Affirmed and Opinion Filed August 15, 2017.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-16-01144-CR

ESTEBAN MONTIEL, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the 363rd Judicial District Court
Dallas County, Texas
Trial Court Cause No. F-1575907-W

MEMORANDUM OPINION

Before Justices Lang, Fillmore, and Schenck
Opinion by Justice Lang

Following a plea of not guilty, appellant Esteban Montiel was convicted by a jury of burglary of a habitation. After appellant pleaded true to the enhancement paragraph alleged in the indictment, punishment was assessed by the jury at fourteen years' confinement and a $5,000.00 fine.

In a single issue on appeal, appellant contends the evidence is insufficient to support the jury's verdict. We decide appellant's sole issue against him. The trial court's judgment is affirmed.

I. Factual and Procedural Context

The indictment alleged in part that "on or about" June 30, 2015, appellant "did unlawfully, intentionally and knowingly enter a habitation without the effective consent of MAMIE CABRALES, the owner thereof, with the intent to commit theft, and further, said

defendant did intentionally and knowingly enter a habitation without the effective consent of MAMIE CABRALES, the owner thereof, and did then and there commit and attempt to commit theft."

At trial the State called Mamie Cabrales ("Mamie") to testify. At the time of the incident, Mamie lived at 2910 Falls Drive with her two children and was pregnant with a third child. Mamie knew appellant and would often let him use her phone and give him food water. On June 29, 2015, between 8:00 and 9:00 p.m. Mamie was leaving her house with her husband and children to go to the hospital because she was having labor pains. According to Mamie, as she was locking her door, appellant was walking down the street and came up to her to ask what was wrong. Mamie informed appellant that she needed to go to the hospital. Appellant told Mamie and her husband that he would "keep an eye on [the] house" while they were gone. Mamie testified that she did not give appellant permission to be in her home, though.

Mamie and her family stayed at the hospital for five or six hours. While in the hospital, she began to receive text messages from a friend named Ashley who also lived in the neighborhood. These texts alarmed Mamie and she believed she needed to go home. After being released from the hospital, Mamie and her family drove back to their house. When Mamie got closer to her house she saw Ashley standing in front of it. Mamie could see that the porch light bulb was off, which was unusual because she always left it on. She could also see that the window air conditioning ("AC") unit was not in the window. The window and the front door were open. Mamie ran inside the house and found that it had been ransacked. Some of the items that were missing were: "Cowboys" jerseys, her television ("TV"), and a gun that she had kept in her closet. Mamie came back out of the house and questioned Ashley about what she had seen. Another neighbor named Lupe also came over and explained what he had seen. Both told Mamie

they had seen appellant and another man, whom they identified as Luis, at her house. Mamie then called the police.

At some point before the events described above, Mamie had the window AC unit installed. Appellant was present for the installation and knew that it was not screwed into the window. Because "you'd have to know that in order to know to push it in" and because Ashley and the neighbor had identified appellant and Luis, Mamie believed appellant was involved.

The morning after the burglary, Mamie received a call from Detective Brewster Billings. Detective Billings informed Mamie that appellant had voluntarily turned himself into them. Mamie went to the police station to identify appellant and the others involved and to give her statement. After appellant was arrested, Mamie received a call from him. According to Mamie, appellant told her "that he was sorry." Appellant also said he "never went in [her] house" but also admitted he took the TV to the car and had pushed the AC unit in to see if anybody was home.

The State also called Mamie's husband, Daniel Cabrales, to testify. Daniel corroborated Mamie's story. After Daniel, the State called Officer Tim Ross with the Dallas Police Department ("DPD"). Officer Ross testified that on June 29, 2015, he responded to a "burglary of a residence call" at 2910 Falls Drive. When he arrived at the house, Mamie told him that the AC unit had been pushed in and that someone had stolen her property. Officer Ross went inside the house and saw that it did look like it had been broken into it "because the window unit was on the living room floor." "There was stuff thrown everywhere" and the house was "ransacked." Officer Ross notified the DPD crime scene unit that they needed to come to the house and dust for fingerprints. He then made a list of the property that had been stolen and noted the value of each item. Officer Ross acknowledged that Mamie looked visibly upset. He asked Mamie if there were any possible suspects and she named appellant and another man named Luis. After talking

with Mamie and Daniel, Officer Ross returned to the police station, and wrote up his report. Officer Ross acknowledged that he did not personally speak with Ashley or the other neighbor.

