Opinion issued December 1, 2011.

In The

Court of Appeals

For The

First District of Texas

NO. 01-10-00318-CR

DARRALL EARL HOUSTON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 400th District Court
Fort Bend County, Texas
Trial Court Case No. 49710B

MEMORANDUM OPINION

A jury convicted Darrall Earl Houston of burglary of a habitation with intent to commit aggravated assault and sentenced him to fifty years' confinement.[1] In his

[1] TEX. PENAL CODE ANN. §§ 30.02, 22.01–22.02 (West 2011).

sole issue, Houston challenges the legal sufficiency of the evidence. We affirm the trial court's judgment.

Background

Late one evening, Q. Durisseau was at his home in Missouri City, Texas, where he lived with his girlfriend, his son, and his daughter. Durisseau testified that he was in the kitchen making cereal when he heard loud kicks at his back door. Durisseau believed that someone was trying to break into his house. He ran from the kitchen to the couch in his living room, where he kept a nine millimeter handgun. As Durisseau grabbed the gun from under his couch, a third kick caused the door to swing open, revealing two masked men carrying handguns. Durisseau testified that one of the men entered the house, and Durisseau shot him. He also testified that one of the gunmen fired his gun, but he could not tell which one. After Durisseau shot one of the gunmen, the other gunman ran away. Durisseau's gun jammed, and the injured gunman stumbled out of the house while Durisseau tried to reload his gun. Durisseau did not chase after them.

Once the two men were out of sight, Durisseau checked on his son and then called his girlfriend to tell her what had happened. He did not contact the police. Because of a prior conviction for possession of marijuana, Durisseau was not allowed to have a gun. He also had a plastic bag containing several ounces of marijuana. Durisseau attempted to get rid of the gun and marijuana before the

police arrived. He hid the gun in some bushes across the street from his house and threw the marijuana in the gutter.

That same night, A. Murguia was driving through Durisseau's neighborhood on his way home from picking up his fiancé at school. Murguia testified that he witnessed a man stumbling around along the curb and falling down near a storm drain. He also heard something metal hit the ground. Murguia assumed that the man was intoxicated or high. Murguia and his girlfriend went into her house, coming out again later when an emergency crew and the police arrived.

T. Robinson lives in Durisseau's neighborhood and was outside in his driveway that evening. He saw two men come running out from behind some houses. One of the men went down the sidewalk to sit down near the storm drain while the other man kept running away. Like Murguia, he testified that he heard something metal hit the ground.

M. Braswell of the Missouri City Fire Department arrived at the scene to find Houston lying on his back in a park, near the storm drain described by Murguia and Robinson. Braswell testified that as they treated Houston for his gunshot wound, he told them he was shot in a drive-by shooting. Braswell saw that there was something hidden in the nearby storm drain. When Missouri City emergency personnel lifted the grate from the storm drain, they found a pistol, ski mask, and pair of gloves inside the drain.

Sergeant J. York was one of the officers dispatched to the scene. Both Murguia and Robinson were at the scene and spoke to York about what they witnessed. York testified that he also spoke to Houston briefly and that Houston stated that he did not know how he got shot.

The police recovered Durisseau's bag of marijuana from another storm drain near his house and his gun from the bushes. At Durisseau's house, police recovered two nine millimeter shell casings inside the house and two .45 caliber shell casings outside the back door. The .45 caliber shell casings did not match the gun found in the storm drain near Houston. The police took photographs of Durisseau's back door, which was dented and the frame of which was broken. They also took photographs of the blood on Durisseau's living room carpet and a bullet hole in his living room ceiling. At trial, Durisseau testified that the damage to the door, the blood on the carpet, and the bullet hole were all a result of the break in, his shooting one of the masked gunmen, and one of the gunmen firing into the house.

Detective J. Joseph spoke to Houston about the incident while Houston was at the hospital. Houston initially told Joseph that he was at the park waiting for his friend, "G," when multiple men drove by in a car and fired shots at him. After Joseph expressed doubts about the veracity of Houston's story, Houston agreed to "tell [Joseph] the truth." Houston then said that he and "G" were planning to kick in the door and break into the house of a man who was cheating with "G's"

girlfriend so that they could ask him some questions. Houston then admitted to kicking in Durisseau's door, getting shot by Durisseau, and fleeing the scene. Houston admitted that he had a gun when he broke into Durisseau's home but denied wearing the ski mask. Houston said that "G" wanted him to wear the ski mask but he refused.

