Affirmed and Memorandum Opinion filed March 24, 2011.

In The

Fourteenth Court of Appeals

NO. 14-10-00252-CR

WILL MILBERGER, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Criminal Court at Law No. 14
Harris County, Texas
Trial Court Cause No. 1604878

MEMORANDUM OPINION

Appellant Will Milberger appeals his conviction for misdemeanor assault of a family member. After the jury found him guilty, the trial court assessed punishment at one year's incarceration in the county jail. The trial court later suspended the sentence of incarceration and granted probation for eighteen months. In one issue, appellant claims the evidence was factually insufficient to support his conviction. We affirm.

Background

The State presented evidence that on the night of June 5, 2009, appellant and his wife, Jan Milberger, were at their home in Houston with their fourteen-year-old daughter B.M. Jan was recovering from bronchitis and did not feel well. Earlier in the evening, appellant had taught a karate class.[1]

After arriving home from his karate class, appellant consumed a twelve-pack of beer and some amount from a bottle of wine. Later that evening, appellant went outside and urinated on the side of the house. When appellant returned inside and told Jan what he had done, an argument started. During the course of the argument, appellant directed obscenities at Jan. Jan told appellant that she wanted him to leave the house.[2]

Believing appellant had left, Jan told B.M. what happened, explained that appellant was leaving the house, and then went to bed. Appellant, however, had not left the house. Appellant went to the bedroom and called Jan, who was in bed, another expletive. Appellant then grabbed a pillow and started hitting Jan, while yelling expletives at her over and over. After hitting her with the pillow, appellant jumped on the bed, straddled Jan, and began pushing her from side to side with his hands. She banged against his legs as he pushed her back and forth. Jan testified that appellant's actions caused her physical pain. Jan told appellant to stop and that he was hurting her.[3] After pushing her back and forth, appellant suddenly grabbed Jan by the neck. Jan believed that if she fought back, he would snap her neck. As her vision began to dim, Jan heard their daughter, B.M., asking through the door what was happening. At that point,

[1] Appellant is a sixth-degree black belt in Soo Bahk Do, a Korean martial art. Some years before the incident in question, Jan had obtained a first-degree black belt in karate. For a while, Jan worked at the karate school with appellant.

[2] Appellant and Jan were trying to work on their marriage during this time. Appellant had recently moved back into the house after a period of separation.

[3] Jan believed that appellant's karate skills so outmatched her own abilities, she could only fight back with her mind. She believed she had to try to calm him down by not causing him any pain, or he would cause her further harm.

appellant removed his hands from Jan's neck and her vision returned. Jan, in an effort to calm appellant, then apologized to him and told him she was only giving him a hard time because she had been sick. Appellant responded by telling her to "just talk to me next time or something." He then got off Jan and left the room.

B.M. did not see what happened in the bedroom, but she did hear what happened. B.M. testified that she had been in her bathroom brushing her teeth when she heard yelling coming from her parents' bedroom. Concerned, she walked over to her parents' side of the house. Outside her parents' closed door, B.M. heard her father screaming obscenities at her mother. She heard her mother say, "Stop. Stop. You're hurting me. Stop." B.M. debated whether to call 911 because it sounded like her father was attacking her mother. She then heard a silence from the bedroom so she called out loudly to make sure they could hear her. Right after she called out, B.M. heard her mother say, "[I]t's okay, yes, just calm down, I'm not feeling well." Moments later, B.M. saw appellant exit the room with a strange look in his eye. B.M. then went back to her room and locked the door. She was afraid of her father. B.M. eventually went to sleep, though it was difficult.

Jan did not feel like she could leave the house immediately after the attack because appellant was "guarding her." Appellant kept coming back into the bedroom throughout the rest of the night, checking on Jan. She came out of her room a few times to get water, but she did not have a phone in the bedroom. She was terrified. She was afraid to open an outside door to leave because she feared the alarm chime would alert appellant. Jan finally suggested that appellant take some Benadryl to help him sleep. The Benadryl worked and when Jan felt certain appellant was asleep, she retrieved her cell phone from the kitchen. Jan stated that she was afraid to call the police because she feared appellant would wake up and attack her before the police could get in the door. Jan called her older daughter, an attorney in San Antonio. Jan then awakened B.M. and they left the house. The older daughter called Jan's middle daughter, who then called the police.

Not long after, Jan and B.M. returned to the house and met the responding sheriff's deputies outside in the driveway. She did not have any marks or bruises that the deputies could see, but one of the deputies testified that was not unusual in assault cases because bruises can develop later.[4] The testifying deputy spoke to both Jan and B.M. separately and then went inside the house and awakened appellant. Appellant admitted that he had argued with Jan, but denied any violence. The deputy saw some signs of appellant's intoxication.

Jan testified that she had recently inherited several million dollars, that at the time of trial she and appellant were divorcing, and that she wanted sole custody of B.M. She was further cross-examined about how to disable the door chimes on the alarm system, the location of phones she could have used to call for help, and the fact that she called her lawyer-daughter rather than the police.

Appellant also presented evidence from a martial arts expert, who testified that the attack as described was not what he would expect of a sixth-degree black belt. The expert further described ways to break choke-holds, which he believed someone like Jan, who had a first-degree black belt, would know. The martial arts expert stated that, in his opinion, Jan's "passive" technique while appellant was choking her was unusual and did not make sense.

