AFFIRM; and Opinion Filed January 13, 2016.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-14-01184-CR

DEMPSTER A. ROSS, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the 416th Judicial District Court
Collin County, Texas
Trial Court Cause No. 416-80539-2014

MEMORANDUM OPINION

Before Justices Fillmore, Stoddart, and O'Neill[1]
Opinion by Justice O'Neill

Appellant Dempster Ross appeals his jury conviction for arson. After a jury found appellant guilty, the trial court sentenced him to fifteen years' imprisonment. In five issues, appellant contends: the evidence is legally insufficient, and the trial court erred in admitting an exhibit, admitting the testimony of a rebuttal witness, excluding evidence regarding other potential suspects, and admitting evidence regarding unadjudicated prior extraneous acts. We overrule all of appellant's issues, and affirm the judgment. Because all dispositive issues are settled in law, we issue this memorandum opinion. TEX. R. APP. P. 47.2(a), 47.4.

[1] The Hon. Michael J. O'Neill, Justice, Court of Appeals, Fifth District of Texas at Dallas, sitting by assignment.

Background

On the evening of November 23, 2012, appellant returned to his girlfriend's apartment from a night of drinking. Appellant's girlfriend, Alisa Crouch, testified that appellant was annoyed when he arrived at her apartment, and he soon became violent—pulling the trigger of a partially-loaded revolver aimed at her and even strangling her. After several unsuccessful attempts to persuade appellant to leave her apartment, she drove appellant to his house three different times over the course of that evening and the following morning.

Crouch testified that during the second trip to appellant's home, appellant emerged with a brown beer bottle that he filled with gasoline upon return to Crouch's apartment. After about thirty minutes to an hour, appellant asked Crouch to drive him back to his home again. Appellant brought the beer bottle of gasoline with him. Upon arrival at his home, appellant asked Crouch for a lighter. Crouch lied and said she did not have a lighter, so the couple drove to a nearby gas station where appellant purchased a lighter. After purchasing the lighter, the couple drove back to appellant's house. Appellant entered his home with rubber gloves, a gasoline-filled beer bottle, a lighter, and paper towels. After appellant exited, Crouch saw him throw the gasoline-filled beer bottle into the front window of his home. Crouch saw flames immediately; appellant then walked back to Crouch's truck, got in, and told her to drive fast. The couple returned to Crouch's apartment where appellant threw the rubber gloves away in a dumpster and fell asleep on the floor.

In the early morning on November 24, 2012, appellant's neighbor called 9-1-1 to report appellant's home was on fire. Crouch also called 9-1-1 to report appellant's actions. Police arrested appellant at Crouch's apartment that morning. The arresting officer testified appellant was asleep on the floor of Crouch's apartment and appellant did not have an odor of gasoline on

his body or clothing. During her trial testimony, Crouch testified appellant told her that he set the house on fire for insurance money.

Lieutenant Timothy Taylor of the Plano Fire Department investigated the fire and testified at appellant's trial. Taylor reviewed the police and fire reports, witness statements, and security footage from the gas station where appellant bought a lighter on the night of the fire. Taylor then obtained a search warrant to conduct an origin and cause investigation. He concluded that the fire was "incendiary" because there were no ignition sources around the fire's origination point in the living room.

Taylor also enlisted the help of arson investigator Brian Gilmore and his arson dog, Baltic. Gilmore testified that Baltic is trained to detect the odor of an accelerant or an ignitable liquid in amounts as small as a quarter of an "eye drop" of "weathered" gasoline. During the search, Baltic alerted to the same area where Taylor concluded the fire started. Gilmore collected samples for testing in the areas where Baltic alerted, but the samples tested negative for the presence of accelerants. Gilmore explained that because Baltic could detect the presence of accelerant the size of a quarter of an eye drop, a sample collected even a half inch off from where Baltic alerted could test negative for accelerant.

