Opinion filed March 16, 2017

In The

Eleventh Court of Appeals

No. 11-15-00051-CR

DONALD EDWARD MCKINLEY, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the 161st District Court
Ector County, Texas
Trial Court Cause No. B-41,729

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

The jury convicted Donald Edward McKinley of burglary of a habitation. *See* TEX. PENAL CODE ANN. § 30.02(a)(3) (West 2011). Appellant pleaded true to one enhancement paragraph, and the jury assessed his punishment at confinement for fifty years and a fine in the amount of $10,000. Appellant presents two issues in this appeal. We affirm.

In his first issue, Appellant argues that the trial court's jury charge acted to confuse rather than lead the jurors. Specifically, Appellant complains that the language in the charge was different than the language in the indictment and that the charge omitted several legal definitions.

Shannon Palmer had known Appellant for about thirty years. In 2011, they became involved in a dating relationship that lasted a little over a year. Appellant moved in with Palmer in December 2011 and lived with her until April 2012. Several months after they broke up, Appellant asked Palmer to dinner. Palmer initially agreed to have dinner with him on November 27, 2012, but changed her mind after she received a phone call from him. Palmer said that Appellant was drunk and had been doing drugs.

Palmer testified that Appellant was very angry that she would not go to dinner with him and that he started cursing and swearing at her. Appellant continued to call Palmer, but she did not answer his calls. About fifteen to twenty minutes after he left the messages, Appellant showed up at the trailer house where Palmer lived. Palmer was on the phone with a friend when Appellant showed up and began to beat on the windows, doors, and the side of the house. Appellant was screaming so loudly that Palmer's friend on the phone could hear him.

After Palmer refused to let Appellant into her house, Appellant left for a brief period. Appellant was gone for about fifteen minutes, and during that time, he left three voice-mail messages on Palmer's phone. When Appellant came back to Palmer's house the second time, he was screaming on the front porch and kicking the door. Appellant was able to gain entry into her home, but Palmer testified that she did not invite him in or give him consent to enter her home. Palmer also testified that, once Appellant gained entry into her home, "[h]e yanked [her] up and started hitting [her]." Palmer further explained that he "doubled up his [fist] and was swinging" and that there were "several blows to the front of [her] face. At some point it knocked [her] off of [her] feet." Appellant left Palmer's house after about forty-five minutes.

Pictures admitted as evidence at trial showed dents in the front door, damage to the dead bolt and doorknob, and pieces of broken wood from the damaged door

frame. Palmer stated that the damage to the door area was caused by Appellant when he kicked in the door. Pictures were also admitted that showed that Palmer had a swollen black eye. Palmer testified that she did not have a black eye prior to this offense and that the black eye was caused when Appellant repeatedly hit her.

In a statement given to Dialo Bass, a lieutenant with the Ector County Sherriff's Office, Appellant admitted that he entered Palmer's residence without permission and that he assaulted her. Lieutenant Bass testified that he listened to the voice mails left by Appellant on Palmer's phone. In those messages, Appellant threatened to kick the door in if she did not open the door. The record reveals that, in one of the messages, he said, "[A]nswer my phone call or I'm coming back to the house and I'm gonna kick the mother f-----g door in."

Appellant argues in Issue One that the jury charge was confusing and misleading. The indictment alleged that Appellant "did then and there intentionally or knowingly enter a habitation, without the effective consent of Shannon Palmer, the owner thereof, and attempted to commit or committed an assault against Shannon Palmer." *See* PENAL § 30.02(a)(3). The application paragraph of the jury charge tracked the language of the indictment; it stated:

> Now, if you find from the evidence beyond a reasonable doubt that on or about the 27th day of November, 2012, in Ector County, Texas, the Defendant, Donald Edward McKinley, did then and there, intentionally or knowingly enter a habitation, without the effective consent of Shannon Palmer, the owner thereof, and *attempted to commit or committed an assault* against Shannon Palmer, then you will find the Defendant guilty as charged in the indictment.

(Emphasis added). Appellant correctly points out that the first paragraph of the charge stated that Appellant was charged with burglary of a habitation with the *intent to commit assault* rather than *attempted to commit assault* and that the signed verdict also stated the offense to be burglary of a habitation with intent to commit assault,

"as charged in the indictment." However, there is no error because the application paragraph tracked the language of the indictment. Thus, the jury was only authorized to convict Appellant for the offense alleged in the indictment.