Detective G. Nelson also spoke to Houston at the hospital. Houston admitted to the break in, that he had a gun, and that he had thrown his "stuff" into the gutter.

Houston's testimony about what happened differed significantly from what he previously told police and emergency personnel. Houston testified that he went to Missouri City with "G" to purchase marijuana. He testified that they did not kick in the door but, rather, knocked on the door and were invited in by Durisseau. According to Houston, the three of them smoked weed together and Durisseau stated that he would have a friend bring over the ten pounds of weed Houston wanted to buy. Houston testified that "G," or Gerald, went out the back door to take a phone call, and while he was out there, Durisseau pulled out a handgun. Houston testified that Durisseau told him that he wanted to take a shower and asked him to wait outside with Gerald. According to Houston, an unknown man approached him and Gerald while they were outside behind Durissau's house and tried to rob them at gunpoint. Houston testified that he grabbed the armed man and was shot in the struggle. He stated that he then walked to where Gerald's car had

been parked but found the car gone. He then stumbled down the street to where he was later found by emergency personnel. Houston denied having disposed of a gun and ski mask in the nearby sewer.

Houston admitted to having told Detective Joseph that he and Gerald had gone "to go f*** this guy who was supposed to have been sleeping with [Gerald's] girlfriend," but testified that he was lying to Joseph at that time. He denied having admitted to Detective Nelson that he had a gun or that he had thrown anything down the storm drain. In his recount of his communications with emergency personnel on the scene, Houston did not tell Braswell that he was shot in a drive-by shooting.

The jury found Houston guilty of burglary of a habitation with intent to commit aggravated assault.

Standard of Review

We review Houston's challenge to the legal sufficiency of the evidence under the standard enunciated in *Jackson v. Virginia*, 443 U.S. 307, 318–20, 99 S. Ct. 2781, 2788–89 (1979). *See Ervin v. State*, 331 S.W.3d 49, 52–56 (Tex. App.—Houston [1st Dist.] 2010, pet. ref'd) (citing *Brooks v. State*, 323 S.W.3d 893, 894–913 (Tex. Crim. App. 2010)). Under the *Jackson* standard, evidence is insufficient to support a conviction if, considering all the record evidence in the light most favorable to the verdict, no rational factfinder could have found that each essential

element of the charged offense was proven beyond a reasonable doubt. *See Jackson*, 443 U.S. at 317, 318–19, 99 S. Ct. at 2788–89; *Laster v. State*, 275 S.W.3d 512, 517 (Tex. Crim. App. 2009). Evidence is insufficient under this standard in four circumstances: (1) the record contains no evidence probative of an element of the offense; (2) the record contains a mere "modicum" of evidence probative of an element of the offense; (3) the evidence conclusively establishes a reasonable doubt; and (4) the acts alleged do not constitute the criminal offense charged. *See Jackson*, 443 U.S. at 314, 318 n.11, 320, 99 S.Ct. at 2786, 2789 & n. 11; *Laster*, 275 S.W.3d at 518; *Williams v. State*, 235 S.W.3d 742, 750 (Tex. Crim. App. 2007).

The *Jackson* standard gives full play to the responsibility of the factfinder to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. *See Jackson*, 443 U.S. at 318–19, 99 S. Ct. at 2788–89; *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007). An appellate court presumes the factfinder resolved any conflicts in the evidence in favor of the verdict and defers to that resolution, provided that the resolution is rational. *See Jackson*, 443 U.S. at 326, 99 S. Ct. at 2793. If an appellate court finds the evidence insufficient under this standard, it must reverse the judgment and enter an order of acquittal. *See Tibbs v. Florida*, 457 U.S. 31, 41, 102 S. Ct. 2211, 2218 (1982).

Legal Sufficiency of the Evidence

In his sole issue, Houston contends that, although there was sufficient evidence to prove that Houston entered Durisseau's home without consent, the evidence was not legally sufficient to support the jury's finding that he had the intent to commit aggravated assault at the time of entry.

A person commits burglary if he "enters a habitation . . . with intent to commit a felony, theft or an assault[.]" TEX. PENAL CODE ANN. § 30.02(a)(1) (West 2011). A person commits an assault if he "intentionally or knowingly threatens another with imminent bodily injury" or "intentionally, knowingly or recklessly causes bodily injury to another." *Id.* § 22.01(a)(1), (2). If the offender "uses or exhibits a deadly weapon" in committing the assault, it is an aggravated assault. *Id.* § 22.02(a)(2). The State had to prove that Houston had the intent to commit an aggravated assault at the time he entered Durisseau's home. *See LaPoint v. State*, 750 S.W.2d 180, 182 (Tex. Crim. App. 1986).

