

In The
Court of Appeals
Ninth District of Texas at Beaumont

NO. 09-08-00176-CR

JOHN PRICE ROSS, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the 128th District Court
Orange County, Texas
Trial Cause No. A-070262-R**

MEMORANDUM OPINION

John Price Ross appeals his conviction and fifteen-year sentence for arson. *See* TEX. PEN. CODE ANN. § 28.02(a)(2)(D) (Vernon Supp. 2009). The sole issue raised on appeal contends the evidence is legally and factually insufficient to support his conviction. Ross argues the evidence failed to establish that he intentionally set the fire. We hold that the evidence, including the evidence regarding Ross's intent, is both legally sufficient and factually sufficient. Accordingly, we affirm the judgment.

When reviewing the legal sufficiency of the evidence, we examine all of the evidence in the light most favorable to the verdict to 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, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979); *Ross v. State*, 133 S.W.3d 618, 620 (Tex. Crim. App. 2004). Also in reviewing a factual sufficiency challenge, we “consider all of the evidence in a neutral light and ask whether the evidence introduced to support the verdict, though legally sufficient, is nevertheless so weak or so against the great weight and preponderance of conflicting evidence as to render the jury’s verdict clearly wrong and manifestly unjust.” *Gamboa v. State*, 296 S.W.3d 574, 579 (Tex. Crim. App. 2009). We address the appellant’s factual sufficiency arguments separately from his legal sufficiency arguments. *See Laster v. State*, 275 S.W.3d 512, 519 (Tex. Crim. App. 2009).

The indictment alleged in part that Ross “did then and there intentionally start a fire by placing a combustible material on the ignited electrical stove burner, with intent to damage and destroy a habitation[.]” Ross admitted that he may have accidentally contributed to the start of the fire on the electric stove, but denied that he started the fire intentionally.

Ross’s sister Julana Phenix testified that Ross’s girlfriend Kathy Bergeron was working for her on the day of the fire. Ross called the shop several times. Ross argued with Bergeron and demanded that she come home. Ross came to the store and argued

with Bergeron out in the parking lot. Phenix came out and ordered Ross to leave, but he refused. The women returned to the shop and Phenix locked the door. Ross tried to get in and broke the lock. The police were called, but by the time they arrived Ross had left.

Phenix testified that she took Bergeron and another employee to dinner. Bergeron decided to get her possessions from the house where she had been living with Ross. When they arrived, Ross had placed Bergeron's possessions into Bergeron's truck. Ross argued with Bergeron. Bergeron's sons drove her truck and Bergeron left with Phenix. When they left, Ross was furious. Ross followed the women in his truck, then turned into a convenience store parking lot and used the pay phone.

Phenix testified that they went to the place Bergeron shared with her children. Ross's mother Virginia called, hysterical, because Ross had said he had set the house on fire and Virginia Ross was concerned that Ross would hurt himself. Phenix called the fire department and the women returned to Ross's home. The fire department arrived before the women. Ross was transported to the hospital by helicopter.

At trial, Virginia Ross testified that Ross called her to let her know that the stove had burned. A statement she gave shortly after the fire was admitted into evidence. In her statement, Virginia Ross stated that Ross was upset with Phenix and wanted to know where Phenix was. Ross called several times, and the last time "he was upset and told me that he was going to burn my house down."

Bergeron testified that she and Ross were living together at the time of the trial. According to Bergeron, Ross was “a little upset” when he called her at the bakery. Bergeron thought Ross merely wanted to talk to her and meant no harm when he pushed the shop door. Bergeron agreed that Ross’s mother called Phenix, who said something about a fire, and then they returned to Ross’s residence. Bergeron did not believe that Ross set the fire.

Firefighter Michael Anthony testified that he used a thermal imager to make his way through the smoke-filled dwelling. He found Ross on the floor in the kitchen and carried Ross to safety. He re-entered the house and searched the entire dwelling. When he returned to the kitchen, the fire attack team had already extinguished the fire. There was still a small fire at the stove, which they extinguished, and debris had dropped down onto the stove. Anthony noticed a knob on the left back side was in the open position. He turned the knob because he could see a pot on that burner. He was using a flashlight and he did not notice the position of any of the other knobs.