Appellant's mortgage company filed an insurance claim with appellant's insurer, Nationwide Insurance. Nationwide investigated the claim, and hired an independent company, Lone Star Investigations, to assess the case. The Lone Star investigator, Gary Morgan, testified that he used an arson dog, Gypsy, to investigate the scene in January 2013. Gypsy alerted to the presence of accelerants in the same area as Baltic, and these samples also tested negative for ignitable liquid. Morgan concluded that the fire originated in the living room near the couch and coffee table—the same origin area that Taylor identified. Morgan also concluded that the fire had an incendiary origin.

Appellant's expert witness, Gary Jackson, testified that Taylor's and Morgan's investigations were incomplete because the investigators relied on the dogs' alerts to indicate the use of accelerant, and said that he would consider the absence of a positive laboratory finding of accelerant to be "almost proof that there [is not] an ignitable liquid." However, Jackson did concede that the National Fire Protection Association's fire investigation manual states that canines are capable of detecting gasoline at concentrations below those normally detectable by laboratory methods.

Discussion

A. Sufficiency of the Evidence

In his first issue, appellant contends the evidence was legally insufficient to support a finding beyond a reasonable doubt that he committed the offense of arson. Specifically, appellant asserts that Crouch was not a credible witness, that uncorroborated dog sniffs are insufficient to show that an accelerant was used, and he finds fault with the arson investigations.

When reviewing the legal sufficiency of the evidence, we consider all of the evidence in the light most favorable to the verdict to determine whether, based on that evidence and reasonable inferences therefrom, a rational finder of fact could have found the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318–19 (1979); *Gear v. State*, 340 S.W.3d 743, 746 (Tex. Crim. App. 2011). We are required to defer to the jury's credibility and weight determinations given to the evidence, and its resolution of any conflicts in the evidence. *Thornton v. State*, 425 S.W.3d 289, 303 (Tex. Crim. App. 2014); *Gear*, 340 S.W.3d at 746.

A person commits the offense of arson if such person starts a fire with intent to destroy or damage any building knowing that it is within the limits of an incorporated city, that it is insured against damage or destruction, or that it is subject to a mortgage. TEX. PENAL CODE § 28.02(a)

(West 2011). Appellant argues that the State failed to present sufficient evidence at trial to convict him of arson.

The State introduced evidence that appellant's home was located at 2824 Landershire Lane, within the city limits of Plano. The State also introduced evidence, through Crouch's testimony, that appellant told Crouch he lit the fire for the insurance money—thus evidencing appellant's knowledge that the building was insured against damage or destruction. Lastly, the State introduced evidence through State's Exhibit 28A—a set of correspondence and notices including an amended payoff statement issued on January 17, 2013 listing appellant as the mortgagor and a promissory note dated April 15, 2004 loaning appellant $144,000 secured by property located at 2824 Landershire Lane—thus showing appellant's knowledge that the building was subject to a mortgage. The only issue left to complete the offense of arson is whether appellant started the fire as alleged in the indictment.

The evidence regarding whether appellant started the fire at his house is conflicting. Crouch testified that she saw appellant start the fire. Crouch saw appellant enter his home with a gasoline-filled beer bottle, a paper towel, and a lighter. Appellant exited his home carrying only the beer bottle. Crouch watched appellant throw the gasoline-filled bottle through the window, and she immediately observed flames inside the home. Appellant argues that no reasonable juror could believe Crouch's testimony because her testimony at trial and her pretrial statements were inconsistent. Crouch admitted during cross-examination that her testimony at trial and her numerous pretrial statements differed slightly. The jury was the sole judge of Crouch's credibility and any conflicts regarding her prior inconsistent statements, and we are required to defer to their determination that her eyewitness testimony was credible. *See Thornton*, 425 S.W.3d at 303; *Gear*, 340 S.W.3d at 746. The State's introduction of Crouch's eyewitness testimony alone provided legally sufficient evidence for a reasonable juror to conclude that

appellant started the fire. *See Aguilar v. State*, 468 S.W.2d 75, 77 (Tex. Crim. App. 1971) (concluding testimony of one eyewitness sufficient to support jury's verdict); *Turner v. State*, 751 S.W.2d 240, 242 (Tex. App.—Dallas 1988, pet. ref'd).

