In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-10-00073-CR

LUKE WATKINS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 359th District Court
Montgomery County, Texas
Trial Cause No. 09-05-05209 CR

MEMORANDUM OPINION

Luke Watkins appeals his felony conviction for assault on a family member, second offense. *See* Tex. Penal Code Ann. § 22.01(a)(1), (b)(2) (West 2011); *see also* Act of May 27, 2005, 79th Leg., R.S., ch. 788, § 1, 2005 Tex. Gen. Laws 2709 (amended 2009) (current version at Tex. Penal Code Ann. § 22.01(b)(2)(A) (West 2011)). A jury found Watkins guilty, found enhancements to be true, and assessed punishment at sixty years of confinement. Watkins asserts the trial court erred in admitting evidence of his prior assaults on the same person. He also challenges the sufficiency of the evidence supporting the verdict.

THE FACTS

C.H., the complainant, has known Watkins since 2004. At the time of the assault they were common-law married, they introduced themselves as husband and wife, and others knew them as "Mr. and Mrs. Hammer." They were homeless. They had no children together.

C.H. contacted the district attorney's office and stated she did not want to participate in the trial. The district attorney's office subpoenaed C.H. She refused to attend the trial. Pursuant to a writ of attachment, law enforcement brought C.H. to the trial against her will. On the witness stand, C.H. cried and testified that she loves Watkins and "didn't want to go against him on this."

She acknowledged calling 9-1-1 in April 2009 from outside a Kroger store in Willis. She does not remember what she told the dispatcher because she was upset and "had been under the influence." She and Watkins had been arguing all day. She had become upset with him for eating all the chicken she had purchased. She grabbed his shirt and was "swinging at him[.]"

The assault occurred later that evening when she asked Watkins for twenty-five cents for a drink. She was "coming off of a binge." She remembered speaking with someone at the Kroger store, and being treated by EMS. She acknowledged reporting that Watkins had kicked her and hit her several times, and so it "probably" happened, although she didn't "remember it actually happened that way." C.H. testified that she did

not file charges against Watkins. After confronting Watkins at the Kroger store she told him she loved him.

During the assault, C.H. suffered an injury to her nose. The injury to her nose hurt more the day after the assault, and took two weeks to heal. At trial, she initially refused to look at the photographs of her injuries. She explained that she still wants to be with Watkins, that she knows she's "better off" without him, that he liked "to tell [her] how to act," and that "he do[esn]'t love [her] like [she] love[s] him."

The jury heard the recording of the 9-1-1 call. C.H. reported that her husband was Luke Watkins and he "beat [her]." She reported an injury to her head but stated she did not need an ambulance. She provided the dispatcher with an address, and stated that Watkins could be found inside a brown car at the residence.

Officer Brian Skero, a patrolman with the Willis Police Department, testified that he arrived quickly at the Kroger store. C.H. approached Skero's patrol car before he got out of the car. Skero testified it was obvious she had a "busted nose[.]" Blood was smeared across her face and hands. Concerned about the amount of blood, Skero told the dispatcher to notify Montgomery County EMS. Skero described C.H. as "emotionally distraught." She told him she was "assaulted" by Luke Watkins after she asked Watkins for twenty-five cents for a drink. Watkins had kicked her and punched her in the face. Skero, who had worked as a paramedic prior to becoming a patrolman, testified that C.H.'s injuries were consistent with her description of the assault. In addition to the

injury to her face, C.H. had red marks and lacerations on her neck and chest consistent with a recent assault. C.H. told him that Watkins had kicked and punched her throughout her body. Skero did not smell alcohol on C.H.'s breath or notice any signs of intoxication.

C.H. provided Skero with an address where the assault had occurred, and she told Skero that Watkins could be found hiding in an abandoned car. Skero gave C.H. a statement form to fill out, and left her with Officer Tammy Towery, a deputy with the Montgomery County Sheriff's Department, who was working security at the store. Officer Towery testified she waited for EMS with C.H. while an officer went to locate the defendant. C.H. told her that her boyfriend had punched her in the face when she asked for twenty-five cents for a drink. Towery did not believe C.H. was intoxicated.

Skero drove to the address, which was about five blocks from the Kroger store. He found Watkins inside a vehicle parked outside a residence. Skero believed Watkins's mother owned the residence.

Watkins was in the driver's seat with his eyes closed, apparently sleeping. Skero knocked on the car window several times in a way that "would have woke anybody up." Watkins did not acknowledge him. Skero believed Watkins was pretending to sleep, because Watkins finally "woke up" but did not appear groggy or disoriented. Skero ordered him to unlock the door. Skero took Watkins back to the store for identification.

