Opinion issued November 5, 2020

In The

Court of Appeals

For The

First District of Texas

NO. 01-20-00075-CR

VICTOR JOHN OBALLE, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 421st District Court
Caldwell County, Texas[1]
Trial Court Case No. 18-309

MEMORANDUM OPINION

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[1] Pursuant to its docket equalization authority, the Supreme Court of Texas transferred this appeal to this Court. *See* Misc. Docket No. 19–9120 (Tex. Dec. 20, 2019); *see also* TEX. GOV'T CODE ANN. § 73.001 (authorizing transfer of cases); TEX. R. APP. P. 41.3.

A jury found appellant, Victor John Oballe, guilty of the felony offense of burglary of a habitation,[2] and the trial court assessed his punishment at confinement for nine years. In his sole issue, appellant contends that the evidence is legally insufficient to support his conviction.

We affirm.

Background

The complainant, Kimberly Rubio, testified that from June 2018 until October 2018, she was in a dating relationship with appellant. On September 17, 2018, she lived at 750 Silent Valley Road in trailer number 89. At the time, the complainant was leasing the trailer. The complainant was listed on the leasing agreement for the trailer, but appellant was not. Although appellant did not live with the complainant, he would sometimes stay the night while they were dating. Appellant did stay at the complainant's trailer for a week on more than one occasion. When appellant would leave, he would go to his parents' home or somewhere else. The complainant's father and three younger siblings also lived in the trailer with her. The complainant had a bedroom, her sister had a bedroom, and her father and two brothers shared a third bedroom. Appellant did not have any furniture or belongings at the complainant's home. If he stayed overnight, he brought a bag of clothes with him or the complainant "would take him to where ever [sic] he had clothes to change and

[2] *See* TEX. PENAL CODE ANN. § 30.02(a)(1).

take a shower." Appellant did not pay for food or help pay for the utilities or the rent for the complainant's trailer.

The complainant testified that, on September 17, 2018, appellant left her trailer around 1:00 p.m. Appellant told the complainant that he was "going to go do something with his brother" and he would be back. When the complainant discovered that appellant was not "going where he told [her] he was going," she sent him a message through Facebook Messenger[3] telling him that he was lying to her and to not come back to her home.

Despite the complainant's message, appellant returned to the complainant's home and proceeded to knock on her front door and window, saying "let [me] in." The complainant did not let appellant into her home, and at the time, the dead bolt lock to her front door was engaged. Appellant also tried to contact the complainant through Facebook Messenger by repeatedly calling her and sending her messages. One message stated that he would "kick in the door." When the complainant did not answer appellant's telephone calls, appellant broke the front door to the complainant's home. The complainant was in her bedroom at the time, and although

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[3] *See Edwards v. State*, 497 S.W.3d 147, 155 n.8 (Tex. App.—Houston [1st Dist.] 2016, pet. ref'd) ("Facebook Messenger is a mobile tool that allows users to instantly send chat messages to friends on Facebook." (internal quotations omitted)); *see also Hassan v. Facebook, Inc.*, No. 19-cv-01003-JST, 2019 WL 3302721, at *1 (N.D. Cal. July 23, 2019) (order) (noting plaintiff used Facebook Messenger application to communicate with others via calls and instant messages).

she did not see appellant break down the front door, she heard it. The complainant got up, but before she could make it out of her room, appellant pushed her bedroom door open. The complainant got upset and went into the living room to see what appellant had done. The complainant was mad, yelled at appellant, and told him not to come back to her home. The complainant also told appellant to leave, but he refused. The complainant then called for emergency assistance so that law enforcement officers could "come and get [appellant] out and make him leave."

While the complainant was calling for emergency assistance, appellant put his hands on the complainant and pushed her to the ground. Appellant hit the complainant in the back of the head, and she had "an owie afterwards" which hurt. The complainant got up and continued telling appellant to leave the home. Eventually, appellant left.

