In the Missouri Court of Appeals

Eastern District

DIVISION TWO

STATE OF MISSOURI,	)	No. ED105110
	)	
Respondent,	)	Appeal from the Circuit Court of
	)	St. Francois County
vs.	)	15SF-CR01317-01
	)	
ROBERT E. STEWART,	)	Honorable Sandra Martinez
	)	
Appellant.	)	Filed: January 9, 2018

OPINION

Following a jury trial, Robert E. Stewart was convicted of one count each of unlawful use of a weapon, Section 571.030,[1] first-degree burglary, Section 569.160, armed criminal action, Section 572.015, and third-degree domestic assault, Section 565.074. Stewart was sentenced to 15 years in prison for unlawful use of a weapon, 5 years for first-degree burglary, 3 years for armed criminal action, and one day for third-degree domestic assault, all terms to run concurrently, and with credit for time served as to the one-day sentence.

Defendant contends that the record at trial did not contain sufficient evidence to sustain the judgment of conviction as to third-degree domestic assault and first-degree burglary. Defendant effectively also seeks the vacation of his conviction of armed criminal action, which as charged

[1] All statutory citations are to RSMo Cum. Supp. 2014 unless otherwise indicated.

and submitted to the jury, must stand or fall based on his conviction of first-degree burglary. We affirm the judgment as to the conviction of third-degree domestic assault but vacate Defendant's conviction of first-degree burglary and consequently his conviction of armed criminal action.[2]

BACKGROUND

Defendant and T.S. were married in March 2005 and divorced in January 2014. After divorcing, they attempted to reconcile. Defendant testified they started living together again in November 2014. T.S. testified she and Defendant both contributed money to put $5,000 down in a rent-to-own arrangement on the residence at issue in this case. She also testified they lived there together until about a week before the January 23, 2015 incident. T.S. stated when Defendant failed to return home one night, she told him "not to come back." T.S. testified that during the interim week, he stayed in a camper they "had . . . at the house."

On cross-examination, T.S. agreed with defense counsel that Defendant "had all of his stuff in [the] house because he was living there[.]" She confirmed that even after he started sleeping in the camper, "all of his stuff," including his clothes, toiletries, and other personal items, remained in the residence; that he continued to eat meals and take showers in the residence; and that he was "just sleeping in the trailer"—"[t]he rest of the time he was in the house with [her] and [they] were actually working on [the house]." T.S. also testified she did not seek a protective order prior to the January 23, 2015 incident.

Defendant testified he and T.S. had a "lease with option to buy" the residence and were living in and working on it while they waited for a contract to be drawn up. He testified that around January 20, 2015, T.S. "caught [him] red-handed" in some way regarding his relationship with

[2] Defendant does not appeal his conviction of unlawful use of a weapon.

another woman and told him to "get out" of the residence. He responded he would stay in the camper but she said he could get the camper off the property, too. He testified the camper was "parked right in the driveway." He stated T.S. left a message on his phone not to come back and that "all [his] stuff would be out in the yard and she'd burn it."

However, she did not follow through and on January 23, 2015, "everything" remained in the residence. Defendant further stated that during the two days prior to January 23, 2015, he "wasn't even on the property . . . because [he] did not want to argue with [T.S.]," and he would come home late at night when he knew she was in bed and he "didn't have to worry about her coming out there and arguing and fighting."

On the morning of January 23, 2015, Defendant was in the residence delivering firewood. Both Defendant and T.S. testified he did so at T.S.'s request. But T.S. did not greet Defendant when he arrived—only her grandmother and uncle did. Defendant inquired about T.S., then walked upstairs to knock on her bedroom door. T.S. testified she was awakened by Defendant's knocking. When she exited the bedroom with another man, who was her overnight guest, she spotted Defendant standing by the back door of the house holding a black handgun. T.S. said she immediately told Defendant to get out of the house. In response, Defendant fired the handgun into the ceiling. T.S. testified she was "startled" by the shot. When she more forcefully told Defendant to leave, he threatened to kill both her and her guest, then left the house.

