

In The
Court of Appeals
Ninth District of Texas at Beaumont

NO. 09-09-00084-CR

KEVIN LEE SMITH, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the 410th District Court
Montgomery County, Texas
Trial Cause No. 08-04-04106-CR**

MEMORANDUM OPINION

A jury found Kevin Lee Smith guilty of harassment of a public servant. *See* TEX. PEN. CODE ANN. § 22.11(a)(2) (Vernon Supp. 2009). In punishment, the jury found Smith to be a repeat offender and assessed punishment at eight years of confinement and a \$1,000 fine. *See* TEX. PEN. CODE ANN. § 12.42(a)(3) (Vernon Supp. 2009). The sole issue raised on appeal challenges the legal and factual sufficiency of the evidence supporting the conviction. We affirm the judgment.

Smith presents his issue, as follows:

A rational trier of fact mustn't be able to find the elements of a crime beyond a reasonable doubt, or the evidence supporting a conviction must be so weak or the conflicting evidence must so greatly outweigh the evidence supporting the conviction for evidence to be insufficient. Two disinterested witnesses said the Appellant did not spit on a police officer. Two police officers said the Appellant did spit on an officer. Was the evidence insufficient?

An appellate legal sufficiency review requires an examination of all 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). In reviewing the evidence for factual sufficiency, 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). The legal sufficiency arguments are addressed separately from the factual sufficiency arguments. *See Laster v. State*, 275 S.W.3d 512, 519 (Tex. Crim. App. 2009).

The incident began as a domestic disturbance. A neighbor testified that Smith and his girlfriend, Cheryl Ann Loving, were arguing loudly outside her third floor apartment. Someone had strewn Smith's clothes outside and Loving was picking up the clothes and placing them in a bag. Smith came out of the apartment and started arguing with Loving.

The neighbor testified that the arguing couple was blocking the door to her apartment and she was afraid that Smith would become violent. Fearing for her life, she went downstairs to the front of the apartment complex. Another neighbor called the police. When the police arrived, Smith and Loving had gone inside. Loving did not answer the door for ten or fifteen minutes. When she eventually opened the door, Loving walked out right past Officer Carl Johnson. Johnson entered the apartment and found Smith hiding in a drawer under the waterbed.

When Johnson handcuffed Smith, Smith started “cussing” the officer. Smith struggled with Johnson as they descended the stairs. Another officer, Ashley Brockett, opened the squad car rear door. Smith struggled as they tried to put Smith in the car. Johnson testified that when he turned Smith around to put Smith in the car, Smith “spit[] right directly in my face.” Brockett sprayed Smith with pepper mace then put Smith in the car. Johnson testified that he got a towel out of the trunk of his car and wiped his face. Johnson was not sure whether the neighbor witnessed Smith spitting.

The neighbor testified that Smith was “jumping up and down, screaming and yelling” as the officer brought Smith down the stairs. The neighbor testified that Loving followed them down the stairs. From a distance of “a few feet” the neighbor saw Smith struggling by the car and saw the officer mace Smith.¹ She did not see Smith spit but she

¹ The prosecutor asked the neighbor if the distance was “From me to you or further?” The witness replied, “A little bit further. I’d say to the back door.”

acknowledged “it is possible” that Smith did spit and she just did not see him do it. She also did not see the officer wipe his face with a towel.

Officer Brockett testified that he was present when Johnson took Smith into custody. Brockett was standing three feet from Smith. According to Brockett, Smith was “very verbally aggressive” towards Johnson at the car. Smith resisted getting into the patrol car. According to Brockett, “Officer Johnson was pushing on Mr. Smith and Mr. Smith spit in Officer Johnson’s face.” Brockett explained that this occurred “[a]fter numerous requests for him to sit down in the car, trying to push him in the car” while Smith “was standing rigid against the frame of the door.” Brockett testified that he used the pepper spray because Smith spit in Johnson’s face. Brockett recalled that Johnson was also struck by some of the pepper spray and that Johnson went to the trunk of his car, but he did not see what Johnson got out of the trunk or if he wiped his face with a towel.

Loving testified for the defense. Loving and Smith were arguing loudly when the police arrived. She told Smith to answer the door but Smith refused because “[h]e had warrants.” Loving testified that she was downstairs when the officers brought Smith down the stairs. It appeared to her that the officers were pushing Smith around, but she did hear Smith arguing with the officers. According to Loving, it was difficult to see outside as it was a dark night and there was glare from the lights of the patrol cars. Loving testified that “I was concerned about him going to jail because I didn’t know what he was going to jail for and I thought the whole situation was just absurd.” She was

talking to an officer and was refusing to complete a written statement when she saw Smith being sprayed with the pepper spray. She was approximately twenty feet from Smith. Smith was “cussing” and the officers were “being aggressive with him.” She did not see Smith spit. Loving admitted that she was not looking at Smith the entire time, but she did not see Smith spit on the officer nor did she think that Smith did spit. She did not see Johnson wipe his face with a towel. Approximately twenty minutes later she asked the officers why Smith was going to jail and they responded that if she did not return to her apartment they would arrest her, too. The officers did not mention the spitting incident.