Then, Detective Brewster Billings testified. He was working on June 30, the day after the burglary. When he arrived at work that day, he was informed that another police officer was bringing appellant to the police station. Appellant wanted to talk to Detective Billings about being accused of burglary. When appellant arrived at the station he was put in an interview room. Detective Billings stated that, at this point, he had no knowledge of the burglary of Mamie's house, "other than an officer saying that one in that area had been committed." The conversation between appellant and Detective Billings was recorded.

According to Detective Billings, appellant stated that "somebody had contacted him and told him that he was a suspect in a burglary" but that "he had not committed this burglary." Appellant then gave Detective Billings his account of what happened. According to appellant, he had been with Mamie earlier that day at her house, but that when she had to leave to go to the hospital, he left, too. Later in the evening he was "back over in that area" by her house and somebody he knew as Luis asked him to "help him put his own television" in Luis's car. He helped Luis do this and got into Luis's car with him. While he was in the car, he saw that the cord on the TV was cut, and it was at this point he realized that the TV may have been stolen. He then asked Luis to stop the car and let him out. When appellant admitted he was at the scene of the crime, Detective Billings "mirandized him" and read him his rights. Appellant signed a waiver and agreed to continue the interview.

During a break in the interview with appellant, Detective Billings called Mamie and she gave him the contact information for Ashley and a neighbor named Lupe. Lupe came into the station to speak with the detective, but this statement was not recorded or written. Detective Billings spoke with Ashley over the phone.

After speaking with the witnesses, Detective Billings returned to the interview room and confronted appellant with the information provided by Ashley and Lupe. Detective Billings testified that, at this point, appellant "changed his story." Appellant told Detective Billings that he was on Mamie's front porch with two others, Luis and a man called "Baby Joe," when Luis pushed the AC unit through the window into the house. Luis and Baby Joe then went inside the house and removed property. Appellant "only helped them carry the television to Luis's car" and put it in the car. Detective Billings told the jury that initially appellant "denied being involved" at all and did not have any knowledge of a burglary , but that as he "pressed" appellant on issues, appellant "continued to change his story." According to Detective Billings, at one point appellant told him that he did not want to be involved, but that Luis kept harassing and bothering him until he finally gave in and participated. Appellant told Detective Billings that "all he did was stand on the front, help carry the television to the car," but he also admitted to Detective Billings that he knew they were breaking in and taking a TV that did not belong to them. Appellant also insisted that he did not keep any of the property that was taken from the house.

Detective Billings stated that based on his experience and knowledge from talking with all of the witnesses, he believed appellant's involvement was "more than he let on" and that Luis and Baby Joe "weren't necessarily the people that put this plan together." Detective Billings did acknowledge that the fingerprints taken from the house were not sufficiently clear to compare to appellant's fingerprints. He also recognized that appellant helped identify Luis and Baby Joe and that DPD typically doesn't "have somebody coming in, telling us they've been accused of something and they want to get it all cleared away."

Appellant gave a written statement during the interview. Detective Billings read part of the statement to the jury: "I put the TV in the car. While putting the TV in the car, Luis started

[the] car and I jumped in, told him to drop me off on Emmett down the street. Haven't seen him since."

Appellant then testified on his own behalf. He stated that around 8:00 p.m. he was inside the house with Mamie and her family. When Mamie started having labor pains and left the house, he left at the same time. Appellant then went to meet up with Ashley and then spent four to five hours with her. After spending time with Ashley, appellant headed to his father's house. On his way there he passed by Mamie's house and saw that the porch light was off. Counsel for appellant asked, "Did you – at some point did you run into somebody else?" and appellant responded, "Not at that time." Counsel for appellant then asked, "Did you run into Luis?" and appellant then answered, "Oh, yeah, I ran into Luis." Appellant then went to his dad's house and stayed there for about three hours, talking with his older brother and "kicking it" until his father got off work. Then, appellant left his dad's house and walked by Mamie's house again. This time he saw the TV on the porch. He saw Luis who told him, "Hey, homeboy, get that TV and put it in the car." Appellant picked up the TV and carried it to Luis's car, which was in front of Lupe's house. Soon, appellant "figured out" what they were doing. Appellant said he just "wasn't thinking," but also said that he took the TV because he knew Luis "was smoking crack" and "didn't want something to escalate" so he just put the TV in the car. However, appellant claimed he only knew the TV was stolen once he "[saw] the cable wire cut."

