In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-11-00069-CR

JENNIFER ELAINE DOORNBOS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Court at Law No. 2
Jefferson County, Texas
Trial Cause No. 272550

MEMORANDUM OPINION

A jury convicted appellant Jennifer Elaine Doornbos ("Jennifer") of the misdemeanor charge of violation of a protective order. The trial court imposed a sentence of thirty days in the Jefferson County jail and a $500 fine, but suspended imposition of the confinement portion of the sentence, placed Jennifer on community supervision for one year, and assessed the $500 fine. In one appellate issue, Jennifer challenges the legal sufficiency of the evidence to support her conviction. We reverse the trial court's judgment and render a judgment of acquittal.

Jennifer's father, Richard Doornbos ("Richard"), obtained a protective order that prohibited Jennifer from "going to or near the residences or places of employment or business of Richard Doornbos[,] including . . . 816 12th Street, Nederland, Texas; and specifically requires Respondent to maintain at least a 500 feet distance from the aforementioned address." The information alleged that Jennifer intentionally and knowingly went to a "residence, located at 816 N. 12th St., Nederland, Texas[,] of RICHARD DOORNBOS, Applicant, in violation of a court order issued pursuant to Section 6.504 and Chapter 85 of the Texas Family Code and under Article 17.292, Code of Criminal Procedure. . . ."

At trial, several witnesses testified concerning the property and Jennifer's presence there. First, Jennifer's sister, Lisa Eubanks, testified that her father owned the building located at 816 N. 12th St., and that the building "used to be an old grocery store[,]" but now "[i]t is just a stucco building that's used for storage." According to Eubanks, her father has used the building for storage for several years, and her father sometimes leased the building to other individuals. Eubanks explained that she discovered Jennifer on the property with her Chevrolet Tahoe and moving van, and Jennifer and some movers were removing Jennifer's belongings from the building. Eubanks testified that her father had never used the building as a residence.

Richard testified that the property "was a grocery store[,] and then they went out of business[,] and I had a chance to buy it; and I bought it." He explained that he uses the property for storage and has never used the property as a residence.

Officer Richard Hebert of the Nederland Police Department was dispatched to 816 12th Street. According to Officer Hebert, there is "a business, a building at that location and a parking lot." Officer Hebert testified that Jennifer was in the parking lot. Officer Hebert explained that when he arrived, Eubanks showed him a copy of the protective order, and he determined that Jennifer had violated the protective order "[b]y coming onto the property at 816 - 12th Street." Officer Hebert testified that he has been a police officer in Nederland for over twenty-five years, and he was unaware of the property being used as a residence.

The State then rested its case, and Jennifer's counsel moved for an instructed verdict, in which counsel asserted that the State "failed to prove beyond a reasonable doubt each and every element of the information, specifically that . . . Jennifer Doornbos did then and there intentionally and knowingly go to and near the residence located at 816 North 12th Street, Nederland, Texas, of Richard Doornbos." The State contended, "that's not a necessary element of the offense; . . . the offense is that she violated the Protective Order . . . the Protective Order is clear that she can't go to a certain number of locations, [and] 816 – 12th Street is one of those locations. The fact that it's listed as a residence, . . . that's surplusage just used to clarify but [is] not necessarily an element of

the offense." The trial court denied defense counsel's motion. The State moved to abandon the portion of the information which specified that the property was a residence, and the trial court denied the State's motion.

Richard McKee, a retired salesman, testified that he has resided in Nederland for over thirty years. McKee testified that he is familiar with 816 North 12th Street, and that he was there on the date in question to help Jennifer move her furniture that was stored there. McKee testified that an old grocery store is located on the property, and no one resides there. McKee testified that he knows Richard Doornbos personally, and that Richard has never resided at 816 North 12th Street.

Kendall Barr, testified that he has resided in Nederland for approximately seventy years. Barr explained that he knows both Jennifer and Richard personally, and that Richard never had a residence on 12th Street. According to Barr, the property in question "was never a residence."

Jennifer testified that all of her furniture was stored on the property. According to Jennifer, Richard gave her permission to enter the property to move her belongings. Jennifer explained that her father owned the property. Jennifer admitted that she entered the property, but she testified that the property was not a residence. According to Jennifer, the property

> [has] been a storage building. It's been a grocery store since I was a kid. It closed. My daddy bought it. It's been a storage building. He's owned it. He rented it to a preacher at one time to hold services in. He let [someone] rent it for a political headquarter campaign [sic] at one time; and then it's

> been . . . storage, as long as I can remember. It's held my property, my aunt's, my dad's.

At the conclusion of Jennifer's testimony, the defense rested its case.

In her sole appellate issue, Jennifer argues that the evidence was legally insufficient to support her conviction. In response, the State contends that (1) pursuant to article 1.14(b) of the Texas Code of Criminal Procedure, Jennifer failed to preserve the issue for review by waiting until the jury was impaneled to raise the issue, (2) the evidence was legally sufficient, and (3) the language in the information concerning the property's status as Doornbos's residence was surplusage. *See* Tex. Code Crim. Proc. Ann. art. 1.14(b) (West 2005).

