In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-21-00116-CR

JOE WAYNE CLARK, JR., APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

On Appeal from the 181st District Court
Randall County, Texas
Trial Court No. 28,822-B; Honorable Titiana Frausto, Presiding

December 2, 2021

OPINION

Before QUINN, C.J., and PIRTLE and PARKER, JJ.

A jury found Appellant, Joe Wayne Clark, Jr., guilty of arson of a habitation, a first degree felony.[1] The trial court assessed punishment at ten years of confinement.[2]

[1] TEX. PENAL CODE ANN. § 28.02(d)(2) (West 2020).

[2] TEX. PENAL CODE ANN. § 12.32 (West 2020) (The range of punishment for felony of the first degree is imprisonment for life or for any term of not more than ninety-nine years or less than five years and imposition of a fine not to exceed $10,000).

Through this appeal, Appellant challenges his conviction, arguing the State failed to prove his identity as the person who set the fire. We will affirm.

BACKGROUND

A witness observed a fire at a home late on an evening at the end of July 2018, and attempted to extinguish the fire with a hose. The witness did not see anyone at home at the time.[3] Investigators later determined that someone had entered the residence by kicking in the back door.

A formal investigation showed a fire had been intentionally set using gasoline poured from a plastic Hawaiian Punch bottle as an accelerant. That bottle was found on the floor of the kitchen. A strong smell of gasoline emanated from the bottle. Investigators concluded the origin of the fire was a couch in the family room. Investigators also found gasoline was used to start a fire in a vehicle parked in the garage.[4] That fire was started with a gasoline-soaked couch cushion[5] that was placed into the vehicle and lit. Investigators determined that the fires were "intentionally set fire[s]" because there appeared to be multiple points of origin, there was a smell of gasoline, and the back door was forced open prior to the arrival of firefighters or police.

[3] The resident testified she stayed the night at her mother's home. No one saw Appellant or anyone else at the home near the time of the fire.

[4] Investigators found prints on the vehicle belonging to Omar Morse, Zachory Coleman, and Harriet Ochaya. None of the prints found on the vehicle belonged to Appellant or to the resident of the home. While Morse's prints were found on the passenger side of the vehicle where a cushion used to start the fire was found, police never investigated whether Morse started the fire at the residence. The resident of the home testified Morse never threatened to burn her house down and never started fires while she was dating him.

[5] The responding fire marshal testified that the fabric of the cushion matched that of the couch inside the home. The resident testified the cushion was not from her couch and that her couch was "dark brown." She said the cushion was not from any piece of furniture in her house. However, Morse testified the cushion was from the house.

The bottle was removed from the residence and tested for the presence of fingerprints.[6] One latent fingerprint[7] was found on the bottle in a location consistent with a person pouring liquid out of the bottle. That print matched that of Appellant's right thumb.[8] The resident of the home testified that although she allowed her son to drink Hawaiian Punch, she did not recognize the bottle and did not recall having the bottle in her home prior to the fire. She also said she did not leave the bottle on the floor and had never emptied a Hawaiian Punch container and put gasoline in it. Furthermore, she said she did not know Appellant and had not given him consent to enter her home at any time. She did, however, tell investigators that she had been involved in a relationship with a man, Omar Morse, and she told him to move out after she discovered his involvement in criminal activity. She said that Morse had threatened to harm her earlier in the day on the day of the fire.[9] Morse was also dating another woman and that woman was Appellant's sister-in-law.[10] Appellant's wife testified that the day before the fire, someone

[6] A crime scene police officer testified there were five latent prints suitable for lifting but only one was suitable for comparison.

[7] The crime scene police officer testified that "an inked print is one that's recreated with an ink pad and placed on a contrasting piece of backing, like a white piece of paper. The other ones are latent prints, and those are the ones that are unseen and then have to be developed using fingerprint powder or other chemicals."

