Affirmed and Memorandum Opinion filed December 1, 2016.

In The

Fourteenth Court of Appeals

NO. 14-15-00834-CR

RAYMOND JOHNSON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 185th District Court
Harris County, Texas
Trial Court Cause No. 1450961

MEMORANDUM OPINION

We consider four issues in this appeal from a conviction for arson: (1) whether the evidence is legally sufficient to support the conviction; (2) whether flawed science tainted the conviction; (3) whether, in response to a jury note, the trial court erred by giving an instruction to continue deliberations; and (4) whether the trial court erred by admitting evidence of an extraneous bad act. Finding no reversible error, we overrule each issue and affirm the trial court's judgment.

BACKGROUND

Firefighters received a report of a fire at the home of Kenneth and Charlene Booker, but by the time they arrived on scene, the fire had already been extinguished by the homeowners. The firefighters found a scorch mark and a burnt piece of paper on the back of a vehicle parked in the driveway. They also detected charring and a "real heavy smell" of gasoline in a separate area along the side of the house. Believing that there were multiple points of origin for the fires, a sign indicative of arson, the firefighters referred the case to the fire marshal's office.

A canine handler from the fire marshal's office was dispatched to the Bookers' house. The handler's dog, which was trained to detect accelerants, alerted at several locations. Five soil and debris samples were collected for chemical analysis, and four of them tested positive for the presence of gasoline.

Tonya Hilton, an investigator at the fire marshal's office, was also dispatched to the scene. She checked the area for possible heat sources, including extension cords, electrical and natural gas lines, cigarettes, candles, and lightning strikes. Hilton eliminated all of these sources as causes for the fires. When she detected a strong odor of gasoline and "distinct, separate areas of origin," Hilton opined that the fires must have been intentionally set.

Suspicions eventually turned to appellant, who once dated the Bookers' granddaughter, Breaunna. There was a troubled history between the Bookers and appellant. Breaunna lived with the Bookers, and they opposed her having any sort of dating relationship. The Bookers specifically opposed a dating relationship with appellant because they believed that he was rude and disrespectful. Breaunna dated appellant anyways, hiding her relationship from her grandparents. She ended the relationship a few months before the fires because appellant scared her and he was "really, really rough" with her.

On the night of the fires, Breaunna saw appellant driving down the cul-de-sac that led away from her grandparents' house. Moments later, as she approached the house, she noticed the fires and promptly warned her family.

Breaunna did not report appellant to the authorities at first. She did not believe that appellant would set fire to her grandparents' house. But after the fires, Breaunna received distressing phone calls from appellant, in which he allegedly said that he would kill her in order to be with her. Breaunna then decided to record her phone calls with appellant.

In a series of conversations, Breaunna told appellant that she would date him again, but only if he confirmed her suspicions and admitted to his role in starting the fires. Appellant eventually did so, explaining that he set the fires because he was heartbroken and he "felt like breaking some hearts." He also said that he wanted to hurt Breaunna because she got him kicked out of college and cost him his financial aid.

During the trial, the State published the recorded phone calls for the jury's consideration and argued that the phone calls proved appellant's guilt. Defense counsel offered a different explanation. Counsel argued that appellant made his statements because he was infatuated with Breaunna and because he believed that if he did not confess to starting the fires, then she would hang up the phone and never talk to him again.

The State tried to eliminate any concern that the fires may have been caused accidentally by Breaunna's grandfather, Kenneth. The evidence showed that Kenneth had cut his grass on the afternoon of the fires using a gasoline-powered lawnmower. Kenneth testified that he spilled some gasoline on the lawnmower as he was refilling it, but he clarified that the spill was so small that no gasoline even

hit the ground. He also testified that he refilled the lawnmower inside his garage, which was removed from the locations of the fires.

The defense asserted an alibi. Appellant's mother testified that she drove appellant to his father's house on the day before the fires. Appellant's father lived in a town more than sixty miles west of the Bookers' house, and appellant did not have any working transportation of his own. A friend also testified that appellant walked to her house on the morning of the fires and he did not leave until the following day.

The jury ultimately rejected appellant's defensive theory and convicted him as charged. The trial court assessed punishment at six years' imprisonment.