Later in his testimony, appellant stated that he "didn't know what [Luis and Baby Joe] were doing." He "thought they were doing it for [Mamie]," but was not sure that Mamie and Daniel were home. He "really didn't" recognize that the TV was Mamie's TV until he saw the cord and "was like, oh, yeah, I know what TV this is." He acknowledged it was "weird" that Luis was in Mamie's house, but explained that "everybody goes to Mamie's house." Appellant said he "knew it was a mistake" on his part and acknowledged he assisted Luis by carrying the TV,

putting it in the car, and did so intentionally. After Luis dropped him off, he went to his dad's house. When appellant left his dad's house he saw Ashley. Ashley told him that detectives were looking for him because he was seen walking down the street with a TV, so appellant called the police the next morning. Appellant gave the police his name, his alias, and described himself so that the police could pick him up to come into the station. Appellant said that during his interview with Detective Billings he discussed his involvement, which was that he took the TV from the porch and put it in the car. He also gave the police Luis and Baby Joe's names and aliases.

While testifying, appellant insisted that he did not push in the AC unit, touch the porch light bulb, go inside the house, burglarize the house, make a plan with Luis, or make any money from his participation. According to appellant, his sole involvement was that he "received the TV from Luis" and put it in the car. Appellant told the jury, "I took a TV from the porch, to me, is not a burglary. It's a receiving stolen property. That's what I'm trying – that's what I did. Receiving stolen property, not a burglary [of a] habitation." Appellant also stated that he felt sorry because he lost Mamie as a friend. He said he called Mamie to apologize for what he did, which was that he "put a TV in the car, and that was it." Appellant was "trying to make things right with her" because he "knew [he] messed up."

Appellant also testified regarding the tattoos on his face and his prior criminal history. He identified his tattoos as being affiliated with the Tango Blast prison gang, but stated that he had left the gang in 2015. Appellant also admitted to having been convicted of four felonies in the past, for various crimes including theft, burglary of a habitation, and the unauthorized use of a motor vehicle. Appellant told the jury about the circumstances of his prior burglary of a habitation conviction. In that case, appellant had gone into his mother's house, opened a window, and stolen a TV.

II. Sufficiency of the Evidence

A. Standard of Review

We review a challenge to the sufficiency of the evidence under the standard set out in *Jackson v. Virginia*, 443 U.S. 307 (1979). *Wilson v. State*, 448 S.W.3d 418, 425 (Tex. Crim. App. 2014). We view the evidence in the light most favorable to the verdict and determine whether a rational factfinder could have found all the elements of the offense beyond a reasonable doubt. *Id*. We are mindful that "[t]he jury is the sole judge of the credibility of witnesses and the weight to be given to their testimonies, and the reviewing court must not usurp this role by substituting its own judgment for that of the jury." *Queeman v. State*, No. PD–0215–16, 2017 WL 2562799, at *3 (Tex. Crim. App. June 14, 2017) (citing *Montgomery v. State*, 369 S.W.3d 188, 192 (Tex. Crim. App. 2012)). "The duty of the reviewing court is simply to ensure that the evidence presented supports the jury's verdict and that the State has presented a legally sufficient case of the offense charged." *Id*. "We will uphold the verdict unless a rational factfinder must have had reasonable doubt with respect to any essential element of the offense." *Wilson*, 448 S.W.3d at 425. "Circumstantial evidence is as probative as direct evidence in establishing the guilt of an actor, and circumstantial evidence alone can be sufficient to establish guilt." *Merritt v. State*, 368 S.W.3d 516, 525 (Tex. Crim. App. 2012) (quoting *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007)).

"[A]n inference is a conclusion reached by considering other facts and deducing a logical consequence from them." *Hooper*, 214 S.W.3d at 16. By contrast, "[s]peculation is mere theorizing or guessing about the possible meaning of facts and evidence presented." *Id*. Juries "are permitted to draw multiple reasonable inferences as long as each inference is supported by the evidence presented at trial" but "are not permitted to come to conclusions based on mere speculation or factually unsupported inferences or presumptions." *Winfrey v. State*, 393 S.W.3d

763, 771 (Tex. Crim. App. 2013); *see also Hooper*, 214 S.W.3d at 16–17. "When the reviewing court is faced with a record supporting contradicting inferences, the court must presume that the jury resolved any such conflicts in favor of the verdict, even if not explicitly stated in the record." *Queeman*, 2017 WL 2562799, at *3; *see also Merritt*, 368 S.W.3d at 526 (citing *Jackson*, 443 U.S. at 326).