At some point, a law enforcement officer arrived at the complainant's home and took photographs of the damage to the home as well as the messages between the complainant and appellant on the complainant's cellular telephone. These photographs were admitted into evidence at trial. The complainant gave the officer a statement, which the trial court also admitted into evidence.

According to the complainant, appellant cracked her bedroom door, the lock to her front door ended up on the ground, and appellant left footprints on the front door when he kicked it. The complainant testified that the damage depicted in the

law enforcement officer's photographs was not there before September 17, 2018. And appellant did not pay for the complainant's front door to be fixed. The complainant's father "fixed it on his own . . . just[] . . . enough to where it w[ould] close."

Former Lockhart Police Department Officer E. Lindesay testified that on September 17, 2018, while on patrol, he was dispatched around 2:00 p.m. in response to a call about a disturbance. Lindesay arrived at 750 Silent Valley Road, trailer number 89, in Caldwell County, Texas and saw that the front door to the home had been "kicked in." Lindesay spoke to the complainant, who identified the perpetrator. Lindesay, however, was unsuccessful in attempting to locate him. The complainant was upset about the situation but did not require medical attention.

In regard to the damage to the complainant's home, Officer Lindesay stated that the front door was "kicked in" and the door frame was broken and damaged. A footprint was on the front door. The dead bolt lock was out as if it was still engaged, but the door had been kicked opened—basically, the dead bolt lock broke through the door frame. The complainant's bedroom door was also cracked. Lindesay noted that an assault had taken place as well. Lindesay took photographs of the damage to the complainant's home and certain messages on the complainant's cellular telephone.

The complainant's statement given to Officer Lindesay on September 17, 2018, at 3:24 p.m., states:

> On 9/17/18 around 2:05pm I . . . was arguing with [appellant] over messenger telling him to leave me alone and don't come back. He called several times and sent a msg saying he was going to kick my door in. He kicked it in then pushed my room door which left a crack in my door. We argued from my room to the front door where I told him I was calling the cops due to my door busted. He then punched me in the back of the head and pushed me to the ground while I was on the phone with 911. Then he left. When hit I felt initial pain to my head. No further pain. Damage to my door include[s] broken lock and room door cracked across door. [E]stimate value $100 to fix. I wish to not press charges at this time but would like for him to pay for the damages to my doors.

The photographs of the complainant's cellular telephone taken by Officer Lindesay, show the following messages and telephone calls between the complainant and appellant on September 17, 2018:

The complainant (at 1:35 p.m.):	"Really u wanna fuxking lie to me. Fuck u stay the fuck away from me. Tell Alyssa ass to fucking let u stay at her house. Im done."
	"Like this shit wasnt gunna pop up on my phone. Gtfo here with that bullshit. I dont have time for it[.]"
	"Real Fucking quick to leave. Do what u gotta do without me."
Appellant (at 2:07 p.m.):	"Open the door[.]"
	"Outside[.]"

(at 2:09 p.m.)	"You missed a call from [appellant]."
(at 2:11 p.m.)	"[Appellant] called you."
(at 2:12 p.m.)	"You missed a call from [appellant]."
(at 2:12 p.m.)	"You missed a call from [appellant]."
Appellant (at 2:12 p.m.):	"I'll kick in the door[.]"
(at 2:13 p.m.)	"You missed a call from [appellant]."
(at 2:13 p.m.)	"You missed a call from [appellant]."
(at 2:14 p.m.)	"You missed a call from [appellant]."
(at 2:14 p.m.)	"You missed a call from [appellant]."

The audio recording of the complainant's telephone call for emergency assistance was admitted into evidence at trial. During the call, the complainant states that she needs someone to come out to her home and get appellant out of her house because he does not want to leave. According to the complainant, appellant was mad because she did not want to let him into her home. While on the call with the emergency assistance operator, the complainant explained that when appellant heard her on the telephone, he put his hands on her, hit her, and threw her down to the

ground. The complainant indicated to the emergency assistance operator that appellant left her home while she was on the call.