T.S. testified that when she walked toward the door to close it, she heard another gunshot and the sound of glass breaking. After T.S. shut the door, Defendant started his car and left the property. When her overnight guest called the police, T.S. told him to hang up. Police arrived later that day and found bullet holes and .32-caliber shell casings matching T.S.'s description of the incident.

Despite her admission, under oath, acknowledging the danger of gunfire, T.S. testified she was not afraid of Defendant and did not think he was trying to hurt her during the incident. Additionally, she stated she was not afraid when Defendant threatened her and her guest and agreed Defendant was "just blowing steam." She stated she was never in apprehension of serious physical injury, though she recognized the seriousness of the injury she might suffer with Defendant firing from such close range. Moreover, she testified she continued to visit Defendant at the jail after he was arrested.

Defendant's account of the incident differed as to only a few details: He testified T.S. told him to get out of the residence before she opened the door to the bedroom. He denied threatening to kill anyone. Additionally, he claimed he fired the second shot accidentally as a result of T.S. slamming the back door behind him and knocking him down the stairs.

Defendant was convicted of first-degree burglary based on the charge he "*knowingly* remained unlawfully in an inhabitable structure . . . possessed by [T.S.], for the purpose of committing the offense of domestic assault in the third degree therein," while T.S. was present in the residence. (emphasis added). He was convicted of armed criminal action on the charge he committed first-degree burglary as just described, by, with, and through the knowing use, assistance, and aid of a deadly weapon. And he was convicted of third-degree domestic assault on the charge he "purposely placed [T.S.] in apprehension of immediate physical injury by threatening to kill her and firing a gun into her home, and [T.S.] and [Defendant] were family or household members in that [T.S.] was the former spouse of [Defendant]."

This appeal follows.

Point I—The Record at Trial Contained Sufficient Evidence to Sustain the Judgment as to Defendant's Third-Degree Domestic Assault Conviction

In his first point on appeal, Defendant contends the record at trial did not contain sufficient evidence to sustain the judgment as to his conviction of third-degree domestic assault.

Standard of Review

Our review of this claim is limited to determining whether sufficient evidence was presented at trial from which a reasonable juror might have found the defendant guilty beyond a reasonable doubt of all the essential elements of the crime. *State v. Hill*, 408 S.W.3d 820, 822 (Mo. App. E.D. 2013) (citing *State v. Thomas*, 387 S.W.3d 432, 436 (Mo. App. W.D. 2013)). All evidence favorable to the verdict, is accepted as true, while contrary evidence and inferences are disregarded. *Id*. That is, unless a contrary inference is such a natural and logical extension of the evidence that a reasonable juror would be unable to disregard it. *State v. Grimm*, 854 S.W.2d 403, 411 (Mo. banc 1993). Reasonable inferences can be drawn from both direct and circumstantial evidence, and circumstantial evidence alone can be enough to support a jury's verdict. *Hill*, 408 S.W.3d at 822. The jury determines the reliability, credibility, and weight of witness testimony. *Id*.

Analysis

A person commits the crime of third-degree domestic assault if the person purposely places a family or household member in apprehension of immediate physical injury by any means. Section 565.074. The State must show both that the defendant intended to place the victim in apprehension of immediate physical injury, and that the victim was actually placed in such apprehension. *J.D.B. v. Juvenile Officer*, 2 S.W.3d 150, 152 (Mo. App. W.D. 1999). "To apprehend something means to 'conceive, believe, fear, or dread' it." *J.D.B.*, 2 S.W.3d at 153

(quoting *State v. McGuire*, 924 S.W.2d 38, 39 (Mo. App. E.D. 1996)). "Physical injury" is defined as "physical pain, illness, or any impairment of physical condition." Section 556.061(20).

Defendant asserts the State failed to present sufficient evidence of T.S.'s actual apprehension of immediate physical injury because T.S. testified specifically that Defendant did not place her in apprehension of immediate physical injury, she was not afraid of him, and she did not think he was trying to hurt her. Defendant's argument is without merit. Even considering the testimony referred to by Defendant above, we find when considering the circumstances surrounding the interaction and the record as a whole, there was sufficient evidence from which the jury could have convicted Defendant of third-degree domestic-assault.