[8] The crime scene officer testified the print matched Appellant's when he compared it to those in the "AFIS" system. He also testified that he himself took Appellant's inked prints the day prior to trial and compared those prints to the print found on the Hawaiian Punch bottle. He told the jury that the prints matched, confirming the print found on the bottle was Appellant's right thumb print.

[9] She testified "he was yelling at [her] and calling [her] out by names and all of that, because he was upset that I wanted to be done." She said she felt "[s]cared" when he did that.

[10] Morse was also dating a third woman. Investigators responded to a fire at her home the day prior to this fire. The investigator testified that fire was also intentionally set, using gasoline as the accelerant. The fire started in a shed while the woman was inside with Morse.

came to her sister's home and asked for gasoline. According to her, Appellant gave them some gasoline.

After Appellant was arrested and booked into jail, he made several telephone calls to his wife. During one of those calls, Appellant told his wife that the print found on the plastic bottle could not have been his because he "didn't go in there without no gloves on."

STANDARD OF REVIEW AND APPLICABLE LAW

A criminal conviction must be supported by a rational trier of fact's findings that the accused is guilty of every essential element of a crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 316, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). To ensure a conviction is satisfactorily supported, we engage in a review of the sufficiency of the evidence. Under this review, we consider all of the evidence in the light most favorable to the verdict and determine whether a rational fact finder could have found the essential elements of the crime beyond a reasonable doubt based on the evidence and reasonable inferences from that evidence. *Whatley v. State*, 445 S.W.3d 159, 166 (Tex. Crim. App. 2014); *Jackson*, 443 U.S. at 319. Because the jury is the sole judge of the credibility of the witnesses and of the weight to be given to their testimony, we resolve any conflicts or inconsistencies in the evidence in favor of the verdict. *Ramsey v. State*, 473 S.W.3d 805, 808 (Tex. Crim. App. 2015); *Wesbrook v. State*, 29 S.W.3d 103, 111 (Tex. Crim. App. 2000).

Moreover, "circumstantial evidence is as probative as direct evidence in establishing guilt, and circumstantial evidence alone can be sufficient to establish guilt." *Winfrey*

v. State, 393 S.W.3d 763, 771 (Tex. Crim App. 2013) (citing *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007)). Juries may "draw multiple reasonable inferences as long as each inference is supported by the evidence presented at trial. However, juries are not permitted to come to conclusions based on mere speculation or factually unsupported inferences or presumptions." *Hooper*, 214 S.W.3d at 15.

Lastly, we measure the sufficiency of the evidence against the elements of the offense as defined by a hypothetically correct jury charge for the case. *Byrd v. State*, 336 S.W.3d 242, 246 (Tex. Crim. App. 2011). Such a charge is one that 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 offense for which the defendant was tried. *Id.*

To prove Appellant guilty of arson in this case, the State was required to prove that he started a fire or caused an explosion with the intent to destroy or damage any habitation, with the knowledge that the habitation is within the limits of an incorporated city. TEX. PENAL CODE ANN. § 28.02(a)(2)(A).

ANALYSIS

Via a single issue, Appellant argues that the evidence was insufficient to establish his identity as the person who set fire to the residence in question. Specifically, he argues that the only evidence tying him to the crime was his fingerprint found on the Hawaiian Punch bottle and such evidence was not adequate to identify him as the person who started the fire at the home. Because Appellant challenges only one element of the

offense of arson, that being the identity of the person who committed it, we will limit our analysis to the evidence supporting the element of identity.

Citing *Skeens v. State*, No. 08-18-00195-CR, 2020 Tex. App. LEXIS 6654, at *7 (Tex. App.—El Paso Aug. 19, 2020, no pet.) (mem. op., not designated for publication) and *In re L.R.L.*, No. 09-97-200-CV, 1997 Tex. App. LEXIS 5559, at *4 (Tex. App.—Beaumont Oct. 23, 1997, no pet.) (mem. op.), Appellant analogizes the presence of the fingerprint on the bottle to the mere presence of an accused at the scene of the offense, arguing that if mere presence of an accused at the scene of an offense is insufficient alone to support a conviction, the mere presence of Appellant's fingerprint on the bottle is likewise insufficient. He argues there is no evidence as to when he might have handled that bottle and it certainly does not connect him to the fire or any participation in starting the fire.