C.H. refused to go to the hospital but received treatment from EMS. Pictures were taken of C.H. after EMS had treated her. When Skero arrived back at the store with Watkins, C.H. was still "hysterical[.]" C.H. immediately approached the patrol car, identified Watkins as her assailant, and began "having choice words about . . . kicking her in the face over 25 cents." She did not want Skero to take Watkins to jail. Skero testified this is common in domestic violence situations because the victim is afraid of retaliation. Skero arrested Watkins and transported him to the Montgomery County Jail. Skero did not observe any injuries to Watkins, Watkins did not complain of any injuries, and the Medical Department at the jail did not require Watkins to receive any treatment.

Skero testified C.H. referred to Watkins as her husband. Skero had seen C.H. once or twice prior to the assault and knew she was homeless. Skero explained that it was his understanding that Watkins and C.H. were common-law married and that they had been together for at least two years. Skero believed that the couple lived together in the car located outside the residence where the assault occurred.

EVIDENCE OF PRIOR ASSAULTS

C.H. testified to two prior assaults by Watkins. She stated that Watkins assaulted her in May 2006. They were living together in a trailer in Willis. She testified she said something to him and he became angry. He slapped her and hit her with a broom handle hard enough to break the handle. She went to the Kroger store and called 9-1-1. Officer Craig Geffert responded to the call and located Watkins within walking distance of the

store. Watkins was arrested and taken to jail. Based on Watkins's relationship with C.H., the charge against Watkins for the 2006 incident included a family violence allegation.

C.H. testified that Watkins also assaulted her in March 2008. They were arguing and she found a bat to defend herself. Watkins hit her in the head at least once and took the bat away from her. C.H. went to a neighbor's home because of her blurred vision. The neighbor called 9-1-1.

Officer Julian Trevathan responded to the call. C.H. was screaming and crying hysterically. C.H. told Trevathan that she had been punched in the head and that she had lost her vision. Trevathan felt several large lumps on C.H.'s head and EMS transported C.H. to the hospital where she was admitted.

Trevathan found Watkins laying face down on a mattress in the house. Trevathan thought Watkins was pretending to sleep. A baseball bat was located in the corner of the room. The bat had a sticky substance on the hand grip and Trevathan noticed the same substance on Watkins when Trevathan handcuffed him. Trevathan did not notice the substance on C.H.'s hands. Watkins did not complain of any injuries or appear injured. C.H. told Trevathan that she loved Watkins and did not want him to go to jail. Watkins was arrested for assault on a family member.

Mark Wright, a crime scene investigator and latent print examiner for the Montgomery County Sheriff's Office Crime Laboratory, matched Watkins's fingerprints

with those on records of his prior conviction for the March 2008 assault family violence charge to which Watkins had pleaded guilty.[1]

THE ISSUES

In issues one and two, Watkins argues the trial court erred during the guilt/innocence phase of the trial by admitting evidence relating to the two prior assaults. Watkins notes that defense counsel asked potential jurors about their feelings on self-defense, but Watkins maintains that questioning during voir dire on the defensive theory does not authorize the State to use extraneous offenses in the case-in-chief to rebut an anticipated self-defense theory. Watkins argues defense counsel "made no mention of self-defense in his opening statement." We review the trial court's ruling under an abuse of discretion standard. *Green v. State*, 934 S.W.2d 92, 101-02 (Tex. Crim. App. 1996). We will not reverse a decision that was "within the 'zone of reasonable disagreement.'" *Id.* at 102 (quoting *Montgomery v. State*, 810 S.W.2d 372, 391 (Tex. Crim. App. 1990)).

Pursuant to Rule 404(b), evidence of other crimes, wrongs, or acts is inadmissible "to prove the character of a person in order to show action in conformity therewith[.]" *Berry v. State*, 233 S.W.3d 847, 858 (Tex. Crim. App. 2007) (quoting Tex. R. Evid. 404(b)). The evidence may be admissible as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Tex. R. Evid. 404(b); *see De La Paz v. State*, 279 S.W.3d 336, 342-43 (Tex. Crim. App. 2009); *see also*

[1] The indictment for this case alleged that Watkins "had previously been convicted of an offense under Chapter 22, Penal Code, against a member of the defendant's family, as described by Section 71.003, Family Code[.]"

Martin v. State, 173 S.W.3d 463, 468 (Tex. Crim. App. 2005) (evidence of extraneous offense admissible to rebut defense of consent); *Halliburton v. State*, 528 S.W.2d 216, 219 (Tex. Crim. App. 1975) (op. on reh'g) ("If the extraneous offense is relevant in tending to disprove the defensive theory, it should be admissible.").