Appellant contends that the physical evidence does not support Crouch's inconsistent testimony because the canine alerts, when not confirmed by laboratory analysis, should not be considered validated. The State introduced as evidence the details of the arson investigations conducted by the Plano Fire Department and Nationwide Insurance. Taylor and Morgan testified about the findings of their independent investigations. Both investigations with arson dogs independently resulted in arson dogs alerting to the presence of an accelerant or igniting liquid near the same area. All samples taken during both investigations from the areas in which the arson dogs alerted tested negative for the presence of ignitable liquid. Eric Steinberg, the forensic scientist that tested the samples, testified that whether canines are more sensitive than laboratory equipment to the presence of ignitable liquids is a heavily debated topic in his field. Steinberg also testified that the absence of detectable levels of ignitable liquid residues can be due to several factors—including destruction by the inherent nature of fire, evaporation prior to the collection and analysis, fire suppression activities, improper packaging of samples, or lack of use of ignitable liquids. Gilmore testified that his arson dog could detect the presence of gasoline in the quantity of a quarter of an eye drop.

Because the jury heard evidence that an arson dog may be more sensitive to the presence of accelerants than laboratory equipment, and testimony providing reasons why the fire itself, fire suppression activities, environmental factors, or improper sample handling could have produced negative test results for the presence of ignitable liquids, it was within the purview of the jury to resolve against appellant any conflict between the arson dog alerts and the negative

lab results. *See Gear*, 340 S.W.3d at 746. Further, it was within the purview of the jury to determine that the investigators completed a thorough investigation. *See id.*

Considered in the light most favorable to the verdict, the State's evidence is legally sufficient to support the jury's verdict. We overrule appellant's first issue.

B. Exhibit 28A

In his second issue, appellant contends that the trial court improperly admitted State's Exhibit 28A into evidence over his objection. We review a trial court's ruling on the admissibility of evidence for an abuse of discretion. *Davis v. State*, 329 S.W.3d 798, 803 (Tex. Crim. App. 2010). A trial court abuses its discretion only if its decision lies outside the "zone of reasonable disagreement." *Id.*

Evidence is relevant if it has any tendency to make a fact of consequence more or less probable than it would be without the evidence. TEX. R. EVID. 401. A party may claim error in a ruling to admit evidence only if the error affects a substantial right of the party, and the party timely objects on specific grounds, stated for the record. TEX. R. EVID. 103(a).

The state moved to admit as State's Exhibit 28 business records from Specialized Loan Servicing LLC regarding appellant's mortgage on his home. Appellant objected to relevance, and the trial court took the matter under advisement until the next day. Outside the presence of the jury, the trial court noted that it had redacted part of the documents, and appellant stated, "We do still object." The trial court overruled the objection and admitted the redacted documents as Exhibit 28A.

State's Exhibit 28A included documents that could reasonably tend to make a fact of consequence, whether appellant knew his home was subject to a mortgage, more or less probable. Thus, the trial court did not abuse its discretion in concluding that State's Exhibit 28A was relevant evidence. *See* TEX. R. EVID. 401.

Appellant's argument that State's Exhibit 28A was more prejudicial than probative is not preserved for review. When the state attempted to introduce State's Exhibit 28, appellant only objected to relevance under rule 401. When the trial court addressed the objection on the following day and proposed admitting the redacted documents, appellant renewed his relevance objection by saying, "We do still object." The opponent of evidence must make a timely, specific objection at the earliest possible opportunity. TEX. R. APP. P. 33.1(a)(1). Appellant never raised a prejudice objection under Texas Rule of Evidence 403. Because appellant did not timely object on the record to any prejudicial effect of State's Exhibit 28A, appellant has not properly reserved the issue for appeal.