Appellant further argues that the jury was not entitled to draw inferences from the presence of the fingerprint because doing so would be impermissibly drawing inferences based on mere speculation. He asserts there "is no fact in evidence in this case from which a reasonable juror can deduce that Appellant was even present at the time this fire was started, much less that he started the fire." He contends that here, the State's case depended on the "indulgence of the inference that Appellant placed the bottle containing gasoline at the residence just prior to the fire, and upon that inference the further inference is indulged that Appellant started the fire in this case[.]" That, Appellant argues requires impermissible inference based on an inference.

The State disagrees, as do we. The State uses the burglary case of *Villarreal v. State*, 79 S.W.3d 806 (Tex. App.—Corpus Christi 2002, pet. ref'd), to illustrate its point that evidence like that found here is sufficient to prove identity of the perpetrator. In that case, fingerprints that were positively identified as belonging to the defendant were found on one or more CD covers located in the bedroom of the home. The defendant argued that the evidence failed to show that his fingerprints were left on a CD cover during the commission of the offense. Because fingerprints can remain on such surfaces for years, he complained, his fingerprints possibly could have been placed on the cover prior to the offense. The court of appeals noted that "[g]enerally, fingerprint evidence alone will be sufficient to sustain a conviction if the evidence shows that the prints were necessarily made at the time of the burglary. *Id.* at 812 (citing *Bowen v. State*, 460 S.W.2d 421, 423 (Tex. Crim. App. 1970); *Nieto v. State*, 767 S.W.2d 905, 908 (Tex. App.—Corpus Christi 1989, no pet.)). It also stated, "[o]ne important factor in determining the sufficiency of fingerprint evidence is the extent to which the fingerprinted object was accessible to the defendant." *Villarreal*, 79 S.W. 3d at 811 (citing *Phelps v. State*, 594 S.W.2d 434, 436 (Tex. Crim. App. 1980)). After reviewing the evidence, the court in *Villarreal* found it sufficient to prove the defendant's identity as the burglar. It noted that the victim testified he kept his CDs in his room, only loaned one or two of them to a close friend with the understanding that no one else use them, that he purchased the CDs new, and no one else had access to the room in which the CDs were kept. The victim and his roommate testified they did not know the defendant and knew no reason for him to be in the house on the day of the burglary. *Id.* at 811-12. The court determined that, taken as whole, the evidence tended to show that the fingerprints were necessarily made at the time of the

burglary and negated the probability that they were made prior to the time of the burglary. *Id.* at 812 (citation omitted). The court concluded that "[e]vidence is sufficient even though highly unlikely possibilities could account for the presence of the defendant's fingerprints in a manner consistent with innocence." *Id.* at 812 (citing *Nieto*, 767 S.W.2d at 909).

The State contends like the circumstances in *Villarreal*, the jury had sufficient evidence from which to conclude Appellant was the person who started the fire. The undisputed evidence shows entry into the home was forced and that the resident did not give consent for Appellant to be in her home at any time.[11] Therefore, at no time did Appellant have permission to be in the home to leave the bottle containing his thumbprint. Accordingly, the presence of Appellant's thumb print on the Hawaiian Punch bottle found in the kitchen smelling of gasoline was a crucial fact from which the jury could have determined Appellant was the person who started the fire. The thumbprint indicated Appellant had been in the home, without permission, with a bottle that smelled of gasoline, from which investigators determined the fire started. That is circumstantial evidence the jury was free to consider in reaching its determination, not the result of impermissible inferences.

