to Rivera's friend and G.D. appeared intoxicated and unable to safely drive her own vehicle. She asked the officers for a ride to her home, but they said it was out of their way. They decided to transport G.D. to a responsible party. At that point, she arranged to stay with her friend Albert, a nursing school classmate who lived on the west side of town. After confirming

Albert's address, G.D. rode with the officers in their patrol car.

While en route, Officer Trejo detected a strong odor of alcohol inside the patrol unit. Also, he noticed that G.D. cried throughout their ride. When they arrived at Albert's apartment, Alexander told Officer Trejo to stay in the unit while he escorted G.D. to the door of the residence. Trejo noted the arrival time as 1:12 a.m. on their daily activity log. Once Alexander returned to the unit, they drove back to the central area of town and responded to two other calls and conducted a traffic stop. Without comment, Alexander then drove them to the station at 2:00 a.m. Arriving, he gave instructions to Trejo to answer emails while he talked with a supervisor. Minutes later, Alexander informed Trejo he was ending his shift early due to his son having a 104-degree fever. Officer Trejo continued working their shift and eventually answered additional calls with a supervisor.

B. The text messages to G.D.

Not long after arriving at Albert's apartment, G.D. found herself feeling uncomfortable at not being in her own home. Even though Albert had an extra bedroom, she wanted to be in her own bed. She talked with Rivera on her phone, asking him to take her back to her car so she could drive home. He encouraged her to sleep at Albert's, promising he would pick her up the next day. G.D. felt worse about being away from her home. At that point, she received an incoming text message, time-stamped at 1:27 a.m. The message said, "Hey[,] its mike the cop. [You] ok?" She soon learned it came from Alexander, one of the officers who had just dropped her off at Albert's apartment. G.D. answered "Yes," and let him know she remained at Albert's. Alexander replied, "[I don't know why] that guy cheated on [you] [you're] smart [and] pretty [and] have a nice body." G.D. responded, "I'm sorry I'm not a bad person[,] I'm just drunk and I'm [so] sorry [you] had to drive me." Alexander replied, "No its good. I don[']t mind at all. [You] [should] get [back] at that

guy [though][,] [laugh out loud]. Sh*t I [would].” G.D. responded, “I’m just hurt. I don’t deserve this[,] I’m not a bad person.”

Continuing their conversation, Alexander offered to meet up if she wanted. G.D. replied, “It’s ok. [T]hank you[,] so . . . I’m at my friends still.” He replied, “Ok.” Minutes later, Alexander asked, “[you] pretty drunk??” She responded, “I’m ok now . . . I’m just up[.] [You]?” He replied, “Yea[,] when [you] opened the door [you] caught me off guard [laugh out loud]. [I’m] [about] to get off [work].” G.D. apologized for him seeing her naked and asked what time he finished his work. Alexander replied he was not complaining because she had a “VERY nice body.” (Emphasis in original). He said he would be off work in an hour or so. G.D. responded, “Mike your (sic) my angel [laugh out loud] [I’m] not drunk[.] Can u come by[.] I’m at the same place[.] Are [you] married[.]” Alexander replied “nope,” and asked what she wanted to do. G.D. replied “anything.” She then added that she was a “hurt nursing student.” Alexander responded he knew she was a good person and he did not want to take advantage of her. He asked whether she was going to be “ok.” G.D. replied that she was at her friend’s house and he was “good people.” Alexander next asked whether she wanted him to pick her up. She replied, “yes [please][.] [laugh out loud].” Replying at 1:57 a.m., he said, “Ok give me like 30 mins.”

At 2:08 a.m., Alexander texted he was on the way and asked if G.D. was still drinking. She replied “no.” Alexander asked if she was a friendly drunk. She replied, “[u]nless [you] f*ck” with me [laugh out loud] I’m friendly.” Alexander next mentioned he accidentally had grabbed her breast at the apartment and he apologized. After confirming it happened, she told him it was “ok.” About 2:25 a.m., Alexander sent a text asking if she could meet him in the front because he was wearing his work pants and did not want to leave his vehicle. G.D. replied she was on her way. At 2:31 a.m., his text message questioned whether she was coming, and at 2:34 a.m. he sent a question

mark. He then called her phone and she returned the call, talking less than a minute.

C. Alexander's truck

Alexander picked G.D. up in his pick-up truck. As she rode in the front passenger seat, they talked about her "drama" with Rivera. Alexander said, "You should get back at him." G.D. kept talking, and crying, without responding directly. G.D. asked for a ride to her car, which remained parked at Rivera's apartment. Instead, Alexander soon parked on a street behind a semi-truck. Again, she asked him to take her to her car. Responding, he asked her to first show him her breasts, implying he would take her to her car after she did so. G.D. testified, "I was shocked. I was, like, surprised. I wasn't expecting him to ask me that. But I did it anyway because I just wanted to get to my car, and he had already seen me naked, so I was like, 'Well, okay. I'll show you. Just take me to my car.'"