Here, both T.S. and Defendant testified T.S. told Defendant to leave the residence, and Defendant responded by firing his gun into the ceiling. T.S. repeatedly and more insistently pleaded for Defendant to leave the house. T.S. testified she was startled by the shot and she recognized the seriousness of the injury she might suffer with Defendant firing from such close range. She also stated that after the first shot, she more forcefully told Defendant to leave. Thereafter, Defendant threatened to kill T.S. and her guest. Finally, there was substantial evidence, including the testimony of both T.S. and Defendant, to support the conclusion that when Defendant ultimately left the residence and T.S. moved to shut the door behind him, he fired another shot into the house through a window next to the door. When asked whether she was concerned, when she heard the second gunshot, that she might be hit by it, T.S. said she could not remember but guessed so.

T.S.'s repeated, increasingly insistent pleas for Defendant to leave the house; her testimony she found herself "startled" after Defendant discharged a firearm inside the house; her understanding of the danger she was in when Defendant fired the handgun at close range; as well

as Defendant's firing of a second shot into the house and her supposed concern of being hit by the second shot, all support Defendant's conviction for third-degree domestic assault. Based upon the foregoing evidence, a reasonable juror could have inferred T.S. was in actual apprehension of immediate physical injury, despite her testimony to the contrary. *See State v. Jackson*, 433 S.W.3d 390, 392, 399 (Mo. banc 2014) (jurors need not believe any particular testimony and have the right to disbelieve any or all evidence).

We reject Defendant's argument that in convicting him of third-degree domestic assault, the jury discarded a subjective standard of apprehension for an objective one. Rather, it seems that in light of all the evidence, the jury simply did not believe T.S.'s testimony that she was not placed in apprehension of immediate physical injury. Indeed, based on the testimony and facts referenced above, we find the jury reasonably concluded T.S. was in actual apprehension of immediate physical injury, and therefore, there was sufficient evidence to support Defendant's conviction of third-degree domestic assault.

Point I is denied.

Point II—The Record at Trial Contained Sufficient Evidence to Sustain the Judgment as to Defendant's First-Degree Burglary Conviction

In his second point on appeal, Defendant contends that the record at trial did not contain sufficient evidence to sustain the judgment as to his conviction of first-degree burglary. We agree.

Standard of Review

As in Point I, our review is limited to a determination of whether, when viewing the evidence in the light most favorable to the State, there is sufficient evidence from which a reasonable juror could have found Defendant guilty beyond a reasonable doubt of all the essential elements of the charged offense. *State v. Myles*, 479 S.W.3d 649, 660 (Mo. App. E.D. 2015). All

evidence favorable to the verdict, is accepted as true, as well as all reasonable inferences. *Hill*, 408 S.W.3d at 822. We accept only those contrary inferences a reasonable juror would be unable to disregard. *Grimm*, 854 S.W.2d at 411.

Analysis

A person commits the crime of first-degree burglary if the person *knowingly* remains unlawfully in an inhabitable structure for the purpose of committing a crime therein, and a person who is not a participant in the crime is present in the structure. Section 569.160.1(3) (emphasis added). A person remains unlawfully in a premises when not licensed or privileged to do so. Section 569.010. The mens rea "knowingly" modifies the phrase "enters unlawfully." Section 569.160. A person acts "knowingly" with respect to his conduct or attendant circumstances when he is "aware of the nature of his conduct or that those circumstances exist." *State v. Hunt*, 451 S.W.3d 251, 257 (Mo. banc 2014) (citing Section 562.016.3(1)). Accordingly, a person "knowingly remains unlawfully" when he is aware he has no privilege to remain. *Cf. id.* (citing *State v. Chandler*, 635 S.W.2d 338, 342 (Mo. banc 1982)) (reaching the same conclusion with regard to knowingly *entering* unlawfully). Thus, pursuant to Missouri Supreme Court precedent, our analysis must focus on the sufficiency of the evidence of defendant's subjective belief. *Id.*