SUFFICIENCY OF THE EVIDENCE

Standard of Review. When reviewing the sufficiency of the evidence, we examine all of the evidence in the light most favorable to the verdict and determine whether a rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *See Temple v. State*, 390 S.W.3d 341, 360 (Tex. Crim. App. 2013). The evidence is legally insufficient when the record contains no evidence, or merely a "modicum" of evidence, probative of an element of the offense. *See Garcia v. State*, 367 S.W.3d 683, 687 (Tex. Crim. App. 2012).

Our review of "all of the evidence" includes evidence that was properly and improperly admitted. *See Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007). We also consider both direct and circumstantial evidence, as well as any reasonable inferences that may be drawn from the evidence. *See Nowlin v. State*, 473 S.W.3d 312, 317 (Tex. Crim. App. 2015). 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. *See Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007).

Although we consider everything presented at trial, we do not reevaluate the weight and credibility of the evidence or substitute our judgment for that of the fact finder. *See Williams v. State*, 235 S.W.3d 742, 750 (Tex. Crim. App. 2007). Because the jury is the sole judge of the credibility of witnesses and of the weight given to their testimony, any conflicts or inconsistencies in the evidence are resolved in favor of the verdict. *See Wesbrook v. State*, 29 S.W.3d 103, 111 (Tex. Crim. App. 2000).

The Offense. To obtain a conviction for arson, the State was required to prove the following essential elements: (1) that appellant started a fire; (2) that he intended to destroy or damage a habitation with that fire; and (3) that he knew that the habitation was located within the limits of an incorporated city or on property belonging to another. *See* Tex. Penal Code § 28.02(a)(2)(A), (D).

Analysis. The record contains legally sufficient evidence to support a finding for each essential element of arson. Hilton opined that the fires were intentionally set, based on the smell of gasoline and the separate points of origin. And in the recorded phone calls, appellant admitted that he was the one who started the fires. He explained that he set the fires at the Bookers' house because he "felt like breaking some hearts." The jury could have inferred from that statement and from his conduct that appellant had the intent to destroy or damage the Bookers' house, which is a habitation. *See Guevara v. State*, 152 S.W.3d 45, 50 (Tex. Crim. App. 2004) ("Intent may also be inferred from circumstantial evidence such as acts, words, and the conduct of the appellant."). The jury could have also determined that appellant knew that the Bookers' house was "property belonging to another" because appellant did not live at that residence and there was testimony that he had

once dropped off Breaunna at that location, knowing that she lived there with her grandparents.

Appellant counters that the evidence is legally insufficient because Hilton's testimony that the fires were intentionally set is scientifically unreliable. This reliability complaint is unpersuasive because it speaks to the admissibility of Hilton's testimony, and when we perform a sufficiency analysis, we consider all of the evidence even if it was improperly admitted. *See Clayton*, 235 S.W.3d at 778. Regardless of its admissibility, Hilton's testimony may be considered in a sufficiency analysis because, in addition to the recorded phone calls, it supports the jury's finding that appellant intentionally set the fires.

We conclude that there is legally sufficient evidence from which the jury could have found every element of the offense beyond a reasonable doubt.

FLAWED SCIENCE

In his second issue, appellant argues that we should grant him a new trial in the interests of justice because his conviction was based on flawed science. Appellant focuses on Hilton's testimony, which, according to him, applied a methodology known as "negative corpus."

Negative corpus, short for negative *corpus delicti*, is the process of concluding that a fire was intentionally set based on the absence of evidence of an accidental cause. *See Control Solutions, Inc. v. Gharda USA, Inc.*, 394 S.W.3d 127, 180 (Tex. App.—Houston [1st Dist.] 2012), *rev'd*, 464 S.W.3d 338 (Tex. 2015). This methodology has been widely criticized as being inconsistent with the scientific method. *E.g.*, *Somnis v. Country Mut. Ins. Co.*, 840 F. Supp. 2d 1166, 1172 n.2 (D. Minn. 2012) ("[T]he conclusion that a fire was intentional due to the *lack* of evidence of an accidental cause is an untestable hypothesis and, hence,

inconsistent with the scientific method."). Under prevailing standards in the fire investigation sciences, if there is no supporting evidence for a conclusion that a fire was incendiary and all other hypothesized causes have been eliminated, "the only choice for the investigator is to conclude that the fire cause, or specific causal factors, remains undetermined." *See* Technical Committee on Fire Investigations, National Fire Protection Association, NFPA 921: Guide for Fire and Explosive Investigations § 19.6.5.1 (2014).