Firefighter Ralph Valenciano testified that he applied water to the fire on the stove. Valenciano was kneeling and he was unable to see through the thick smoke, but he noticed that the left front burner was red. Valenciano tried to turn off the left front burner but due to the low visibility he asked Anthony to check the stove.

Firefighter Kenneth Luce testified that he was called out at 8:38 p.m. and that the fire was extinguished prior to his arrival at the scene. Luce performed the origin and

cause investigation. Because an airpack would obscure his vision, Luce checked the CO level to determine that he could enter without an airpack. A V-shaped pattern showed that the fire started on the back right side of the stove. A pan on the left side of the stove showed no sign of excessive heating. A towel across the back burner had been consumed in the fire. The two right hand knobs (front and back burners) and the center (oven) knob were turned on. Both left side knobs were off.

Investigator Thomas Smith testified that the fire was arson caused by placing combustible material across an ignited electrical burner. The combustible material, a towel, had been rolled up and laid at the back of the stove and did not look as though it had been tossed. Smith interviewed Ross at the hospital. Ross initially claimed that he forgot he had left bacon frying on the stove. Smith mentioned that he knew how the fire started. Without Smith having mentioned the towel, Ross stated that he was washing his hands and threw a towel on the stove but did not know why he did it.

Ross gave a statement in which he claimed that he and Bergeron had been arguing all day, that Bergeron decided to pack her things, that Phenix showed up for reasons not known to Ross, and that the two women left together. In his statement, Ross claimed that he became very angry as they were leaving, that he washed his hands, grabbed a bath towel from the dryer, dried his hands then threw the towel at the stove,¹ then followed the women in his truck. He changed his mind about following the women and returned home

¹ Smith testified that the distance between the dryer and the stove was fifteen feet.

to discover the house was full of smoke. In his statement, Ross claimed he went to his neighbor Ron's house and that Ron told Ross that he had already called the fire department. Ross also stated that he called his mother from Ron's house and told her the house was on fire. Ross returned to the house and attempted to extinguish the fire with a garden hose but was overcome by the smoke.

Ross's neighbor Ron Bingham testified that he and Ross did not speak that day. Bingham noticed Ross leaving and then saw him return ten or fifteen minutes later. Ross did not mention that his house was on fire and did not borrow Bingham's telephone. Bingham first noticed the fire when the fire engines arrived and he did not call for emergency services as Ross claimed.

John Ross testified on his own behalf at trial. Ross claimed he was frying bacon when he got into a heated argument. As the women were leaving, Ross washed his hands then grabbed a large bath towel above the dryer. According to Ross, as he left the kitchen he threw the towel back towards the sink area. Faced with phone records showing collect calls from the convenience store where the women saw Ross using the telephone, Ross admitted that he called his mother at 7:25 p.m. for one minute and forty seconds and that he spoke to her again at 7:48 p.m. for one minute and forty-five seconds. The fire department was called at 8:05 p.m. Ross could not recall what he told his mother. Ross claimed his mother knew he and Bergeron had been arguing and Ross was "[c]hecking on her."

On appeal, Ross argues the evidence is legally insufficient because “[t]he evidence fits the scenario of an accidental fire and not one of arson.” “[M]ental culpability is of such a nature that it generally must be inferred from the circumstances under which a prohibited act or omission occurs.” *Hernandez v. State*, 819 S.W.2d 806, 810 (Tex. Crim. App. 1991). “Intent may be inferred from acts, words and conduct of accused.” *Id.* We review circumstantial evidence of intent with the same scrutiny as other elements of the offense. *Laster*, 275 S.W.3d at 519. In reviewing the evidence of intent for legal sufficiency, we must avoid focusing upon other reasonable hypotheses. *Id.* at 522-23 (quoting *Geesa v. State*, 820 S.W.2d 154, 159 (Tex. Crim. App. 1991), *overruled on other grounds by Paulson v. State*, 28 S.W.3d 570, 573 (Tex. Crim. App. 2000)). “It is up to the factfinder to ‘resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.’” *Laster*, 275 S.W.3d at 522 (quoting *Jackson*, 443 U.S. at 319). The issue is not whether a rational jury could have entertained a reasonable doubt regarding the intent of the accused, but whether a rational jury would have necessarily entertained a reasonable doubt. *See Swearingen v. State*, 101 S.W.3d 89, 96 (Tex. Crim. App. 2003).