Alyssa Valdez testified that she and appellant have two children together, but their relationship ended in 2012. In September 2018, Valdez was also living at 750 Silent Valley Road in trailer number 40. According to Valdez, the complainant and appellant were dating at the time. She believed that they were living together because she would see appellant outside of the complainant's home, when he would "Facetime[4] the[ir] children" she could see the complainant's home in the background, and she would see him at the complainant's home on a regular basis.

Valdez further testified that on September 17, 2018, around 1:00 or 2:00 p.m., she picked appellant up in her car from outside the complainant's home so that they could have a conversation about their children. They drove around talking for about forty-five minutes and then she drove him back to the complainant's home. Although Valdez could not see the front door of the complainant's home or whether the door was open or closed when she stopped her car to drop appellant off, she did not see appellant break down the door. Rather, appellant just walked in the door; he went straight inside.

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4 "FaceTime is a[] [cellular telephone] application that allows individuals to make video calls from telephones. FaceTime also may be run from other electronic devices." *See Perone v. State*, No. 14-12-00969-CV, 2014 WL 1481318, at *2 (Tex. App.—Houston [14th Dist.] April 15, 2014, no pet.) (mem. op., not designated for publication).

Cindy Luna, appellant's mother, testified that the complainant and appellant began their relationship in spring 2018, and she believed that the complainant and appellant were living together because the complainant and appellant told her that they were living together at the complainant's home. Previously, from August 2017 to around the end of 2017, appellant lived with his parents in Austin, Texas. Luna did not know where appellant went after he moved out of her home. At the time of trial, appellant's mail continued to come to Luna's home.

Standard of Review

We review the legal sufficiency of the evidence by considering all of the evidence in the light most favorable to the jury's verdict to determine whether any "rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 318–19 (1979); *Williams v. State*, 235 S.W.3d 742, 750 (Tex. Crim. App. 2007). Our role is that of a due process safeguard, ensuring only the rationality of the trier of fact's finding of the elements of the offense beyond a reasonable doubt. *See Moreno v. State*, 755 S.W.2d 866, 867 (Tex. Crim. App. 1988). We defer to the responsibility of the fact finder to resolve conflicts fairly in testimony, weigh evidence, and draw reasonable inferences from the facts. *Williams*, 235 S.W.3d at 750. That said, our duty requires us to "ensure that the evidence presented actually supports a conclusion that the defendant committed" the criminal offense of which he is accused. *Id.*

We note that in reviewing the sufficiency of the evidence, a court must consider both direct and circumstantial evidence and any reasonable inferences that may be drawn from the evidence. *See Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007); *see also Wise v. State*, 364 S.W.3d 900, 903 (Tex. Crim. App. 2012) (evidence-sufficiency standard of review same for both direct and circumstantial evidence). Circumstantial evidence is just as probative as direct evidence in establishing the guilt of an actor, and circumstantial evidence alone can be sufficient to establish guilt. *See Clayton*, 235 S.W.3d at 778; *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007). For evidence to be sufficient, the State need not disprove all reasonable alternative hypotheses that are inconsistent with a defendant's guilt. *See Wise*, 364 S.W.3d at 903; *Cantu v. State*, 395 S.W.3d 202, 207–08 (Tex. App.—Houston [1st Dist.] 2012, pet. ref'd). Rather, a court considers only whether the inferences necessary to establish guilt are reasonable based on the cumulative force of all the evidence when considered in the light most favorable to the jury's verdict. *See Wise*, 364 S.W.3d at 903; *Hooper*, 214 S.W.3d at 13. The jury, as the judge of the facts and credibility of the witnesses, could choose to believe or not to believe the witnesses, or any portion of their testimony. *Sharp v. State*, 707 S.W.2d 611, 614 (Tex. Crim. App. 1986); *Jenkins v. State*, 870 S.W.2d 626, 628 (Tex. App.—Houston [1st Dist.] 1994, pet. ref'd).