At the time, G.D. wore leggings as well as a tank top without a bra. As she pulled her shirt down, Alexander touched her and started licking her breast. He kept complimenting her body. Responding, she told him to stop, saying to him, "Can you" -- "can you just get away? I want to go to my car." She had worked a full shift and had not showered. She told him, "Stop. I'm dirty," and "no." She did not want him to try anything else nor did she want to have sex with him. Rather than stop, Alexander continued touching her and kissing her breast. He lifted her shirt, kissed her stomach, and moved down her body. Feeling shocked, she was afraid to push him off of her or to do anything. She was then thinking of him being a police officer who would likely have a gun with him in the vehicle. Alexander next removed her shoe and the left side only of her pants, continuing despite her telling him to stop. After he pulled her leg towards him, he pulled down his own pants and penetrated her sexual organ with his sexual organ. G.D. started feeling nauseous from the rocking motion. She was afraid and shocked. She testified she felt frozen in fear, not knowing what

to do.

While testifying, G.D. acknowledged she did not fight back. Instead, she just laid still trying not to throw up. She confirmed that Alexander ejaculated but she did not know where exactly. He asked her for napkins from the glove compartment, which she assumed he wanted to "clean himself up." Alexander then told her to move away and put her pants on. She described she could only partly dress because she felt dizzy and nauseous. As he then drove her to her car, she described the ride as being "quiet and awkward," and he did not say anything. Only when they arrived at her car, he asked whether she was still drunk and whether she could drive. She responded, "I'm just going to sleep in my car." Responding, "okay," he then left without saying anything more.

Once Alexander left, G.D. went inside Rivera's apartment and told him everything that happened to her. Rivera testified that G.D. was a completely different person when she arrived. She was devasted and crying uncontrollably, making statements that she had been raped. G.D. told Rivera that the officer who had walked into the bedroom, not the one that had detained him, had picked her up in a different vehicle but still in uniform. He took her by some semitrucks on Mesa street and raped her. She did not want to call the police because of "what happened the first time." Instead, she asked Rivera to take her to a nearby hospital. She was admitted for treatment at 4:03 a.m. Two hours later, she was transferred to a different hospital to undergo a sexual assault exam.

D. Examination by a sexual assault nurse

Theresa Navarrette, a sexual assault nurse examiner, performed G.D.'s examination that same morning at about 8:00 a.m. Nurse Navarrette testified G.D. was soft-spoken, withdrawn, and tearful when they met. Before starting the exam, Nurse Navarrette explained she needed to take a word for word account of G.D.'s complaint, which she would write in the patient history portion

of her report. G.D. reported she was drinking with her "ex" when they started fighting. When police arrived, they were separated, and she was taken to her friend's house. G.D. told the nurse that one of the officers started texting her, so she asked him to pick her up and take her back to her car, and he agreed. She then reported that he drove somewhere between apartments and a hotel, then parked on a street behind a semi-truck. G.D. described, "I don't remember exactly because I was very drunk." Nurse Navarrette documented that G.D. reported the following details about the event:

> [H]e parked there, first [Alexander] said he would take me home if I showed him my boobs[.] [T]hat was the moment I knew I was f*cked, and before I thought thank God a cop is so nice and going to take me to my car but no, and he started touching my boobs and licking my nipples and he lifted the center console on the truck and he grabbed my left shoe and took it off and grabbed my legs and pulled me close to him and he took my pants off but only on my left leg and my legs were up in the air and he took his pants off and stuck his dick in me he spit I don't know if on his dick or me before he put it in. I just heard him spit at some point before my pants were fully off he was like [performing] oral sex on me, he was licking me and I just lay there like a fish and a few minutes or seconds I don't know how long it was he told me to get some napkins out of the glove compartment. I didn't know where the glove compartment was so he reached over me and he grabbed napkins from the glove compartment and he cleaned himself with them. I don't know where he [ejaculated] [because] it was dark and I couldn't see, and I sat up and I said can you just take me to my car . . .

Alexander then drove her to her car. He asked, "Are you sure you aren't going to drive because you are drunk?" She told him she would sleep in her car. He drove off before she got into her car. Based on the patient history, Navarrette took multiple photographs of G.D., and for DNA testing, she took swabs from her body and from her clothes.

E. The investigation

Detective Eduardo Castanon, Jr. testified that he and Detective Marissa Almeida were assigned to the case. The two detectives met G.D. at the hospital. Because she only gave a vague description of where the sexual assault had occurred, they asked her to ride with them in their car

to point out the area. As they drove near Albert's apartment, she excitedly said: "There. There. That's it. That's where it happened." She had spotted a semi-tractor trailer that remained parked on the street. G.D. also gave the detectives a video-recorded statement that same day. Detective Castanon testified that, during her statement, G.D. identified Alexander as the person who had sexually assaulted her. Officers soon obtained a search warrant to photograph and search Alexander's personal vehicle.