Because the first responders did not notice that all of the knobs on the stove had been turned on, Ross argues that the jury could not have found beyond a reasonable doubt that Ross intentionally set the fire by turning on all of the stove and oven burners. Viewed in the light most favorable to the verdict, however, the evidence supports the jury’s finding

that Ross intentionally set the fire. The firefighters explained that they were working in a dark, smoke-filled environment. Anthony turned off one left-side burner and Valenciano turned off the other. Once the smoke cleared, Luce entered and found that the oven and the other two burners were also on. Luce also determined from the burn pattern that the fire started on the right rear of the stove.

Viewed in the light most favorable to the verdict, the evidence regarding Ross's behavior also supports the jury's verdict that he intentionally started the fire. Ross called his mother minutes before the fire was reported to the fire department by Phenix. The jury could have believed Virginia Ross's statement truthfully recounted what Ross said to her, namely, that Ross "was going to burn my house down." The jury could also believe Luce's and Smith's testimony that the towel had been rolled up and placed across the back burner and disregard Ross's testimony that he tossed a bath towel in the general vicinity of the stove. The jury could also infer guilty knowledge from Ross's failure to call the fire department and Ross's false claim that he spoke with his neighbor about summoning the fire department. Thus, a rational jury could have found the essential elements of the crime beyond a reasonable doubt.

Ross also contends the evidence is factually insufficient because there was evidence that Ross accidentally set fire to the house. Ross testified that he did not intentionally start the fire. Ross explained that when he gave his statement he did not mention his argument with Bergeron because he did not think it had anything to do with the fire. At trial, Ross

could not recall whether he turned off the stove. Ross also testified that it is possible to remove the stove knob, turn it 180 degrees, and place it back on the stove. Ross testified that he believes the fire started when he washed his hands and threw the towel, but that he does not know how the fire started. Ross testified that he may have been confused about whether he called his mother from the store or from the neighbor's house. At trial, Ross admitted that he spoke to his mother twice from the store before he returned home. Ross testified that he tried to put out the fire using a water hose from the front yard, but he lacked water pressure, so he retrieved a hose from the back but was overcome by the smoke.

Viewed in a neutral light, Ross's claim that he did not intentionally set the fire, together with his explanation that he was "checking" on his mother when he called and not threatening to burn down her house, is not so compelling that the jury could not find beyond a reasonable doubt that Ross intentionally started the fire. *See Gamboa*, 296 S.W.3d at 579. Although there is some evidence in the record that Ross accidentally started the fire, this evidence fails to provide an objective basis for holding that when viewed in a neutral light the evidence so contradicts the jury's verdict that we could be justified in ordering a new trial. *See Watson v. State*, 204 S.W.3d 404, 417 (Tex. Crim. App. 2006).

In his argument regarding the factual sufficiency of the evidence, Ross also appears to challenge the State's allegation that the habitation was on property belonging to Virginia Ross. Ross argues that "there was evidence that the entire family intended and believed

that the home was John Ross's home. This was the intention and belief of every one even if it had not been carried out yet." Although Ross had lived in the home for years, his parents purchased the property and Virginia Ross held title to the property and paid the taxes. In his statement, Ross stated that the property was purchased by his parents in August 1993 with the intent to turn it over to Ross when his father died, and that his father died in December 2000 but the property has not been deeded to him. In her statement, Virginia Ross stated she owns the home but allows her son to stay there. During the trial, she testified that "it's my house; but we bought it for John." It was undisputed that Ross's parents purchased the property, which Ross did not hold the title, and that Virginia Ross never acted on her intention to transfer the property to Ross. Viewing this evidence in a neutral light, the evidence that Virginia Ross owns the property is neither so weak, nor is the contrary evidence so strong, that the standard of proof beyond a reasonable doubt could not have been met as to the "property belonging to another" element of arson. *See* TEX. PEN. CODE ANN. § 28.02(a)(2)(D).

We hold the evidence supporting the jury's verdict of guilt is both legally sufficient and factually sufficient. Accordingly, we overrule issue one and affirm the judgment.

AFFIRMED.

CHARLES KREGER
Justice

Submitted on February 2, 2010
Opinion Delivered February 17, 2010
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Before McKeithen, C.J., Kreger and Horton, JJ.