B. Applicable Law

Under the Texas Penal Code, "[a] party is criminally responsible as a party to an offense if the offense is committed by his own conduct, by the conduct of another for which he is criminally responsible, or by both." TEX. PENAL CODE ANN. § 7.01(a) (West 2011). Further, a person is criminally responsible for an offense committed by the conduct of another if, "acting with intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense." *Id*. § 7.02(a)(2). Additionally, "[i]f, in the attempt to carry out a conspiracy to commit one felony, another felony is committed by one of the conspirators, all conspirators are guilty of the felony actually committed, though having no intent to commit it, if the offense was committed in furtherance of the unlawful purpose and was one that should have been anticipated as a result of the carrying out of the conspiracy." *Id*. § 7.02(b).

A person commits burglary of a habitation:

> if, without the effective consent of the owner, the person:
>
> (1) enters a habitation, or a building (or any portion of a building) not then open to the public, with intent to commit a felony, theft, or an assault; or
> (2) remains concealed, with intent to commit a felony, theft, or an assault, in a building or habitation; or
> (3) enters a building or habitation and commits or attempts to commit a felony, theft, or an assault.

TEX. PENAL CODE ANN. § 30.02(a) (West 2011). A person commits theft if he "unlawfully appropriates property with intent to deprive the owner of the property." TEX. PENAL CODE ANN.

§ 31.03(a) (West Supp. 2016). Appropriation of property is unlawful if it is without the owner's effective consent. *Id*. § 31.03(b).

Under the law of parties, "if the evidence is sufficient to support appellant's conviction as a party under either section 7.02(a)(2) or 7.02(b), we must uphold the conviction." *Smith v. State*, 187 S.W.3d 186, 191 (Tex. App.—Fort Worth 2006, pet. ref'd) (citing *Swearingen v. State*, 101 S.W.3d 89, 95 (Tex. Crim. App. 2003)); *Rabbani v. State*, 847 S.W.2d 555, 558 (Tex. Crim. App. 1992).

"In reviewing the sufficiency of the evidence to support appellant's participation as a party, we may consider 'events occurring before, during and after the commission of the offense, and may rely on actions of the defendant which show an understanding and common design to do the prohibited act.'" *King v. State*, 29 S.W.3d 556, 564 (Tex. Crim. App. 2000) (quoting *Ransom v. State*, 920 S.W.2d 288, 302 (Tex. Crim. App. 1996) (op. on reh'g)). Actions may be "shown by direct or circumstantial evidence" to establish a "common design." *Leadon v. State*, 332 S.W.3d 600, 606 (Tex. App.—Houston [1st] 2010, no pet.) (citing *Miller v. State*, 83 S.W.3d 308, 314 (Tex. App.—Austin 2002, pet. ref'd)); *see Williams v. State*, No. 05–14–00790–CR, 2016 WL 355115, at *6 (Tex. App.—Dallas Jan. 28, 2016, no pet.) (mem. op., not designated for publication). While mere presence at the scene of the offense is "not alone sufficient to support a conviction," it is "'a circumstance tending to prove guilt which, combined with other facts, may suffice to show that the accused was a participant.'" *Id*. (quoting *Valdez v. State*, 623 S.W.2d 317, 321 (Tex. Crim. App. [Panel Op.] 1981) (op. on reh'g)).

C. Application of Law to the Facts

Appellant contends the "evidence is insufficient to support his conviction" of burglary of a habitation because: (1) "[n]o one saw [appellant] enter the home" and "[n]o physical evidence proves that [appellant] entered the home"; (2) "[t]here is no evidence that [appellant] solicited,

encouraged, directed, aided or attempted to aid Luis and Jose in committing the burglary of Mamie's house"; and (3) "[t]here is no evidence that they were acting together, each contributing some part toward execution of the common purpose at the time of the offense." Appellant insists "[t]he evidence shows, at most, that [appellant] put a TV in Luis' car."