During his opening statement, defense counsel made the following comments about what he thought the evidence would show regarding the alleged assault:

> I think the evidence . . . is going to show that the day before [the assault], [C.H.] went out with her friends and stayed out all night long. I think the evidence in this case is also going to show that [C.H.] is suppose to be on medication, and she doesn't take it very often. And I think the evidence is going to show that that day, she was looking for Luke because she wanted money because she was hungry. And she came and found him where he was mowing yards and demanded money from him. . . .
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> . . .
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> I think the evidence is going to show that he was on a bicycle because they were moving from one lot to another, and she snatched him off the bicycle and pulled him down on top of her; and then she started a physical fight with him. And I, also, think the evidence is going to show that this disagreement continued all day long, all evening long. And at some point, Mr. Watkins had had enough. He said: Leave me alone. And she wouldn't do it.
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> I think the evidence is going to show that, at that point, he did what he needed to do to get rid of her. . . . And you'll see that [C.H.] is the kind of person that is not just excited because she got her nose punched or she got her nose busted, she's excited all the time. All the time. The least little thing sets her off. . . .
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> [C.H.] is the kind of person that if [they] get off their medication, you just can't deal with them.

Defense counsel questioned witnesses regarding C.H.'s alcohol use and whether C.H. appeared intoxicated the night of the incident. He also asked law enforcement if C.H.'s reputation in the community was that she was "combative[.]" Defense counsel questioned C.H. about her alcohol use, asked her if she "snatched" Watkins off his bicycle and pulled him on top of her on the day of the assault. Counsel asked her if she was obsessed with Watkins, and whether the car in front of Watkins's mother's house was where Watkins would hide if he wanted to stay away from her. He asked one of the officers if it was fair to say that Watkins is "a fairly silent type individual." During closing arguments, defense counsel argued that several pieces of evidence supported a finding that Watkins acted in self-defense.

Before the trial court admitted the evidence of the prior assaults, the State argued, outside the hearing of the jury, that the evidence should be admitted because defense counsel had raised the issue of self-defense when he argued that C.H. was the aggressor because she pulled Watkins off his bicycle. When asked by the trial court whether during opening statement and in the questioning of the witnesses defense counsel argued Watkins lacked criminal intent, defense counsel answered, "I think we put forth the idea that, you know, that she was the one who started it." The trial court could reasonably conclude Watkins's argument and questioning of the witnesses attempted to portray C.H. as the aggressor and Watkins as merely defending himself and lacking criminal intent. The trial court's ruling was not an abuse of its discretion. *See* Tex. R. Evid. 404(b); *see*

also Powell v. State, 63 S.W.3d 435, 439 (Tex. Crim. App. 2001) (A trial court has discretion to "admit extraneous offense evidence to rebut a defensive theory raised in an opening statement."); *Jones v. State*, 241 S.W.3d 666, 669-70 (Tex. App.—Texarkana 2007, no pet.) ("In some circumstances, positions or defenses first posited during an opening statement are subject to impeachment.").

Watkins also argues on appeal that the prior violent acts were more prejudicial than probative. Although admissible under Rule 404(b), the same evidence may be inadmissible under Rule 403 if the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. *Prince v. State*, 192 S.W.3d 49, 56 (Tex. App.—Houston [14th Dist.] 2006, pet. ref'd). The following factors are considered when undertaking a Rule 403 analysis: (1) the inherent probative force of the proffered evidence; (2) the proponent's need for that evidence; (3) any tendency of the evidence to suggest decision on an improper basis; (4) any tendency of the evidence to confuse or distract the jury from the main issues; (5) any tendency of the evidence to be given undue weight by a jury that has not been equipped to evaluate the probative force of the evidence; and (6) the likelihood that presentation of the evidence will consume an inordinate amount of time or merely repeat evidence already admitted. *Gigliobianco v. State*, 210 S.W.3d 637, 641-42 (Tex. Crim. App. 2006). Rule 403 favors admission of relevant evidence; relevant evidence is presumed to be more probative than unfairly prejudicial. *Shuffield v. State*, 189 S.W.3d 782, 787 (Tex. Crim. App. 2006).

C.H., the only witness to the assault, was clearly a hostile witness and claimed at trial not to remember parts of the altercation. Watkins inquired at trial into C.H.'s "combative" behavior, use of alcohol, and whether she instigated the argument on the day of the assault. The evidence involved similar physical altercations between C.H. and Watkins where Watkins was arrested for assault, C.H. was the only one who sustained injuries, C.H.'s solicited medical help but was ambivalent to Watkins being arrested on each occasion, and Watkins responded by pretending to sleep after at least one of the altercations. *See Casey v. State*, 215 S.W.3d 870, 884 (Tex. Crim. App. 2007) (after defense put victim's "character, motives, recollection, and conduct on trial," trial judge did not abuse her discretion in allowing State to rebut it with *modus operandi* evidence). The trial court did not abuse its discretion in its Rule 403 determination. Issues one and two are overruled.