Meanwhile, Alexander volunteered to give a video-recorded statement. The statement was admitted into evidence and played for the jury in its entirety. When Alexander was informed that he had been accused of committing a sexual assault during the overnight hours of March 10, 2018, he denied both that he sexually assaulted anyone and that he had any sexual encounter during that time period. When asked whether any calls stood out from the night before, he responded, "the one that is in question."

Alexander described that he and Officer Trejo had responded to a call reporting an unknown problem involving a screaming female and a male trying to control her. Arriving on scene, they were directed to a nearby apartment by the person who called 911. Alexander described that a female opened the door—while arguing with a male and before they knocked—and she was completely naked. He said the female appeared emotional and intoxicated. He and his partner learned the couple had been arguing over whether the male resident had cheated on the female. Alexander described that he spoke with the female while Officer Trejo spoke with the male.

Alexander asked G.D. to put clothes on and followed her down a hallway. He waited in the hallway while G.D. was getting dressed in the bedroom. After she dressed, she came out of the room and they spoke while standing in the doorway. Alexander denied that G.D. ever made any "advances" towards him. Instead, she continued arguing with Rivera. Alexander described that he

had to "push her back" when she tried passing him to approach Rivera. As part of the call, Alexander confirmed that G.D. gave him her phone number but he denied giving his number to her.

After determining that no physical violence had occurred and G.D. and Rivera were clear of any warrants, Alexander asked G.D. what she wanted to do. G.D. wanted to leave but Rivera wanted her to stay. Instead, Alexander and Officer Trejo transported her to a responsible party.

Alexander claimed that he and Officer Trejo then moved on to another call. Afterwards, he downloaded on his phone, for the first time, a free texting application (the app). The app generated random numbers so as to hide his true number. He used the app to text G.D., explaining he was worried about her. Alexander asserted that G.D. would not have been able to get in contact with him had he not texted her through the application first. Alexander explained he used the app for his own safety because he did not want G.D. "to shoot [him] later on," "her boyfriend to shoot [him]," "or anyone to shoot [him]."

Alexander explained the reason he texted her was that he felt bad for her. He identified himself as "Mike" because he did not want her to know his real name for his personal safety. He asked G.D. if she needed anything and she stated she needed a ride. He disclosed to the detectives that he and G.D. engaged in some flirtation in their texting. He then went back to the station, took the last five hours of his shift as sick leave, and picked up G.D.

After picking her up, G.D. wanted to talk. So, he parked in the parking lot of a nearby Chili's restaurant. They talked for about fifteen minutes. G.D. asked him to take her home, but Alexander said it was too far. She then asked him to take her to her car. He told her he did not suggest she drive and to sleep it off. When he dropped her off, G.D. told him thank you for listening to her and that she would text him in the morning. Alexander saw her get in the back seat of her

car and he drove off. After he dropped her off, he did not text G.D. again nor did she text him.

Alexander denied sexually assaulting G.D. He denied making any advances towards G.D. He denied any sexual contact, ever touching G.D., or G.D. ever touching him. He stated they never crossed the middle console in the vehicle. Alexander stated maybe he shook her hand when she was leaving the vehicle. Insisting, he said, "I put this on my kids, I never touched her at all." He questioned, "I don't know if she told this guy that she was with me and he got pissed off and the allegations started flying and he convinced her to come in here."

F. The trial

Alexander was indicted by a grand jury of one count of sexual assault of G.D. without her consent. On January 24, 2020, a six-day jury trial began. In addition to the above evidence presented to the jury, the jury also viewed the data extracted from both G.D.'s and Alexander's cell phones. The data from Alexander's cell phone showed a deleted incoming call from G.D. and a deleted outgoing call to G.D. The records also showed the app Alexander used to text G.D. was also deleted from Alexander's cell phone. The exhibits also showed Alexander's and G.D.'s text messages to and from different people occurring between March 8 and March 10, including those sent to each other.

G.D.'s medical records were also admitted into evidence. Photographs taken by nurse Navarrette were included. Navarrette noted a small bruise on G.D.'s upper right arm, knee, and a bite mark on her breast. G.D. was not sure how she received some of the injuries but believed Alexander caused the bite mark on her breast. Navarrette testified she did not document the bite mark nor G.D.'s remarks on Alexander causing it. However, Navarrette confirmed that she swabbed the area for testing based on G.D.'s statement. There was no noted injury to G.D.'s vaginal area but Navarrette testified this did not rule out the possibility of non-consensual sexual

intercourse. The swabs taken by Navarrette were analyzed against both G.D. and Alexander's DNA. Alexander's DNA was not found on the vaginal swabs but he could not be excluded as a contributor to the DNA found on G.D.'s breast.

Alexander did not present any witnesses but he offered limited excerpts of the video-recorded statement of G.D. Only two excerpts were admitted into evidence and played for the jury. The first portion included G.D.'s description that Alexander picked her up, they parked, she was ranting about Rivera, and Alexander was telling her she was beautiful. She asked if he would take her to her car to which he responded he would take her if she showed him her breasts. Alexander then touched her and started kissing her. The second excerpt included G.D. saying she told Alexander to stop when he was kissing her breasts and when he started performing oral sex but after that she was just a "dead fish."