While there may have been some possibilities to explain Appellant's fingerprints on the bottle that would be consistent with innocence, we cannot say those possibilities rise to the level of rendering the evidence before the jury insufficient. *Villarreal*, 79 S.W.3d

[11] The resident testified that just prior to the fire, she and Morse travelled to Houston. While there, she received calls from her alarm company informing her that her home security alarm had indicated the garage door had been opened. When she returned, she found her weapons and some money were gone but nothing else was missing. She also told the jury that the day before the fire, she "heard a couple of thuds" from the back door and her alarm went off. Police responded and they found her back door was "kicked in" and "broke." She had someone put a "metal piece" on the door. She was unable to open and close the door at that point.

at 812. This is particularly true given Appellant's statement to his wife during a jail phone call that was admitted into evidence at trial over Appellant's objection. In that call, he said he could not have left a fingerprint because he "didn't go in there without no gloves on."[12] While this was an attempt to explain his innocence, the jury could have taken it for what it appeared to be—an admission that Appellant was in the victim's home. Furthermore, during the jail phone call to his wife, Appellant indicated he knew the container at issue was a plastic bottle, a fact undisclosed to the public prior to that time.[13] Therefore, the jury could have determined the only way Appellant knew the gasoline was in a plastic bottle was if he was the person handling that bottle on the day of the fire.

We also note that the resident testified that the television that was normally in her living room was missing. She told the jury it was in the home the day prior to the fire but was gone after the fire. In the jail phone call from Appellant to his wife in which they were discussing the reason he was in jail, he told his wife to put the "new television" in his son's room. The jury could have taken that circumstantial evidence, in conjunction with the other evidence, as evidence pointing to Appellant's presence in the home at or near the time of the fire and could have made the reasonable inference that he was the person who took the television when he was in the residence and started the fire. *See Williams v. State*, No. 07-96-0108-CR, 1996 Tex. App. LEXIS 5776, at *8 (Tex. App.—Amarillo Dec. 30, 1996, no pet.) (mem. op., not designated for publication).

[12] Appellant's wife tried to explain this statement away by saying Appellant actually said "like, why would I not wear gloves, basically." The jury was free to believe or disbelieve her explanation. *Jones v. State*, 984 S.W.2d 254, 258 (Tex. Crim. App. 1998).

[13] Appellant told his wife he picked up trash all the time and he might have picked it up at any time, including when mowing grass. He said he "didn't know nothing about no fire."

Moreover, while there was testimony from other witnesses, in particular testimony from Morse,[14] that Appellant was not guilty of this offense, as well as some convoluted testimony from Appellant's wife about Morse and "some other guy" asking them for gasoline, the jury is the judge of the credibility of the witnesses and the sole finder of fact.[15] Disagreeing with the fact finder's determination is proper "only when the record clearly indicates that such a step is necessary to arrest the occurrence of a manifest injustice; otherwise, due deference must be accorded the fact finder's determinations, particularly those concerning the weight and credibility of the evidence." *Villarreal*, 79 S.W.3d at 811. Such a step is not necessary here and we will not disturb the jury's view of the witness testimony.

Viewing the evidence in the light most favorable to the verdict, we find it is sufficient to support Appellant's conviction. The jury was able to assess the credibility and demeanor of the witnesses who testified at trial and determine from the circumstantial evidence that it was Appellant who left his fingerprint on the plastic bottle in the course of committing the offense of arson. *See Jackson*, 443 U.S. at 319; *Hooper*, 214 S.W.3d at 16-17. "This was not a determination so outrageous that no rational trier of fact could agree." *Merritt v. State*, 368 S.W.3d 516, 527 (Tex. Crim. App. 2012) (citation omitted). Accordingly, we resolve Appellant's sole issue against him.

[14] Morse admitted that he told Appellant's sister-in-law, one of the women he had been dating, that if she did not bring money to him in jail, "[Appellant] was going to jail." But, he said, he was "just messing" with the sister-in-law. He testified he did not know Appellant and did not think he "burnt up the houses."

[15] Morse testified he did not request or receive gasoline from Appellant and his wife.

CONCLUSION

Having overruled Appellant's sole issue, we affirm the judgment of the trial court.

Patrick A. Pirtle
Justice

Publish.