In issues three and four, Watkins challenges the legal and factual sufficiency of the evidence supporting the jury's guilty verdict. Watkins argues that the evidence fails to establish that C.H. was a member of Watkins's family as described in Section 71.003 of the Texas Family Code. *See* Tex. Fam. Code Ann. § 71.003 (West 2008). In a legal sufficiency review, an appellate court considers all of the evidence in the light most favorable to the verdict to determine whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007) (citing *Jackson v. Virginia*, 443 U.S. 307, 318-19,

99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)). The jury is the ultimate authority on the credibility of witnesses and the weight to be given their testimony. *Penagraph v. State*, 623 S.W.2d 341, 343 (Tex. Crim. App. 1981). We give deference to the jury's responsibility to fairly resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. *Hooper*, 214 S.W.3d at 13. The Court of Criminal Appeals recently concluded that there is no meaningful distinction between a legal-sufficiency review and a factual-sufficiency review in a criminal case, and held that

> the *Jackson v. Virginia* standard is the only standard that a reviewing court should apply in determining whether the evidence is sufficient to support each element of a criminal offense that the State is required to prove beyond a reasonable doubt. All other cases to the contrary, including *Clewis* [*v. State*, 922 S.W.2d 126 (Tex. Crim. App. 1996)], are overruled.

Brooks v. State, 323 S.W.3d 893, 912 (Tex. Crim. App. 2010).

The State sought to show that Watkins intentionally, knowingly, or recklessly caused bodily injury to another family member and that Watkins had previously been convicted of assault against a member of his family. Tex. Penal Code Ann. § 22.01(a)(1); Act of May 27, 2005, 79th Leg., R.S., ch. 788, § 1, 2005 Tex. Gen. Laws 2709 (amended 2009). "Family" includes "individuals related by . . . affinity[.]"[2] *See* Tex. Fam. Code

[2] The Penal Code provision in effect at the time did not define "family" but instead referred to the definition found in 71.003 of the Family Code. Act of May 26, 1999, 76th Leg. R.S. ch. 1158, § 1, sec. 22.01(e), 1999 Tex. Gen. Laws 4063 (amended 2005); *see also* Tex. Fam. Code Ann. § 71.003 (West 2008).

Ann. § 71.003. Two persons are related by affinity if they are married to each other. *Id.*, *see* Tex. Gov't Code Ann. § 573.024(a)(1) (West 2004).

Watkins concedes that the jury charge was correct and that all elements of the indictment, except that C.H. was a member of Watkins's family as described in Section 71.003 of the Texas Family Code, were proven beyond a reasonable doubt. Watkins maintains that the State prosecuted him for felony family violence upon a theory that he and C.H. were husband and wife under Texas common law, but the State failed to prove a common-law marriage between Watkins and C.H.[3] Watkins does not argue that a common-law husband and wife are not related by affinity.

The State was required to prove that Watkins intentionally, knowingly, or recklessly caused C.H., a family member, bodily injury. *See* Tex. Penal Code Ann. § 22.01(b)(2). C.H.'s testimony and statements to the police officers established that Watkins was responsible for the harm, that Watkins was C.H.'s common-law husband, and that they held themselves out as common-law spouses. *See Hudson v. State*, 179 S.W.3d 731, 741-42 (Tex. App.—Houston [14th Dist.] 2005, no pet.) (In a trial for assault on a family member, the evidence was sufficient to show that the complainant was a member of defendant's family, even though a doctor believed that the complainant

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[3] A valid common-law marriage consists of three elements: (1) the couple agreed to be married; (2) after the agreement they lived together as husband and wife; and (3) they represented to others in Texas that they were married. Tex. Fam. Code Ann. § 2.401(a)(2) (West 2006).

referred to defendant as her boyfriend, because the complainant's statements to the police established that defendant was her common-law husband.). Skero testified that C.H. and Watkins were common-law married and had been together for at least two years. The jury heard testimony that Watkins had been charged two other times with assault on a family member for assaults on C.H., one of which resulted in a conviction. The evidence is sufficient to support the jury's verdict. Issues three and four are overruled. The judgment is affirmed.

AFFIRMED.

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DAVID GAULTNEY
Justice

Submitted on May 26, 2011
Opinion Delivered August 24, 2011
Do Not Publish

Before Gaultney, Kreger, and Horton, JJ.