The jury returned a verdict of guilty and assessed punishment at ten years in the Texas Department of Criminal Justice. The jury also imposed a fine of $10,000 and court costs in the amount of $290. The jury recommended the sentence be suspended and Alexander be placed on community supervision. Rendering a judgment of conviction, the trial court imposed a sentence of ten years confinement, which was then suspended, and Alexander was then placed on community supervision for ten years.

Alexander filed a motion for new trial which was denied by operation of law. This appeal followed.

II. SUFFICIENCY OF THE EVIDENCE

In four issues on appeal, Alexander argues the evidence at trial was legally insufficient to support his conviction for the offense of sexual assault of complainant G.D. Although he does not now dispute that he engaged in sexual intercourse with G.D., he challenges the sufficiency of the

evidence to support two related elements of the offense—lack of consent and culpable mental state—challenging both in regard to the alternate forms of compulsion that were asserted by the State.

A. Standard of Review and Applicable Law

When evaluating the legal sufficiency of the evidence, we view 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, 318-19 (1979); *King v. State*, 29 S.W.3d 556, 562 (Tex. Crim. App. 2000). The standard is the same for both direct and circumstantial evidence cases. *See Hopper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007). "Circumstantial evidence is as probative as direct evidence in establishing the guilt of an actor, and circumstantial evidence alone can be sufficient to establish guilt." *Id.* We give deference to the trier of fact to fairly resolve conflicts in testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. *Id.* We do not reevaluate the weight and credibility of the evidence, but rather, we act only to ensure that the jury reached a rational decision. *Muniz v. State*, 851 S.W.2d 238, 246 (Tex. Crim. App. 1993). The sufficiency of the evidence is measured by the elements of the offense as defined by the hypothetically correct jury charge for the case. *Malik v. State*, 953 S.W.2d 234, 239-40 (Tex. Crim. App. 1997).

B. Applicable law

A person commits the offense of sexual assault if he "intentionally or knowingly . . . causes the penetration of the . . . sexual organ of another person by any means, without that person's consent." TEX. PENAL CODE ANN. § 22.011(a)(1)(A). The Penal Code sets forth several circumstances in which a sexual act is considered to be without a person's consent. *See id.* § 22.011(b). When the jury charge authorizes the jury to convict on more than one theory, we must

uphold the guilty verdict if the evidence is sufficient on any of the theories in the jury charge. *Campbell v. State*, 426 S.W.3d 780, 786 (Tex. Crim. App. 2014). Relevant here, a sexual assault is without the consent of the other person if: "the actor compels the other person to submit or participate by the use of physical force, violence, or coercion"; or "the other person has not consented and the actor knows the other person is unconscious or physically unable to resist[.]" *Id.* § 22.011(b)(1), (3). The jury was charged on both of these statutory provisions.

C. Analysis

1. Lack of consent

Alexander's first and second issues challenge the sufficiency of the evidence to support findings that G.D. failed to consent to a sexual encounter based on the State's assertion of alternate forms of compelling submission: first, by use of physical force or violence (first issue); and second, by G.D. being unable to resist and Alexander knowing she was unable to do so (second issue). We address each in turn.

a. Use of physical force or violence

By his first issue, Alexander argues there was insufficient evidence that he compelled G.D. to participate in a sexual encounter by use of physical force or violence. We disagree.

Here, there is evidence in the record to support the use of force in compelling the act of sexual intercourse. G.D. testified that she told Alexander to stop, to "get away," and that she did not want to have sex. Instead of stopping, he continued to touch her breasts and moved further down her body. To further dissuade him from this course of action, she said to him, "I'm dirty . . . Like, I don't want to have sex right now. Like, no, no. That's not what I want." Rather than stop, Alexander lifted her leg, removed her pants, pulled her down onto her back, and dragged her across the seat towards him. She described that she was "shocked" and "surprised" that it was happening, and she was afraid to push him off or do anything. Explaining, she said, "I mean, he's an officer.

He has a gun in the car. And that's what I thought at the time." Acknowledging she never saw a gun, she described that she knew from her brothers having worked as police officers that officers generally kept their guns with them, even when off duty. After removing her pant leg, and at the point when she was on her back, he got on his knees on the driver's side, pulled his own pants down, then put his penis inside of her. Asked why she stayed in the vehicle, she answered that they were parked in a dark area that was unfamiliar to her, it was 2 o'clock in the morning, she was drunk, and she was afraid.

There is no requirement that a certain amount of force be used, only that it be used. *See* TEX. PENAL CODE ANN. § 22.011(b). Thus, the degree of physical resistance by a victim does not render the evidence insufficient to prove a lack of consent. *See Barnett v. State*, 820 S.W.2d 240, 241 (Tex. App.—Corpus Christi 1991, pet. ref'd). Rather, the issue is whether sufficient evidence exists to show appellant compelled the victim's submission by actual force. *See id.* The facts in each individual case determines whether any force was used at all. *Smith v. State*, 719 S.W.2d 402, 403 (Tex. App.—Houston [1st Dist.] 1986, no pet.).