Sufficiency of Evidence

In his sole issue, appellant argues that the evidence is legally insufficient to support his conviction for burglary of a habitation because the State did not prove that appellant "had the requisite intent to assault [the complainant] at the time of entry into [the complainant's] home."

A person commits the offense of burglary of a habitation if he, without the effective consent of the owner, enters a habitation with the intent to commit an assault. *See* TEX. PENAL CODE ANN. § 30.02(a)(1); *DeVaughn v. State*, 749 S.W.2d 62, 64–65 (Tex. Crim. App. 1988). A person commits the offense of assault if he "intentionally, knowingly, or recklessly causes bodily injury to another." *See* TEX. PENAL CODE ANN. § 22.01(a)(1). The intent to commit an assault must exist at the moment of entry. *DeVaughn*, 749 S.W.3d at 64–65; *Martinez v. State*, 269 S.W.3d 777, 781 (Tex. App.—Austin 2008, no pet.); *see also* TEX. PENAL CODE ANN. § 30.02(b) (for purposes of section 30.02, "enter" means to intrude (1) "any part of the body"; or (2) "any physical object connected with the body" (internal quotations omitted)).

"Intent is almost always proven by circumstantial evidence." *Trevino v. State*, 228 S.W.3d 729, 736 (Tex. App.—Corpus Christi–Edinburg 2006, pet. ref'd); *see also Hart v. State*, 89 S.W.3d 61, 64 (Tex. Crim. App. 2002) ("Direct evidence of the requisite intent is not required . . . ."); *Smith v. State*, 56 S.W.3d 739, 745 (Tex.

App.—Houston [14th Dist.] 2001, pet. ref'd). A jury may infer intent from any facts which tend to prove its existence, including the acts, words, and conduct of the defendant, and the method of committing the offense. *Edwards v. State*, 497 S.W.3d 147, 157 (Tex. App.—Houston [1st Dist.] 2016, pet. ref'd); *see also Cary v. State*, 507 S.W.3d 750, 758 (Tex. Crim. App. 2016) ("The necessary specific intent can be proven through circumstantial evidence, and we may rely on events that took place before, during, or after the commission of the offense."). A person acts with intent "with respect to the nature of his conduct . . . when it is his conscious objective or desire to engage in the conduct . . . ." *See* TEX. PENAL CODE ANN. § 6.03(a).

Here, the jury heard evidence that on September 17, 2018, appellant left the complainant's home around 1:00 p.m. The complainant then sent appellant messages telling him to not come back. At 1:35 p.m., the complainant told appellant: "Fuck u stay the fuck away from me. . . . Im done. . . . Gtfo[5] here with that bullshit. . . . Do what u gotta do without me." In her statement given to Officer Lindesay, the complainant stated that she argued with appellant over Facebook Messenger and told him to leave her alone and not to come back to her home.

Despite the complainant's messages to appellant, he returned to her home and told her to "let him in." The dead bolt lock on the complainant's front door was

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5 "Gtfo" is a common abbreviation for "Get The F*** Out." *See* Randall M. Kessler & Molly Y. Teplitzky, *Our Top 10 Apps for Family Law Attorneys*, 41-WTR FAM. ADVOC. 6, 8 (2019).

engaged at the time. At 2:07 p.m., appellant sent the complainant a message telling her that he was outside her home and to "[o]pen the door." When she did not respond, he called her at 2:09 p.m., 2:11 p.m., and twice at 2:12 p.m. Also, at 2:12 p.m., he sent the complainant a message, stating: "I'll kick in the door[.]" The complainant did not respond. Appellant then called the complainant twice at 2:13 p.m. and twice more at 2:14 p.m. Essentially, in the span of five minutes, appellant sent the complainant three unanswered messages and called her eight times.