Appellant asserts that Hilton engaged in the negative corpus methodology because she considered and then eliminated any accidental causes for the fires. Believing that this approach was scientifically unreliable, appellant argues that Hilton's testimony should have been excluded.

Appellant failed to preserve error on this point. He did not object to Hilton's testimony, which means that he has forfeited any argument that the testimony was unreliable. *See* Tex. R. App. P. 33.1; *Stewart v. State*, 995 S.W.2d 251, 258 (Tex. App.—Houston [14th Dist.] 1999, no pet.) (reliability complaint not preserved when there was no reliability objection at trial).

Appellant also suggests that his trial counsel may have been constitutionally ineffective because counsel did not challenge the reliability of Hilton's testimony. To prevail on a claim that counsel rendered ineffective assistance, the defendant must prove by a preponderance of the evidence that (1) his counsel's performance was deficient, and (2) the deficient performance resulted in prejudice. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). We need only address the first of these requirements because the failure to show either defeats the claim of ineffectiveness. *Id.*

Our review of counsel's performance is highly deferential, beginning with the strong presumption that counsel's actions were reasonably professional and

motivated by sound trial strategy. *See Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994). There is nothing in our record to rebut this strong presumption. Appellant did not move for a new trial, and counsel did not file an affidavit explaining his reasons for not challenging the reliability of Hilton's testimony.

When the record is silent regarding counsel's strategy, as it is here, we cannot conclude that the defendant received ineffective assistance unless the challenged conduct was "so outrageous that no competent attorney would have engaged in it." *See Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005). That difficult standard has not been met. Counsel may have reasonably determined that Hilton had not employed the negative corpus methodology because there was affirmative evidence to support a conclusion that the fires were intentionally set—namely, the smell of gasoline and the separate points of origin. Indeed, Hilton cited this evidence when she opined that the fires were incendiary. Appellant has not demonstrated that counsel was constitutionally ineffective for failing to object to Hilton's testimony.

DELIBERATION INSTRUCTION

The jury deliberated over a span of two days. On the second day, the jury sent two notes to the trial court. The notes are date-stamped, but not time-stamped, and the record does not affirmatively reveal which note was submitted first. One of the notes reads as follows: "At this time, we are one juror from a unanimous verdict. This is the same place where we were end of day Wed[nesday] and prior to lunch today Thursday. Please advise how we can move forward as this one juror is confident in his/her position." For ease of reference, we identify this note as the "Long Note." The space underneath the Long Note, reserved for the trial court's answer, is blank.

The other note, which we identify as the "Short Note," reads as follows: "At this time, we are unable to come up with a unanimous verdict. What is the next step?" At the bottom of the Short Note, the trial court gave a handwritten response, which says, "Please continue your deliberations."

At some point during the second day of deliberations, the trial court gave the jury an *Allen* charge, which was read on the record and provided in paper form. Although the record affirmatively shows that the jury returned a verdict two hours after receiving the *Allen* charge, the record does not establish the exact sequence of events regarding the Long Note, the Short Note, and the *Allen* charge.

Appellant asserts in his brief that the Long Note preceded the *Allen* charge, which in turn preceded the Short Note. He then argues that the trial court committed reversible error by responding to the Short Note without referencing the *Allen* charge. Without such a reference, appellant contends that the trial court's response was coercive.

Because the notes are not time-stamped and because the record does not otherwise reflect the exact sequence of events, we must "indulge every presumption in favor of the regularity of the documents in the trial court." *See Breazeale v. State*, 683 S.W.2d 446, 450 (Tex. Crim. App. 1984) (op. on reh'g). Accordingly, we must presume that the Short Note preceded the Long Note, followed next by the *Allen* charge, because under this scenario, there would be no question that the proceedings were regular. Appellant's argument relies on a contrary premise, which we cannot indulge.

Moreover, even if the Short Note had followed the *Allen* charge, there is still no showing that appellant objected to the trial court's response of "Please continue your deliberations," which means that he has procedurally defaulted on any claim

that the response amounts to reversible error. *See Word v. State*, 206 S.W.3d 646, 652 (Tex. Crim. App. 2006).