Additionally, with respect to the offense of sexual assault, the Legislature has provided that a conviction may be supported by the uncorroborated testimony of the complainant if she "informed any person, other than the defendant, of the alleged offense within one year after the date on which the offense is alleged to have occurred." TEX. CODE CRIM. PROC. ANN. art. 38.07(a). And this provision applies in this instance as G.D. made such a report immediately following the event in question. After Alexander dropped her off at her car, she went straight into Rivera's apartment, woke him up, and reported to him that she had been "raped." Hours later, when she met with a nurse examiner, the nurse described her demeanor as being withdrawn and tearful. When giving a patient history, her statements to the nurse examiner essentially matched her trial

testimony: that Alexander had grabbed her left shoe and took it off, grabbed her legs and pulled her close to him, then he took her pants off but only on her left leg.

In support of his challenge against the sufficiency of the evidence establishing the use of physical force to compel consent, Alexander points to a variety of cases in which courts found evidence was sufficient, urging they are distinguishable. *See Barnett*, 820 S.W.2d at 241 (finding sufficient evidence of the use of actual force where victim's testimony indicated defendant straddled the victim's chest, moved the victim's head in a thrusting motion, and defendant pushed the victim's head down when the victim attempted to get up); *Limonta-Diaz v. State*, 593 S.W.3d 447, 457 (Tex. App.—Austin 2020, pet. ref'd) (finding sufficient evidence of the use of force through victim's testimony that defendant was on top of her, was heavy, she felt pinned down, she tried to push him off, and she told her brother she had been raped); *Gonzales v. State*, 2 S.W.3d 411, 415 (Tex. App.—San Antonio 1999, no pet.) (finding force when victim testified defendant threw her on the couch and laid on top of her preventing her from moving); *Horne v. State*, 46 S.W.3d 391, 394 (Tex. App.—Fort Worth 2001, pet. ref'd) (finding sufficient evidence of force when defendant pinned the victim down, so she was unable to move); *Bannach v. State*, 704 S.W.2d 331, 333 (Tex. App.—Corpus Christi 1986, no pet.) (finding force when victim was grabbed from the sidewalk with excessive force and forced her head down); *Brown v. State*, 580 S.W.3d 755, 763-64 (Tex. App.—Houston [14th Dist.] 2019, pet. ref'd) (finding force when victim testified defendant forcefully held her down by the neck with one hand and undressed her with the other hand). Highlighting the differences, Alexander points to evidence of G.D.'s lack of resistance. For example, he argues, "She didn't do anything, didn't hit him, scratch him, slap, didn't run away, she didn't try to stop him." He asserts that G.D. was a violent person who would have resisted if she was not consenting to the sexual encounter that otherwise occurred. To support

that claim, he focuses on the 911 caller's report of "a female hitting a male and they were running down the street."

Regardless of how Alexander characterizes G.D.'s level of resistance, it is well established that sexual assault is defined by the actor's compulsion, not by the victim's resistance. *Wisdom v. State*, 708 S.W.2d 840, 842-43 (Tex. Crim. App. 1986); *Bannach*, 704 S.W.2d at 332-33. Thus, we are not persuaded by his argument. Here, there is evidence of the use of physical force given that—even after G.D. had told him to stop, that she did not want to have sex, and for him to get away from her—he continued to pull her leg towards him, put her on her back, pulled off her pant leg, then sexually penetrated her without her consent.

Also, Alexander tries to discredit G.D.'s use of force testimony by pointing to her statements to the sexual assault nurse examiner wherein she stated, "the officer was not rough with her," and she was not in any pain. The entire statement taken in context, however, shows that G.D. reported that Alexander "was not rough with her *besides grabbing her leg and pulling it up*." Even though G.D. did not use the word "force," or otherwise mention being struck or beaten, evidence of overt threats or beatings is not required to establish the use of physical force or violence. *See Barnett*, 820 S.W.2d at 242.

In reviewing the evidence in the light most favorable to the verdict, we conclude a rational trier of fact could have concluded that Alexander compelled G.D. to submit or participate by the use of physical force. *See* TEX. PENAL CODE ANN. § 22.011; *Jackson*, 443 U.S. at 319. Because the evidence supports a finding that Alexander engaged in sexual intercourse with G.D. without her consent, as provided under subsection (b)(1) of section 22.011 of the Penal Code, we conclude the evidence was legally sufficient to support Alexander's conviction for sexual assault.

We overrule Alexander's first issue.

b. Physically unable to resist

In his second issue, Alexander similarly contends the evidence is legally insufficient to show he knew G.D. had not consented, and that he knew she was physically unable to resist. Alexander contends that, even though G.D. had been drinking over many hours of the night in question, the evidence showed she remained physically able to resist. He references evidence that G.D. had been hitting Rivera, both while they were running down the street, and later when she awoke him after Alexander dropped her off at her parked car. He argues that G.D.'s actions with Rivera show that it could be inferred she was capable of resisting Alexander, if she had not otherwise consented to having sexual relations. We disagree.