Sufficiency of the Evidence

In his sole issue, appellant challenges the factual sufficiency of the evidence to support his conviction. While this appeal was pending, the Court of Criminal Appeals held that only one standard should be used in criminal cases to evaluate the sufficiency of the evidence to support findings that must be established beyond a reasonable doubt: legal sufficiency. *Brooks v. State*, 323 S.W.3d 893, 894-95 (Tex. Crim. App. 2010) (plurality op.); *id.* at 926 (Cochran, J., concurring). Accordingly, we review the

[4] The State did offer photographic evidence of bruises that developed on Jan several days later. The photos, apparently taken with a cell phone, were not of good quality.

sufficiency of the evidence in this case under a rigorous and proper application of the legal sufficiency standard of *Jackson v. Virginia*, 443 U.S. 307 (1970). *Brooks*, 323 S.W.3d at 906; *Pomier v. State*, 326 S.W.3d 373, 378 (Tex. App.—Houston [14th Dist.] 2010, no pet.). When reviewing the sufficiency of the evidence, we view all of the evidence in the light most favorable to the verdict to determine whether the fact finder was rationally justified in finding guilt beyond a reasonable doubt. *Brooks*, 323 S.W.3d at 899. This court does not sit as a thirteenth juror and may not substitute its judgment for that of the fact finder by re-evaluating the weight and credibility of the evidence. *Id.* at 901-02; *see also Williams v. State*, 235 S.W.3d 742, 750 (Tex. Crim. App. 2007). We defer to the fact finder's resolution of conflicting evidence unless the resolution is not rational. *Brooks*, 323 S.W.3d at 902 n.19, 907.

A person commits misdemeanor assault if the person intentionally, knowingly, or recklessly causes bodily injury to another, including the person's spouse. Tex. Penal Code § 22.01(a) (Supp. 2009); *see Hudson v. State*, 179 S.W.3d 731, 741 (Tex. App.—Houston [14th Dist.] 2005, no pet.). Bodily injury is defined as "physical pain, illness, or any impairment of physical condition." Tex. Penal Code § 1.07(a)(8) (Supp. 2009).

Jan's testimony established each of these elements. Jan, appellant's wife, described how appellant pushed her with his hands and used his hands to squeeze her neck until her vision dimmed. She felt physical pain from the attack. Direct evidence that a victim suffered pain is sufficient evidence of bodily injury. *Laster v. State*, 275 S.W.3d 512, 524 (Tex. Crim. App. 2009). That appellant intended to cause the pain and injury can be inferred from his acts and the hurling of obscenities at Jan. *See Guevara v. State*, 152 S.W.3d 45, 50 (Tex. Crim. App. 2004) (intent must generally be inferred from the circumstantial evidence surrounding an incident, including the acts, words, and conduct of the accused). The testimony of the complainant is sufficient to support the jury's verdict. *See Hudson*, 179 S.W.3d at 741; *Johnson v. State*, 176 S.W.3d 74, 78 (Tex. App.—Houston [1st Dist.] 2004, pet. ref'd) ("The testimony of a single eyewitness, such as [complainant] is sufficient to support a felony conviction.").

Moreover, B.M. testified that, based on what she heard, it "certainly sounded likely my dad was attacking my mom." Her testimony about what she heard corroborated Jan's description of the attack. Viewing all of the evidence in the light most favorable to the verdict, we conclude the jury was rationally justified in finding guilt beyond a reasonable doubt. *See Brooks*, 323 S.W.3d at 899.

In support of his claim that the evidence is insufficient, appellant lists, without further explanation, four arguments: (1) although Jan described a choking incident, the responding officer observed no signs of injury; (2) B.M. did not see what actually transpired in the bedroom; (3) as established by the martial arts expert, the type of choking attack described is not what one would expect a sixth-degree black belt to use; and (4) Jan had filed for divorce and was seeking sole custody of the couple's daughter, thus giving her a motive to falsely accuse appellant.

Appellant's arguments amount to an attack on the weight and credibility of the State's evidence. *See Fuentes v. State*, 991 S.W.2d 267, 271 (Tex. Crim. App. 1999). The jury, as the trier of fact, is the sole judge of the credibility of the witnesses and of the strength of the evidence. *Id.*; *see also Williams*, 235 S.W.3d at 750 (reviewing courts give deference to "'the responsibility of the trier of fact to fairly resolve conflicts in testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.'"). The jury was the sole judge of the credibility of, and weight to be given, Jan's testimony, B.M.'s testimony, Jan's alleged motive for false accusations, and the strength of the evidence provided by the State. *See Fuentes*, 991 S.W.2d at 271; *Johnson*, 176 S.W.3d at 78 (alibi testimony, lack of physical evidence, and differences in witness testimony were all factors for the jury to consider in weighing the evidence.). We defer to the jury's weight and credibility determinations and find the evidence sufficient to support the jury's verdict.

For the preceding reasons, we overrule appellant's sole issue.

Conclusion

Having overruled appellant's sole issue, we affirm the judgment.

/s/ Martha Hill Jamison
Justice

Panel consists of Justices Brown, Boyce, and Jamison.

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