EXTRANEOUS BAD ACT

The trial court conducted a hearing outside the presence of the jury to determine whether evidence of flight would be admissible in the guilt phase of appellant's trial. During this hearing, the prosecutor gave a brief overview of the facts that he anticipated to hear from his witness. The prosecutor said that an officer went over to the Bookers' house less than two weeks after the fires to retrieve the recorded phone calls from Breaunna. During the officer's visit, appellant approached the house and saw the officer's marked patrol unit. The officer asked appellant to stop, but appellant turned around and fled. A chase then ensued, first by vehicle, and later on foot, after appellant's vehicle was disabled. A helicopter was called to assist, and appellant was eventually apprehended.

The trial court ruled that the evidence of flight was admissible, but the court restricted the scope of this evidence:

> I am going to allow you to put on the evidence that when he saw the officers, he turned and fled and . . . that eventually at some point during this fleeing, he was stopped or he was caught. . . . But not all the stuff surrounding the jumping out of the car . . . . So you can have the officer testify that they saw him, that the patrol car was there, he turned and ran, a chase ensued and eventually he was apprehended.

The jury heard even less evidence than what the trial court had approved. The prosecutor called an officer to the stand who testified that he assisted in appellant's chase after it had already begun. This officer merely established that appellant was involved in a chase and that appellant was captured at the end of the pursuit. Beyond mentioning that the chase was initiated by another officer who was investigating the arson, the officer provided no other details about the chase, and

no other witness involved in the chase testified. In effect, the jury was never advised that the chase originated at the Bookers' house, that appellant had fled that location after seeing the marked patrol units, or that his evasion had continued on foot and that a helicopter was called to assist.

Appellant argues in his final issue that evidence of his flight should have been excluded. We review the trial court's decision to admit or exclude evidence for an abuse of discretion. *See Shuffield v. State*, 189 S.W.3d 782, 793 (Tex. Crim. App. 2006). A trial court abuses its discretion when its decision is arbitrary, unreasonable, or without reference to guiding rules or principles. *See State v. Mechler*, 153 S.W.3d 435, 439 (Tex. Crim. App. 2005). We examine the trial court's decision in light of what was before the trial court at the time the decision was made. *See Weatherred v. State*, 15 S.W.3d 540, 542 (Tex. Crim. App. 2000). The trial court's decision will be upheld if it is reasonably supported by the record and correct under any theory of law applicable to the case. *See Willover v. State*, 70 S.W.3d 841, 845 (Tex. Crim. App. 2002).

Appellant argues that the trial court should have excluded the evidence of flight because the flight was more connected to a charge for evading arrest than for arson. Our record does not contain a charging instrument for evading arrest and appellant was not tried for that offense in this case. However, we are aware of several documents in the record referencing such a charge under another cause number. In any event, the trial court could have reasonably concluded that the evidence of flight was relevant to the arson charge because the prosecutor represented in his proffer that the chase began at the Bookers' house when appellant saw the marked patrol units. The jury likewise heard that the chase was initiated by the officer investigating the arson. We cannot say that the trial court's decision to admit the evidence of flight was an abuse of discretion. *See Hunter v.*

State, 530 S.W.2d 573, 575 (Tex. Crim. App. 1975) (holding that evidence of flight is relevant and admissible "to show the efforts made to locate or apprehend the accused, his pursuit and capture, including his resistance to arrest when overtaken even though this may also prove the commission of another crime").

Appellant also suggests that the evidence of flight should have been excluded because its probative value was substantially outweighed by a danger of unfair prejudice. *See* Tex. R. Evid. 403. Unfair prejudice refers to "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." *See Rogers v. State*, 991 S.W.2d 263, 266 (Tex. Crim. App. 1999). Appellant has not explained how the flight suggested a conviction based on an improper basis. Even if we were to assume that the trial court abused its discretion by admitting the evidence of flight, we cannot say that the trial court's error was harmful when the jury heard appellant on tape admitting to the arson.

CONCLUSION

The trial court's judgment is affirmed.

/s/ Tracy Christopher
Justice

Panel consists of Justices Christopher, Jamison, and Donovan.
Do Not Publish — Tex. R. App. P. 47.2(b).