In *Elliott v. State*, the Court of Criminal Appeals held that "where assent in fact has not been given, and the actor knows that the victim's physical impairment is such that resistance is not reasonably to be expected, sexual intercourse is 'without consent' under the sexual assault statute." 858 S.W.2d 478, 485 (Tex. Crim. App. 1993); *see also* TEX. PENAL CODE ANN. § 22.011(b)(3). Moreover, it is not required for the State to prove a victim was unconscious due to intoxication or unable to move in order to establish that she was physically unable to resist. *Elliott*, 858 S.W.2d at 485. Rather, the State must prove the actor knows the victim is physically impaired to the point where resistance is not reasonably to be expected. *Id.*

Here, G.D. testified she could not remember exactly how many drinks she had while at the apartment with Rivera. She described, "I was drinking, and then [Rivera] fell asleep. And I finished his drink, and then I made another one, and then another one. So it[']s hard to remember how many, but I was making them." She also described she had already been drinking before she arrived at Rivera's. Also, the hospital records indicated that G.D. had stated she had three mixed drinks and eight shots of alcohol while at the apartment with Rivera. Lastly, she reported to Nurse Navarrette that she did not remember exactly because she was very drunk.

Additional to this evidence, G.D. testified she felt dizzy, nauseous, and described she could not see much while inside Alexander's vehicle. Due to her condition, she described that she just laid there during the assault and tried not to throw up. She stayed in the truck before and afterwards because—on top of the late hour, feeling afraid, and not knowing where to go—she felt she could not physically leave the truck because she was drunk. She also described that she was unable to put her pants back on and just pulled them on halfway. G.D. described to detectives that she told Alexander to stop; but, when he proceeded regardless, she just laid there like a dead fish.

Other witnesses also described G.D.'s level of intoxication. Rivera testified that when G.D. arrived at the apartment prior to their altercation, she appeared "a little bit intoxicated." He described that he could "definitely tell she had been drinking." He smelled alcohol on G.D.'s breath and she exhibited normal signs of someone who had consumed alcohol. Her friend Albert testified that when she was transported to his residence, she appeared intoxicated and needed assistance to walk into his apartment. He believed that if he let go of her, she would not be able to stand straight. He described being concerned about her level of intoxication because she was "way too drunk." Fearing she would choke on her own vomit while she slept, he advised her to sleep on her side.

Additionally, Officer Trejo testified he believed G.D. to be drinking upon his arrival to the apartment of the 911 call. He also testified that he and Alexander decided to transport G.D. to a responsible third-party instead of allowing her to leave on her own because of her state of intoxication. G.D.'s behaviors of answering the door while naked and asking to take a bottle of wine with her when being transported contributed to his determination that she was intoxicated.

Finally, in his own statement to the detectives, Alexander described G.D. as being intoxicated when they arrived at the apartment. During the call, he mentioned that G.D. apologized to the officers because she was drunk. He believed that G.D. was drunk but she was able to tell

him what had been going on prior to his arrival. He described that she was drunk but not "falling over," or "out of mind." He noticed she had slurred speech. On the drive to Albert's apartment, Alexander described that G.D. was crying, saying she was a good person, and that she was sorry. Later, when Alexander texted G.D., he repeatedly asked her the status of her intoxication. Even so, he mentioned he did not want to take advantage of her. Yet, after dropping her off at her car, he suggested to her that she not drive, but instead, sleep in her car. Based on the totality of this evidence, the jury could reasonably infer that when Alexander had intercourse with her, which he no longer disputes, he knew she remained intoxicated and unable to resist any unwanted advances.

As before, Alexander challenges the legal sufficiency of the evidence regarding G.D.'s ability to resist, pointing to her statement that she laid there like a fish. He argues that her actions with Rivera, earlier in the evening, demonstrated she was "capable of resisting," if there was no consent, and she "definitely did not lay there like a dead fish with Rivera." However, a victim's effort or attempt to resist is not necessary to constitute a sexual assault, even under the theory of physically unable to resist. *Elliott*, 858 S.W.2d at 485.

Alexander also argues that G.D. was not intoxicated to the point where she did not remember what happened as she understood and remembered everything that occurred. He points to the fact that G.D. knew Alexander was not wearing a condom and did not ejaculate inside of her. Thus, he argues the evidence was insufficient for the jury to find G.D. did not consent and was physically unable to resist. However, the State is not required to prove G.D. was unconscious, blacked out, or could not remember the encounter. *Id.* Rather, the State must show that Alexander knew she did not give consent and resistance was not reasonably expected. *Id.*

Viewing the evidence in the light most favorable to the jury's verdict and based on the combined and cumulative force of the circumstantial evidence—along with the reasonable

inferences drawn from it—we conclude a rational trier of fact could have concluded beyond a reasonable doubt that Alexander knew G.D.'s physical impairment was such that resistance was not reasonably to be expected.