Accordingly, we overrule appellant's second issue.

C. Rebuttal Testimony

In his third issue, appellant contends the trial court improperly allowed Jeanette Newland to testify over his objection. This issue is not preserved for review. At the close of appellant's case in chief, the State announced its intent to call Jeanette Newland and Lori Coburn as rebuttal witnesses. In a hearing outside the presence of the jury, appellant objected to the rebuttal witnesses on two grounds: (1) the witnesses would not rebut any evidence introduced by appellant; and (2) the State did not provide notice of the witnesses as required. *See* TEX. R. EVID. 404(b). The trial court overruled appellant's first objection as to Newland, but sustained the second objection and excluded testimony as to Lori Coburn. Appellant withdrew his second objection to Newland's testimony upon recognizing that the State in fact provided notice in accordance with rule 404(b). Before the jury, Newland testified that appellant would not close the doors to the wood-burning fireplace in his home because "if [a log] falls out and burns down the house . . . [he] would get money."

The prosecution is entitled on rebuttal to present any evidence that tends to refute the defensive theory of the accused and the evidence introduced in support of it. *Laws v. State*, 549 S.W.2d 738, 741 (Tex. Crim. App. 1977). Appellant's expert witness testified that the fire was accidental rather than deliberately set. Newland's testimony could show a plan, lack of accident, or at least appellant's motive to start the fire, so the testimony could reasonably refute appellant's defensive theory of accident. Thus, the trial court did not abuse its discretion when it ruled Newland's testimony admissible.

The opponent of evidence must make a timely, specific objection at the earliest possible opportunity. TEX. R. APP. P. 33.1(a)(1). Appellant objected to Newland's testimony on alternative grounds that the state failed to provide the proper 404(b) notice. The State demonstrated a subsection (k) of its 404(b) notice addressed Newland's testimony, and appellant promptly withdrew his objection. Accordingly, appellant has not preserved an appeal regarding Newland's testimony on 404(b) grounds. Accordingly, we overrule appellant's third issue.

D. Exclusion of Evidence

In his fourth issue, appellant contends he suffered harm when the trial court sustained the State's objections to cross-examination of State witnesses regarding threats made by other potential suspects. Appellant sought to question several State witnesses to show that Adam Wolfe and Cindy Hamilton threatened him. Appellant asked Taylor if he read reports that included the names of Wolfe and Hamilton; Taylor said that he remembered those names coming up in the reports. Taylor also acknowledged that one of these reports referenced "a threat about someone trying to burn down [appellant's] house." When appellant raised the issue of Wolfe and Hamilton with other State witnesses, the State frequently objected on foundational grounds; however, the State did not object to some questions and answers about appellant's confrontations with Wolfe and Hamilton

A party may claim error in a ruling to exclude evidence only if the error affects a substantial right of the party and the party informs the court of its substance by an offer of proof, unless the substance was apparent from the context. TEX. R. EVID. 103(a)(2). Appellant repeatedly asked about confrontations with Wolfe and Hamilton, and the State did not object to some of these questions and answers. The evidence that appellant tried to elicit from State witnesses was apparent from the context of appellant's questions: appellant wanted to present evidence of an alternative perpetrator of the arson that the investigators did not pursue. On cross-examination, appellant asked Taylor if he conducted an investigation into prior "incidents" at appellant's home. Taylor acknowledged that he read police reports that mentioned Wolfe and Hamilton, and that one report referenced "a threat about someone trying to burn down [appellant's] house." Ultimately, Taylor said he considered the information within the police reports, but he did not pursue it further as there was no indication that Wolfe or Hamilton had any involvement in the fire.