When the complainant did not respond to appellant, appellant broke down the front door to the complainant's home. *See, e.g.*, *Avila v. State*, No. 07-19-00130-CR, 2020 WL 5287879, at *4–5 (Tex. App.—Amarillo June 29, 2020, pet. ref'd) (mem. op., not designated for publication) (holding evidence legally sufficient to support jury's finding defendant intended to commit assault when he entered complainant's home despite complainant's repeated refusals to allow him to come to her home); *McIntosh v. State*, 297 S.W.3d 536, 540–41 (Tex. App.—Houston [1st Dist.] 2009, pet. ref'd) (in holding evidence legally sufficient to support jury's finding defendant entered house with intent to assault complainant, considering that defendant broke window to enter complainant's house when no one would open the door); *see also McGee v. State*, 923 S.W.2d 605, 608 (Tex. App.—Houston [1st Dist.] 1995, no pet.) ("[T]he jury is exclusively empowered to determine the issue of intent, and the

events of a burglary may imply the intent with which the defendant entered. Thus, intent may be inferred from the defendant's conduct and surrounding circumstances." (internal citations omitted)). In doing so, appellant left footprints on the front door from kicking it, broke and damaged the door frame, and the lock from the front door ended up on the ground. *See, e.g.*, *Hunt v. State*, No. 04-15-00475-CR, 2016 WL 4538543, at *1, *6 (Tex. App.—San Antonio Aug. 31, 2016, no pet.) (mem. op., not designated for publication) (in holding evidence legally sufficient to support jury's finding defendant entered home with intent commit assault, considering damage done to door and door frame); *Howard v. State*, Nos. 01-07-00686-CR to 01-07-00688-CR, 2008 WL 3876227, at *4–6 (Tex. App.—Houston [1st Dist.] Aug. 21, 2008, pet. ref'd) (mem. op., not designated for publication) (holding evidence legally sufficient to support jury's finding defendant entered habitation with intent to commit sexual assault where he violently kicked in complainant's front door); *see also McGee*, 923 S.W.2d at 608.

The complainant, who was in her bedroom, heard appellant break down the front door, but before she could make it out of her bedroom, appellant pushed in the door to the complainant's bedroom, cracking it. When the complainant told appellant to leave her home, he refused. The complainant then told appellant that she was going to call for emergency assistance, and while she was on the telephone with the emergency assistance operator, appellant punched the complainant in the

back of the head and pushed her to the ground. *See, e.g.*, *Norris v. State*, No. 03-04-00323-CR, 2005 WL 1787447, at *2–3 (Tex. App.—Austin July 27, 2005, no pet.) (mem. op., not designated for publication) (in holding evidence legally sufficient to support jury's finding defendant entered home with intent to commit assault, considering, among other evidence, that defendant, after entering home, actually hit complainant); *see also McGee*, 923 S.W.2d at 608. Appellant, despite knowing that a law enforcement officer had been called, left the complainant's home before his arrival. *See Clayton*, 235 S.W.3d at 780 (fact finder may draw inference of guilt from circumstance of flight).

The jury could have reasonably inferred from the above evidence that appellant possessed the intent to commit an assault at the time he entered the complainant's home. *See Hart*, 89 S.W.3d at 64 (fact finder may infer intent from any facts that tend to prove its existence, including acts, words, conduct of accused, and method of committing offense); *see also Kizer v. State*, No. 01-16-00937-CR, 2018 WL 3233572, at *4 (Tex. App.—Houston [1st Dist.] July 3, 2018, pet. ref'd) (mem. op., not designated for publication) (person's acts, words, and conduct are generally reliable circumstantial evidence of one's intent); *McGee*, 923 S.W.2d at 608. Viewing the evidence in the light most favorable to the jury's verdict, we conclude that a rational jury could have determined beyond a reasonable doubt that appellant entered the complainant's home with the intent to commit an assault. *See*

TEX. PENAL CODE ANN. § 30.02(a)(1). Thus, we hold that the evidence is legally sufficient to support appellant's conviction.

We overrule appellant's sole issue.

Conclusion

We affirm the judgment of the trial court.

Julie Countiss
Justice

Panel consists of Justices Kelly, Goodman, and Countiss.

Do not publish. TEX. R. APP. P. 47.2(b).