We overrule Alexander's second issue.

2. Culpable mental state

In his third and fourth issues, Alexander contends the evidence was legally insufficient to support the jury's finding of a culpable mental state beyond a reasonable doubt. He argues he might have known he was doing something wrong—that is, that he should not be having intercourse with the complainant—yet, nonetheless, such awareness of wrongdoing is not enough to support a finding on the sexual assault element of culpable mental state. He urges there is a difference between engaging in an illicit act of intercourse and one wherein the actor knows the complainant cannot resist, whether due to the actor's use of physical force (third issue), or that the complainant was physically unable to resist (fourth issue). As to both forms of compulsion, the State argues the evidence was legally sufficient to establish a culpable mental state. We agree.

a. Use of physical force

In his third issue, Alexander argues the evidence is legally insufficient to support the finding of a culpable mental state, that is, whether he intentionally or knowingly compelled G.D. to submit or participate in penetration of her sexual organ by the use of physical force or violence.

As stated earlier, a person commits sexual assault if he intentionally or knowingly causes the penetration of the sexual organ of another person by any means without the other person's consent. TEX. PENAL CODE ANN. § 22.011(a)(1)(A). The crime consists of a "result" element (causing penetration of the victim's anus or sexual organ) as well as a "circumstances surrounding conduct" element. *Pitre v. State*, 44 S.W.3d 616, 620 (Tex. App.—Eastland 2001, pet. ref'd). As well, the term "by any means" refers to the nature of the defendant's conduct. *Id*. Moreover, a

person acts "intentionally" in this circumstance when it is his conscious objective or desire to engage in the conduct or cause the result. TEX. PENAL CODE ANN. § 6.03(a). A person acts "knowingly" with respect to the circumstances surrounding his conduct when he is aware of the nature of his conduct or that the circumstances exist. *Id.* § 6.03(b). Based on this statutory scheme, the Court of Criminal Appeals has recognized that a single offense can contain any one or more of these "conduct elements," which alone or in combination, form the overall behavior which the Legislature has intended to criminalize. *McQueen v. State*, 781 S.W.2d 600, 603 (Tex. Crim. App. 1989). In other words, it is those essential "conduct elements" to which a culpable mental state must apply. *Id.*

In reviewing the sufficiency of the evidence, we look at "events occurring before, during and after the commission of the offense and may rely on actions of the defendant which show an understanding and common design to do the prohibited act." *Guevara v. State*, 152 S.W.3d 45, 49 (Tex. Crim. App. 2004) (quoting *Cordova v. State*, 698 S.W.2d 107, 111 (Tex. Crim. App. 1985). "Each fact need not point directly and independently to the guilt of the appellant, as long as the cumulative effect of all the incriminating facts are sufficient to support the conviction." *Id.* Intent may be inferred from circumstantial evidence such as acts, words, and the conduct of the actor. *Id.* When determining the legal sufficiency of evidence to show a defendant's culpable mental state, any conflicting inferences are considered resolved in favor of the verdict. *Cary v. State*, 507 S.W.3d 750, 757 (Tex. Crim. App. 2016) (citing *Jackson*, 443 U.S. at 326).

Viewing the evidence in the light most favorable to the jury's verdict, we conclude a rational jury could have found, beyond a reasonable doubt, that Alexander intentionally or knowingly compelled G.D. to submit to penetration of her sexual organ by the use of physical force or violence. G.D. testified she told Alexander to stop, to "get away," and that she did not

want to have sex. Ignoring her pleas, Alexander grabbed her, pulled her across the seat, removed her pant leg, then penetrated her sexual organ against her will. Her testimony alone was sufficient to convict appellant. TEX. CODE CRIM. PROC. ANN. art. 38.07(a). A rational jury could have found that Alexander acted knowingly when he compelled G.D. to have sexual intercourse through the use of physical force.

Circumstantial evidence before the offense established that, while Alexander was responding to the disturbance call, he gave G.D. a piece of paper with his number on it even though he denied he had done so.[2] After impounding Alexander's vehicle, detectives confirmed the paper he used to write down his number matched with a notepad they found in his vehicle. Phone records also showed that he deleted the texting application from his cell phone.