Testifying on his own behalf, Smith claimed that the officers “kind of roughed me up a little bit because they thought there was an assault on a woman” and that the officers were shoving and pushing him as they descended the stairs. Smith admitted, “I did become a little angry and I probably did say some words to him, you know, because I felt that they were going a little extreme with me.” Smith testified that he uttered a profanity and Brockett responded with pepper spray. Smith testified, “I spoke bad about his wife and his mother and spit in the floorboard” but claimed that he did not spit on Johnson. Defense counsel asked Smith, “[D]id it come across your mind to possibly spit on the officer?” Smith replied, “Yes, it did.” However, Smith explained, he had been arrested and jailed for retaliation two months earlier and he had “kind of learned my lesson.”

Smith claimed the officers fabricated the spitting incident to justify their use of pepper spray.

Smith argues that the evidence was legally insufficient to prove that he had spit on the police officer. Smith admits that it is possible that “in his cursing and yelling, some of his saliva might have contacted Officer Johnson” but argues that the evidence does not show that he intentionally expectorated or that he caused Johnson to contact Smith’s saliva. A legal sufficiency review “is restricted to guarding against the rare occurrence when a factfinder does not act rationally[.]” *Laster*, 275 S.W.3d at 517. Evidence of intent is reviewed in the same manner as other evidence, both direct and circumstantial. *See id.* at 520-21. “One’s acts are generally reliable circumstantial evidence of one’s intent.” *Id.* at 524 (quoting *Rodriguez v. State*, 646 S.W.2d 524, 527 (Tex. App.--Houston [1st Dist.] 1982, no pet.). In this case, all of the witnesses--Smith included--agreed that Smith was angry and belligerent while he was being taken into custody. Smith admitted he thought about spitting on the officer and that he spat in the floorboard of the patrol car, but claimed he did not spit on the officer. In assessing the relative weight and credibility of the testimony, the jury could rationally believe Johnson truthfully stated that Smith “spit[] right directly in my face” and could rationally infer from Smith’s belligerence that Smith intended to cause his saliva to come into contact with Johnson. The jury could rationally reject the contrary testimony, none of which proved that the incident could not have happened the way the officers testified it did.

See Evans v. State, 202 S.W.3d 158, 162-63 (Tex. Crim. App. 2006) (discussing the distinction between uncontradicted testimony and undisputed facts). We hold that the evidence is legally sufficient.

Smith argues that the evidence is factually insufficient because the neighbor was a disinterested witness who testified that she did not see Smith spit on Johnson. He argues that Loving did not have a motive to lie for Smith and Loving testified that she did not see Smith spit on Johnson. He also argues that the officers' testimony could be questioned as unreliable because they were dealing with a combative, uncooperative suspect. Smith also notes various inconsistencies in the testimony of the different witnesses and argues that these inconsistencies undermine the officers' credibility.

Smith asserts that discrepancies in the officers' testimony undermined their credibility to the extent that such testimony was not trustworthy. Johnson recalled that he entered the apartment alone and he testified that he was "pretty sure" that Brockett was downstairs when Johnson found Smith hiding in the drawer under the waterbed. Brockett testified that he was in the apartment with Johnson when they found Smith. The neighbor testified that Loving followed Johnson and Smith down the stairs, while Loving testified that she was already downstairs at that time. Johnson testified that Loving walked right past him, while Brockett testified that Loving stated "He beat me up." However, from the record it is clear that all of the witnesses were on the ground floor when Smith spat on Johnson and Brockett sprayed Smith with pepper spray.

Smith contends that the neighbor and Loving were disinterested witnesses and the weight of their testimony renders the officers' testimony too weak to support the verdict. Neither Loving nor the neighbor testified that Smith did not spit in Johnson's face; rather, each woman testified that she did not see Smith spit in Johnson's face. In addition to having a relationship with the defendant, Loving had a felony conviction for assault on a public servant and had also previously been arrested for assault with family violence. The jury could have taken her felony conviction into account in assessing her credibility. *See* TEX. R. EVID. 609 (a). Furthermore, Johnson and Brockett were within three feet of Smith, while Loving was standing twenty feet away and the neighbor was standing at a distance not clearly shown on the record. The jury could have determined that the women were not in as good a position to notice Smith if he did spit and accordingly could have given more weight to the officers' testimony. The jury's credibility assessments regarding contradictory testimony are entitled to deference. *Lancon v. State*, 253 S.W.3d 699, 706 (Tex. Crim. App. 2008). Viewing the evidence in a neutral light, we hold the evidence is factually sufficient to sustain the verdict. We overrule the appellate issue and affirm the judgment.

AFFIRMED.

CHARLES KREGER
Justice

Submitted on March 16, 2010
Opinion Delivered March 31, 2010
Do Not Publish

Before McKeithen, C.J., Kreger and Horton, JJ.