In his motion for new trial, Defendant asserts only that the State failed to show that he in fact *had* no license or privilege to remain inside the residence, rather than raising any argument concerning his subjective belief. However, claims concerning the sufficiency of the evidence to support a conviction are considered on appeal even if not raised in the motion for new trial. *State v. Claycomb*, 470 S.W.3d 358, 361 (Mo. banc 2015); *See also* Rule 29.11(d)(3) (allegations of error must be presented in motion for new trial following jury trial *except* sufficiency of the evidence) (emphasis added). Thus, we consider whether there was sufficient evidence from which

a reasonable juror could have found Defendant was aware he lacked any such license or privilege to remain in the residence beyond a reasonable doubt. *Id*.; *See also Myles*, 479 S.W.3d at 660; and *State v. Voss*, 488 S.W.3d 97, 109 (Mo. App. E.D. 2016).

Here, there was no direct testimony or evidence of Defendant's subjective knowledge. The only evidence the State presented of Defendant's awareness he lacked any license or privilege to remain in the residence was T.S.'s affirmative answers on redirect examination in response to the State's questioning (1) whether Defendant "eventually did get out" of the residence, and (2) whether he "didn't say, hey, I have every right to be here, you can't tell me to get out."

Where proof of an essential element of a crime relies solely on circumstantial evidence, "a conviction must rest upon inferences, which inferences must be strong enough to support a finding of guilt beyond a reasonable doubt." *State v. Allen*, 2017 WL 4247998 (Mo. App. E.D. 2017) (citing *State v. Waller*, 163 S.W.3d 593, 596 (Mo. App. W.D. 2005)). Speculation may not be used to support a verdict. *State v. Clark*, 490 S.W.3d 704, 711 (Mo. banc 2016). To determine whether circumstantial evidence sufficiently supports an inference of knowledge, we must look at the totality of the circumstances. *State v. Evans*, 410 S.W.3d 258, 263 (Mo. App. W.D. 2013).

On this record, there is no direct evidence Defendant eventually left the residence because he was subjectively aware he had no right to be there. Nor is there any evidence he failed to assert such a right because he was aware he lacked any license or privilege to remain in the residence. Rather, the record contains ample evidence suggesting Defendant was in fact *not* subjectively aware he lacked such license or privilege, and to support the conclusion he had other reasons for leaving and failing to assert his right to remain in the residence.

T.S. testified Defendant left "all of his stuff" in the house, continued to eat meals and take showers there, and was "just sleeping" in the camper. Both T.S. and Defendant testified he was

delivering firewood to the house, at her request, just before he went upstairs and the domestic incident began. This evidence and inferences therefrom support the conclusion that Defendant lacked subjective awareness that he had no right to remain.

Defendant also testified that prior to the incident, he stayed away from the property during the day because he did not want to argue with T.S., and he would come home late at night when he knew she was in bed and he "didn't have to worry about her coming out there and arguing and fighting." A reasonable juror could have concluded from this evidence that Defendant, believing he had a license or privilege to remain in the residence, failed to insist on such a right before he left, ending the dangerous situation he initiated. Regardless of why Defendant eventually left the residence and failed to assert a right to remain, there is nothing in the record to suggest he did so because he *knew* he lacked any license or privilege to stay inside.

There is no direct evidence from which a juror could conclude Defendant was aware he did not have the privilege to remain in the residence and knowingly remained unlawfully therein. Instead, the circumstantial evidence and inferences therefrom would require juror speculation to conclude that Defendant must have been aware he lacked any license or privilege to remain. Such speculation may not be used to support a verdict. *Clark*, 490 S.W.3d at 711. Instead, the totality of the circumstances support the conclusion Defendant lacked awareness of the fact he had no right to remain in the residence. Thus, even viewing the evidence in the light most favorable to the jury's verdict, we hold there was insufficient evidence presented to establish the "knowingly" element of first-degree burglary.

Point II is granted.

CONCLUSION

The judgment of the trial court is affirmed as to the conviction of third-degree domestic assault, but Defendant's convictions of first-degree burglary and armed criminal action are vacated.

Lisa P. Page, Presiding Judge

Roy L. Richter, J., and
Philip M. Hess, J., concur.