As well, other circumstantial evidence including Alexander's statements to investigators and to his wife established his intent and knowledge to commit the offense. After G.D. reported the assault, Officer Giron arrived at Alexander's residence with a warrant to secure his vehicle. Alexander soon approached asking, "What's going on?" Officer Giron informed him that allegations had been made and he needed to speak with him. He did not describe the type of allegation or any other details. Instead, he told him that details would be explained to him by other investigators. Alexander asked, "Is this about the call with the naked chick?" After Officer Giron responded that he did not know, he asked Alexander whether he would be willing to go with him to headquarters to give a voluntary statement. Alexander agreed but he requested that he first be allowed to leave some personal belongings with his wife. Officer Giron agreed and they both

[2] At trial, Defense counsel argued that G.D. texted Alexander first using the number he gave her on the piece of paper. Alexander supported this argument by showing the phone records showing that G.D. had saved the phone number on her phone as "Mike the cop," arguing this evidence showed G.D. had actually texted him first. However, G.D. testified she saved Alexander's number in her contacts after he texted her for the first time saying "Hi, its Mike the cop." Additionally, Alexander admitted to detectives that he was the one who initiated the texting conversation with G.D.

walked back to his apartment. When Alexander knocked on the door of his apartment, his wife answered. Alexander said to her, "I've got to go with these guys to give a statement. Some chick is accusing me of rape."[3] Up to that point, however, Officer Giron had not informed Alexander about the nature of the investigation or why he was asked to give a statement. Similarly, while Officer Giron and Alexander drove together to police headquarters, Alexander continued to ask questions on whether the inquiry was about "the 58 case," whether "she was still drunk," and whether "she [was] getting a rape kit done."

Finally, during the ensuing investigation, Detective Castanon contacted Alexander to arrange for him to provide a second interview, after DNA results were received. Alexander claimed he would not be available because he had a new job and was then living in Houston. He provided no concrete information about when he would be returning to El Paso. Unbeknownst to Alexander, while he spoke with Detective Castanon, other officers were conducting surveillance on his El Paso apartment. A short time later, officers observed that Alexander arrived at his local apartment. Together, these actions and statements, tended to circumstantially establish that Alexander was aware of the nature of his conduct and that he committed such acts without G.D.'s consent, by use of physical force and while knowing she was intoxicated and unable to physically resist. Attempts to mislead investigators establishes a consciousness-of-guilt that he committed the offense. *See Ross v. State*, 154 S.W.3d 804, 812 (Tex. App.—Houston [14th Dist.] 2004, pet. ref'd) ("A defendant's conduct after the commission of a crime which indicates a 'consciousness of guilt' is admissible to prove that he committed the offense.").

Alexander argues, however, that his statements to investigators only evidence that he

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[3] In review of Alexander's test messages on March 10, 2018, he then sent a text message to his wife stating, "A woman from a call is [accusing] me and [Officer Trejo] [of] sexually assault[ing] her last night now [I'm] giving a statement at headquarters."

engaged in "inappropriate sexual activity on the job" and he was simply trying to conceal his adultery to protect his employment. However, when the record supports conflicting inferences, we presume the jury resolved the conflicting inferences in favor of the verdict and defer to that determination. *Merritt v. State*, 368 S.W.3d 516, 525-26 (Tex. Crim. App. 2012). Said differently, we defer to the jury's responsibility to fairly resolve conflicts in testimony, weigh evidence, and draw reasonable inferences from the facts. *Jackson*, 443 U.S. at 319.

Lastly, Alexander again argues not that he did not have sexual intercourse with G.D. but that he had consensual intercourse as indicated by her overall failure to resist his advances. Rhetorically, he questions how he was to know those advances were unwelcome. As stated before, however, we are permitted to look at events occurring before, during, and after the commission of the offense, and in doing so, we may rely on actions of the defendant which show an understanding and common design to do the prohibited act. *Guevara*, 152 S.W.3d at 49. Here, the totality of the evidence was legally sufficient to establish that Alexander knowingly compelled G.D. to submit to penetration of her sexual organ by the use of physical force or violence.

We overrule Alexander's third issue.

b. Physically unable to resist

In his fourth issue, Alexander argues he lacked the culpable mental state to commit the offense because he did not know G.D. was physically unable to resist. Alexander asserts he "tested the water as to G.D.'s level of intoxication," by asking her in a text message whether she was "pretty drunk??" Responding, she indicated, "I'm ok now."

As stated earlier, the court of criminal appeals has held that, where a victim has not in fact consented, the State need prove only that the actor knows the victim's physical impairment is such that resistance is not reasonably likely to be expected. *See Elliot*, 858 S.W.2d at 485. Here, the record includes evidence of G.D.'s level of intoxication as reported by herself and several other

persons including Officer Trejo and Alexander himself. Reviewing the evidence in the light most favorable to the prosecution, the jury could have reasonably determined Alexander knew G.D.'s physical condition was such that any resistance was unlikely. Moreover, the evidence of Alexander's inconsistent and inculpatory statements made after the fact supports a finding that Alexander had a culpable mental state to commit the crime. Viewing the evidence in the light most favorable to the jury's verdict, we conclude a rational jury could have found, beyond a reasonable doubt, that Alexander had the culpable mental state to commit the crime because he knew G.D. was intoxicated and her resistance was not reasonably likely or expected. *See id.*

We overrule Alexander's fourth issue.

III. CONCLUSION

The trial court's judgment is affirmed.

GINA M. PALAFOX, Justice

July 29, 2022

Before Rodriguez, C.J., Palafox, and Alley, JJ.

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