Taylor's testimony indicated that Wolfe and Hamilton may have threatened to burn appellant's home, and that Taylor's investigation did not focus on Wolfe and Hamilton. Ultimately, the jury chose to disregard appellant's theory of alternative perpetrators. Because the jury heard evidence regarding appellant's theory that there might have been alternative suspects, we conclude appellant's substantial rights were not affected by the court's exclusion of some testimony about Wolfe and Hamilton. Further, appellant failed to preserve error regarding the trial court's decision to exclude evidence when he did not make an offer of proof to set forth the substance of the proffered evidence. *See* TEX. R. EVID. 103(a)(2); *Mays v. State*, 285 S.W.3d 884, 889 (Tex. Crim. App. 2009). Accordingly, we overrule appellant's fourth issue.

E. Improper and Insufficient Evidence to Support Sentence

In his final issue, appellant contends the trial court improperly admitted evidence of two

extraneous acts during the punishment phase: (1) a sexual assault on appellant's ex-wife, and (2) a burglary of Jeannette Newland's home.

Evidence may be offered by the State as to any matter the court deems relevant to sentencing, including his character or any evidence of a bad act that is shown beyond a reasonable doubt by evidence to have been committed by the defendant for which he could be held criminally responsible. TEX. CODE CRIM. PROC. ANN. Ann. art. 37.07, § 3(a)(1). A party may claim error in a ruling to admit evidence only if the error affects a substantial right of the party and the party timely objects on specific grounds. TEX. R. EVID. 103(a); *Hernandez v. State*, 599 S.W.2d 614, 617 (Tex. Crim. App. [Panel Op.] 1980) (op. on reh'g).

Appellant contends the trial court improperly admitted evidence that he sexually assaulted his ex-wife. Appellant argues that because he was charged and the grand jury returned a no-bill verdict, any evidence of this sexual assault should be excluded. The State called Officer Beth Chaney of the Plano Police Department to testify that she obtained a video showing appellant digitally manipulating the vagina of a sleeping woman—later identified as his ex-wife––and that appellant admitted making the video. Appellant did not object when the State entered the video into evidence as State's Exhibit 103. Because appellant did not raise the issue in the trial court by timely objecting to the video on specific grounds, appellant failed to preserve error. *See* TEX. R. APP. P. 33.1(A); TEX. R. EVID. 103(a).

Appellant next contends the trial court improperly admitted evidence he burglarized Jeannette Newland's home. Newland testified someone broke the windows of her home by throwing rocks through them. Officer Scott Kermes testified he found fresh blood inside the broken window and on a chair inside Newland's home. Amy Smuts, a forensic analyst who performed DNA testing on blood samples taken from Newland's home, testified the blood samples matched appellant's DNA. The State introduced Smuts's report into evidence, and the

trial court overruled appellant's foundational objection. Appellant argues that the report was improperly admitted and that the remaining evidence does not show beyond a reasonable doubt that appellant committed this bad act.

Appellant objected to the introduction of the lab results report on the basis of foundation; however, the State properly laid the foundation and introduced the report as a record of a regularly conducted activity. The State elicited from Smuts that she made the report with knowledge of the information, that the record was one typically made in the regular course of business and was kept in the ordinary course of business, and that she was considered the custodian of records for the report. *See* TEX. R. EVID. 803(6). Because the trial court did not abuse its discretion when admitting the lab report, and because the trial court could have found that the State showed beyond a reasonable doubt that appellant committed burglary, we cannot conclude appellant has shown an abuse of discretion. Accordingly, we overrule appellant's fifth issue.

Conclusion

We resolve appellant's issues against him and affirm the trial court's judgment.

/Michael J. O'Neill/
MICHAEL J. O'NEILL
JUSTICE, ASSIGNED

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

DEMPSTER A. ROSS, Appellant	On Appeal from the 416th Judicial District Court, Collin County, Texas
No. 05-14-01184-CR V.	Trial Court Cause No. 416-80539-2014.
	Opinion delivered by Justice O'Neill.
THE STATE OF TEXAS, Appellee	Justices Fillmore and Stoddart participating.

Based on the Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

Judgment entered this 13th day of January, 2016.