Appellant also argues in his first issue that the trial court erred when it omitted definitions that were necessary to a burglary conviction and an assault conviction. Appellant asserts that the definition for possession was necessary because it is an element of burglary. Further, Appellant contends that the charge should have included definitions for "reckless" and "bodily injury" because they are elements of assault and that it was necessary to include the definition for "attempt" because "the application paragraph states that the appellant attempted to commit or committed an assault" against Shannon Palmer.

The trial court is ultimately responsible for the accuracy of the jury charge and the accompanying instructions applicable to the criminal offense alleged in the indictment. *Delgado v. State*, 235 S.W.3d 244, 249 (Tex. Crim. App. 2007). We review a jury charge issue under a two-step process. *Ngo v. State*, 175 S.W.3d 738, 743 (Tex. Crim. App. 2005). We first determine whether an error exists. *Id.* Then, if we find error, we analyze that error for harm. *Id.* If Appellant fails to object to the charge, we will reverse only if the record shows "egregious harm" to Appellant. *Id.* at 743–44. Errors that result in egregious harm are those that affect "the very basis of the case," "deprive the accused of a 'valuable right,'" or "vitally affect [a] defensive theory." *Almanza v. State*, 686 S.W.2d 157, 172 (Tex. Crim. App. 1985).

Appellant concedes that he did not object to the jury charge. Thus, there must have been "egregious harm" to Appellant before this court will reverse. Even if we were to find that the trial court erred when it omitted certain definitions from the jury charge, we cannot say that Appellant suffered egregious harm as a result. As the State argues, Appellant was not harmed with the omission of "recklessly" because there was no evidence admitted or presented at trial that Appellant acted recklessly.

Further, the legal definitions for "bodily injury," "possession," "attempt," and "property" are not significantly different than their commonly understood meanings. "[W]hen the statutory definition is not included in the charge, it is assumed the jury would consider the commonly understood meaning in its deliberations." *Olveda v. State*, 650 S.W.2d 408, 409 (Tex. Crim. App. 1983). We overrule Appellant's first issue on appeal.

In Appellant's second issue on appeal, he argues that the evidence was insufficient to prove the offense of burglary of a habitation. Specifically, Appellant contends that, because of Palmer's misstatements, the jury could not have found Appellant guilty. Appellant directs us to Palmer's inconsistencies in her testimony about when the police were first called and arrived at her house. Palmer testified that the police came to her house at 2:00 a.m. the night of the incident. However, Lieutenant Bass confirmed that the initial report was made on November 28, at 11:28 a.m. Lieutenant Bass testified that he was not aware of any officers going to Palmer's residence at 2:00 a.m. on November 27 and that, if they would have, a report would have come across his desk.

We review the sufficiency of the evidence, whether denominated as a legal or as a factual sufficiency claim, under the standard of review set forth in *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, 288–89 (Tex. App.—Eastland 2010, pet. ref 'd). Under the *Jackson* standard, we examine all of the evidence in the light most favorable to the verdict and determine whether, based on that evidence and any reasonable inferences from it, any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Jackson*, 443 U.S. at 319; *Isassi v. State*, 330 S.W.3d 633, 638 (Tex. Crim. App. 2010). 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.) (citing *Jackson*, 443 U.S. at 314, 318 n.11, 320).

We disagree with Appellant's contention that the evidence was insufficient to sustain his conviction. Appellant concedes that he entered Palmer's home without consent. Additionally, Palmer testified that Appellant kicked the door in and, once inside, began punching her in the face. Pictures that were admitted into evidence showed the damage to Palmer's door and Palmer with a swollen black eye. Palmer testified that the black eye was caused by Appellant punching her. Additionally, the voice mails from Palmer's phone displayed Appellant's anger that night. Further, the jury, as the factfinder, can accept or reject any or all of the testimony of each witness. *Penagraph v. State*, 623 S.W.2d 341, 343 (Tex. Crim. App. [Panel Op.] 1981). The factfinder is the sole judge of the credibility of the witnesses and the weight to be given to their testimony. *Wise v. State*, 364 S.W.3d 900, 903 (Tex. Crim. App. 2012). Accordingly, viewing all the evidence in the light most favorable to the verdict, we conclude that a rational trier of fact could have found all of the elements of the charged offense of burglary of a habitation beyond a reasonable doubt. We overrule Appellant's second issue on appeal.

We affirm the judgment of the trial court.

JIM R. WRIGHT
CHIEF JUSTICE

March 16, 2017

Do not publish. *See* TEX. R. APP. P. 47.2(b).

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