The "*Jackson v. Virginia* legal-sufficiency standard is the only standard that a reviewing court should apply in determining whether the evidence is sufficient to support each element of a criminal offense that the State is required to prove beyond a reasonable doubt." *Brooks v. State*, 323 S.W.3d 893, 895 (Tex. Crim. App. 2010). When evaluating the sufficiency of the evidence under *Jackson*, we assess all the evidence in the light most favorable to the prosecution to determine whether any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007). We must give deference to the responsibility of the trier of fact to fairly resolve conflicts in testimony, weigh the evidence, and draw reasonable

inferences from basic facts to ultimate facts. *Hooper*, 214 S.W.3d at 13 (quoting *Jackson*, 443 U.S. at 319).

We turn first to the State's contention that Jennifer failed to preserve the issue for review. Article 1.14 of the Texas Code of Criminal Procedure provides as follows, in pertinent part:

> If the defendant does not object to a defect, error, or irregularity of form or substance in an indictment or information before the date on which the trial on the merits commences, he waives and forfeits the right to object to the defect, error, or irregularity and he may not raise the objection on appeal or in any other post[-]conviction proceeding.

Tex. Code Crim. Proc. Ann. art. 1.14(b). Jennifer's complaint concerns the legal sufficiency of the evidence to support her conviction rather than a defect in the indictment, such as the omission of necessary language or the inclusion of surplusage. Jennifer raised the issue in a motion for instructed verdict, and we find that she has not waived the right to raise the issue on appeal.

Section 25.07(a)(3) of the Texas Penal Code states as follows, in pertinent part:

> (a) A person commits an offense if, in violation of . . . an order issued under Chapter 85, Family Code . . ., the person knowingly or intentionally:
>
> . . . .
>
> (3) goes to or near any of the following places as specifically described in the order or condition of bond:
>
> (A) *the residence or place of employment or business* of a protected individual or a member of the family or household[.]

Tex. Penal Code Ann. § 25.07(a)(3) (West Supp. 2011)[1] (emphasis added). To determine the essential elements of an offense, we look to the hypothetically correct jury charge for the case. *Geick v. State*, 349 S.W.3d 542, 545 (Tex. Crim. App. 2011). A hypothetically correct jury charge '"accurately sets out the law, is authorized by the indictment, does not unnecessarily increase the State's burden of proof or unnecessarily restrict the State's theories of liability, and adequately describes the particular offense for which the defendant was tried.'" *Id.* (quoting *Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997)). "However, when an indictment needlessly pleads an allegation that gives rise to an immaterial variance, that allegation will not be included in the hypothetically correct jury charge." *Id.* (citing *Gollihar v. State*, 46 S.W.3d 243, 257 (Tex. Crim. App. 2001)).

Section 25.07(a)(3) of the Penal Code expressly provides that a defendant commits an offense if, in violation of a protective order, the person enters the residence, place of employment, or business of a protected individual or a member of his family or household, as described in the protective order. Tex. Penal Code Ann. § 25.07(a)(3). In addition, the application paragraph of the jury charge provided as follows, in pertinent part:

> . . . [I]f you believe from the evidence beyond a reasonable doubt that JENNIFER ELAINE DOORNBOS, hereafter styled the Defendant,

[1] Section 25.07 has been amended since the date of the offense. However, because the amendments did not change section 25.07(a)(3), we cite to the current version of the statute.

> heretofore on or about July 25, 2008, did then and there intentionally and knowingly go to and near [the] residence, located at 816 N. 12th St., Nederland, Texas of RICHARD DORNBOS, Applicant, in violation of a court order . . . .

We conclude that the inclusion in the information of the type of property ("residence") Doornbos allegedly entered was not surplusage. *See Geick*, 349 S.W.3d at 545; *see also* Tex. Penal Code Ann. § 25.07(a)(3).

As previously discussed, all of the evidence adduced at trial indicated that although Richard owned the property at 816 N. 12th Street, Richard was using the property for storage, and he had never used it as a residence. Because section 25.07(a)(3) explicitly requires that the property Jennifer entered be Richard's residence, place of employment, or business, and the evidence affirmatively demonstrated that the property was not Richard's residence as alleged in the information, the evidence was legally insufficient to support the verdict. *See Brooks*, 323 S.W.3d at 895; *Jackson*, 443 U.S. at 318-19; *Hooper*, 214 S.W.3d at 13; *see also Geick*, 349 S.W.3d at 545 (quoting *Gollihar*, 46 S.W.3d at 254-55) ("When a statute lays out several alternative methods of committing the offense, and the indictment alleges only one of those methods, 'the law as authorized by the indictment' is limited to the method specified in the indictment."). We sustain Jennifer's sole issue. Accordingly, we reverse the trial court's judgment and render a judgment of acquittal.

REVERSED AND RENDERED.

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STEVE McKEITHEN
Chief Justice

Submitted on December 8, 2011
Opinion Delivered December 21, 2011
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Before McKeithen, C.J., Gaultney and Kreger, JJ.