Intent is an essential element of the offense of burglary, which the State must prove beyond a reasonable doubt; it may not be left simply to speculation and surmise. *LaPoint*, 750 S.W.2d at 182. However, intent is a question of fact for the jury, and the jury may infer intent from a defendant's conduct and the surrounding facts and circumstances. *See id.* In determining whether Houston threatened Durisseau with imminent bodily injury, the crucial inquiry is whether he "acted in

such a manner as would under the circumstances portend an immediate threat of danger to a person of reasonable sensibility." *Olivas v. State*, 203 S.W.3d 341, 347 (Tex. Crim. App. 2006). "[O]ne's acts are generally reliable circumstantial evidence of one's intent[.]" *Laster*, 275 S.W.3d at 524 (quoting *Rodriguez v. State*, 646 S.W.2d 524, 527 (Tex. App.—Houston [1st Dist.] 1982, no pet.)).

The record contains both direct and circumstantial evidence that Houston intended to threaten or cause bodily injury to Durisseau when he broke into Durisseau's house. First, there is evidence that Houston kicked in Durisseau's back door and entered Durisseau's home without permission at approximately 11 p.m., while wearing a ski mask and brandishing a gun.[2] *Cf. Macri v. State*, 12 S.W.3d 505, 507–08 (Tex. App.—San Antonio 1999, pet. ref'd) (holding evidence sufficient to support conviction for burglary with intent to commit aggravated assault, even though accused left house without actually attempting to injure anyone, when accused broke into house through window carrying handgun and knife and continually asked, "Where is she?" before leaving). Such conduct would

[2] Houston argues that an intent to threaten Durisseau cannot be inferred from "the mere fact of entry into the home wearing masks and carrying guns" because "the two intruders could just as equally have had the intent to commit theft instead." But an intent to threaten imminent bodily injury and an intent to commit theft are not mutually exclusive. If there is evidence from which the jury could reasonably infer that Houston intended to communicate an imminent threat of bodily harm to Durisseau, the evidence is legally sufficient to support the jury's verdict in this respect, regardless of whether the evidence could also support an inference of an intent to steal from Durisseau.

"portend an immediate threat of danger to a person of reasonable sensibility." *Olivas*, 203 S.W.3d at 347.

Second, there is evidence that Houston told police officers that they broke into Durisseau's home to "f***" Durisseau in retaliation for sleeping with Gerald's girlfriend. While Houston testified that he was lying when he made this statement to Detective Joseph, the jury was free to believe the story Houston told shortly after the event rather than the story he told at trial. *See Chambers v. State*, 805 S.W.2d 459, 461 (Tex. Crim. App. 1991) (stating rule that jury is sole judge of credibility of witnesses, and may choose to believe or disbelieve all or any part of witness's testimony). This is particularly true in light of the physical evidence—such as the damage to Durisseau's back door, the blood on Durisseau's carpet, the bullet hole in Durisseau's ceiling, and the shells from Durisseau's gun found inside Durisseau's house—which is more consistent with Houston getting shot after kicking in Durisseau's back door and entering Durisseau's living room than with Houston getting shot on the back porch after entering and exiting Durisseau's home with permission as part of a drug deal. *See Coleman v. State*, 832 S.W.2d 409, 414 (Tex. App.—Houston [1st Dist.] 1992, pet. ref'd) (stating that jury could have disregarded accused's entire statement of what happened when it was inconsistent with physical evidence and testimony of others).

With respect to the "aggravated" element of the intended assault, there is legally sufficient evidence that Houston exhibited a gun. Durisseau testified that Houston had a gun when he broke into Durisseau's home. Two witnesses saw Houston stumbling down the street in Durisseau's neighborhood and stop at a storm drain, at which time they heard something that sounded like metal hitting the ground. The police retrieved a gun, a mask, and gloves from the same storm drain. Houston was laying in the grass near the storm drain when he was discovered by emergency personnel. Detective Nelson testified that Houston admitted to having thrown his "stuff" down the storm drain. Although Houston denied having made this statement, the jury was free to credit the officer's testimony and discredit Houston's testimony. *See Chambers*, 805 S.W.2d at 461.

We overrule Houston's sole issue.

Conclusion

We hold that the evidence is legally sufficient to support the jury's verdict. We therefore affirm the trial court's judgment.

Harvey Brown
Justice

Panel consists of Justices Jennings, Sharp, and Brown.

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