The State responds that, although "[t]he State did not present direct evidence of Appellant's participation in the burglary to the trial court," the State "did present substantial circumstantial evidence that would have allowed a rational fact finder to find Appellant was at least a party to the burglary, if not more."

As appellant points out, he voluntarily went to the police station and provided the names of two others involved. Further, appellant testified that he did not push the AC unit into the house, enter the house, or burglarize the house. However, appellant's version of what happened conflicted with Mamie's version.

We consider the following to determine the sufficiency of the evidence. At trial, Mamie testified that she locked the front door when she left, but that when she returned, the AC unit was pushed in and the front door was open. There was no evidence the front door was forcefully opened. According to Mamie, appellant had been present when the AC unit was installed and was one of a few people who knew it could readily be pushed through the window opening. Further, two witnesses told Mamie appellant was involved. Additionally, Mamie told the jury appellant called her to apologize for taking her TV to Luis's car and that, in that conversation, appellant admitted he had pushed in the AC unit to see if anyone was home. Both Mamie and appellant agreed he was present when Mamie left her house that day.

Further, the record demonstrates appellant gave varied accounts of what happened on June 29, 2015, in his own testimony. At one point, appellant admitted he "figured out" what Luis was doing, but simply "didn't want something to escalate" because he knew Luis was under the

influence of drugs. At other points in his testimony, appellant stated he did not recognize the TV as Mamie's TV until he saw that the cable cord was cut. Finally, appellant admitted to prison gang involvement and a prior conviction for burglary, a burglary that involved breaking into a home through a window and taking a TV.

The jury could have rationally determined that appellant was not a credible witness due to the inconsistencies in his testimony, his prior gang involvement, and his prior convictions. *See Theus v. State*, 845 S.W.2d 874, 881 (Tex. Crim. App. 1992); *Revels v. State*, 334 S.W.3d 46, 53 (Tex. App.—Dallas 2008, no pet.); *McKnight v. State*, 874 S.W.2d 745, 746 (Tex. App.—Fort Worth 1994, no pet.) ("Evidence of gang membership bears on the witness's veracity and bias."). Appellant's prior conviction could have demonstrated that appellant had the motive, opportunity, intent, a plan, and was not mistaken. *See* TEX. R. EVID. 404(b). The jury was at liberty to weigh the credibility of the witnesses and resolve the conflicting testimony between appellant and Mamie in favor of Mamie Cabrales. *Jackson*, 443 U.S. 307 at 319; *Chambers v. State*, 805 S.W.2d 459, 461 (Tex. Crim. App. 1991); *Jones v. State*, 936 S.W.2d 678, 680 (Tex. App.—Dallas 1996, no pet.) ("[T]he jury may resolve conflicts in the evidence, accept one version of the facts, disbelieve a party's evidence, and resolve any inconsistencies in favor of either party.").

Further, the record supports the inference that whomever broke into Mamie's home did so by pushing the AC unit into the house, climbing into the house through the window, and leaving through the front door after unlocking it from inside. The jury could have reasonably concluded appellant entered Mamie's home himself while she was gone, or helped someone else do so. *See Hooper*, 214 S.W.3d at 16–17 ("[J]uries are permitted to draw multiple reasonable inferences from the evidence (direct or circumstantial). . .").

On this record, we conclude the evidence is sufficient to support a finding that appellant was criminally responsible for burglary of a habitation either as a principal or by the conduct of others. *See* TEX. PENAL CODE. ANN. § 7.01(a); *Winfrey*, 393 S.W.3d at 771, *Williams v. State*, No. 05–16–00860–CR, 2017 WL 2443133, at *5 (Tex. App.—Dallas June 6, 2017, no pet.) (mem. op., not designated for publication).

We decide appellant's sole issue against him.

III. Conclusion

For the foregoing reasons, the trial court's judgment is affirmed.

/Douglas S. Lang/
DOUGLAS S. LANG
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

ESTEBAN MONTIEL, Appellant	On Appeal from the 363rd Judicial District Court, Dallas County, Texas
No. 05-16-01144-CR V.	Trial Court Cause No. F-1575907-W.
	Opinion delivered by Justice Lang. Justices
THE STATE OF TEXAS, Appellee	Fillmore and Schenck participating.

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

Judgment entered this 15th day of August, 2017.