In The

Court of Appeals

Ninth District of Texas at Beaumont

_____

NO. 09-15-00142-CR

_____

JOSEPH JOHNSON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 252nd District Court
Jefferson County, Texas
Trial Cause No. 13-15872

MEMORANDUM OPINION

Appellant Joseph Johnson (Appellant or Johnson) was indicted for robbery, with enhancements for prior felony convictions. *See* Tex. Penal Code Ann. § 29.02 (West 2011). Johnson waived a jury trial and pleaded not guilty. After a bench trial, the court found Johnson guilty. At a sentencing hearing, Johnson pleaded "true" to the enhancements for three prior felonies and the court sentenced Johnson to twenty-five years' imprisonment. In a single issue, Johnson appeals his conviction, challenging the sufficiency of the evidence.

BACKGROUND

Testimony of D.R.

D.R., the complainant, testified for the State. D.R. testified that she and Johnson had dated, but at the time of the incident, they had not had contact with one another for about three months because "Johnson is on drugs and he was stealing from [her] house and selling stuff out of [her] house and [she] couldn't take it any more." According to D.R., that on the day of the incident, as she was leaving her house and locking the burglar bar, Johnson approached her and told her to go back into the house. D.R. explained that Johnson had been hiding between her house and the house next door. She testified that she told Johnson she would not go back inside and that Johnson then punched her, threw her against a brick wall, and choked her. According to D.R., when she started screaming, he choked her again, "so much until [her] eyes start[ed] rolling in the back of [her] head[.]" D.R. testified that she then punched the "panic button" for her home security system, which she had on her keys that were in her pocket. She explained that Johnson then told her to turn it off and she told him she could not turn it off. Johnson then tried to force D.R. into her car that was sitting in the driveway by grabbing her around the neck and trying to drag her. D.R. explained that Johnson

continued to choke and punch her while he was trying to get her into the car. Johnson "drug [her]" to the car and they struggled inside the vehicle.

D.R. testified that when a police officer arrived she was in the car with Johnson and Johnson looked up and saw the officer and let her go but took her purse and her alarm pad and left. According to D.R., she never got her purse back, which had her wallet, credit cards, and money. D.R. testified that Johnson had previously stolen from her, and she believed that the reason Johnson came to her house that day was "for nothing else but to steal[]" something that he could sell to support his drug habit. She also explained that she sought medical treatment later that day for injuries she had sustained during the incident. D.R. identified photographs of the injuries she received as a result of Johnson's actions during the altercation.

Calls to 911

State's Exhibit 1 contained audio recordings of calls to 911 reporting the incident. Exhibit 1 was admitted into evidence without objection. Cheryl Ridinger (Ridinger), supervisor and custodian of records for 911 operations for the City of Beaumont, testified that such records are kept in the regular course of business and that it is their regular practice to maintain such records. Ridinger also testified that the recordings were true and correct copies of calls to the 911 dispatch concerning

the incident. After the recordings were played, D.R. identified one of the calls as the call from her "panic button." In each of the recorded calls, the dispatcher terminated the call when the caller verified to the dispatcher that the police had arrived at the scene of the incident.

Testimony of Officer Pratt

Officer Pratt (Pratt), the detective on this case, was called as a witness by the defense. Pratt testified that his report indicates that the event happened November 29, 2012, but on November 30th, he realized he needed the witness statement and nonconsent form. According to Pratt, he was unable to meet with the victim to obtain her statement until about December 13, 2012. Pratt testified that he eventually decided to file a robbery charge against Johnson based on the report that the victim's purse was taken by force during the altercation. Pratt did not recall if the report from the officer who responded to the incident described a purse.

Testimony of Joseph Johnson

Johnson testified that he and D.R. were both at the house on the morning of the incident and that they left the house together that day. Johnson explained that he and D.R. were arguing and she started "cussing at [him]" and "swinging at [him] and stuff[,]" and he "pushed her back." According to Johnson, D.R. "flopped herself to the ground" and Johnson picked her up. Johnson testified that D.R.

pushed him and tried to hit him, and that when he pushed her back, D.R.'s neck was scratched. Johnson said he walked away when the police arrived because he did not want to go to jail. Johnson denied that he choked or punched D.R., and when asked how D.R. injured her elbow, Johnson stated, "Hit it on the car or something . . . it wasn't from me dragging her." Johnson also denied taking D.R.'s purse and he stated that he did not rob her.

On cross-examination, Johnson testified that D.R. lied when she said Johnson had been hiding in the bushes, she lied when she said he held her against the brick wall, she lied when she said he dragged her to the car and put her into the car, and she lied when she said that he held her by the throat. Johnson also testified that a neighbor who made a 911 call regarding the incident was lying when the neighbor said Johnson was dragging D.R. According to Johnson, a woman who called 911 about the incident was mistaken when she reported that Johnson was strangling and hitting D.R. and was trying to kill her. Johnson testified further as follows:

> I didn't rob her. I didn't take no purse from her or none of that. I didn't do none of that. I didn't drag her or none of that, none of that happened. I didn't drag her. I did not drag her. I did not take her purse. She said that I held her purse up and walked across the yard. The officer was right there in the yard when I walked off, and what he described -- he described everything I had on, everything, you know, even the jacket I had in my hand. She said I was holding the purse up

> going across the yard. Now, don't you think he would have seen that if I would have had her purse in my hand. She said it was in my right hand and the officer was right there in the car, got out of the car. I seen him; he seen me. I didn't have no purse.

Johnson explained that D.R. was lying when she testified that she had thrown him out of her house for stealing from her three months prior to the incident because three months prior to the incident Johnson was in State jail.

The trial court found Johnson guilty of robbery. At a sentencing hearing, Johnson agreed that he was previously convicted of three felonies. The court sentenced Johnson as a habitual offender to a term of twenty-five years. Johnson timely filed a notice of appeal.

ISSUE ON APPEAL

In a single issue, Johnson complains that the evidence is insufficient to sustain his conviction. More specifically, he argues that the offense of robbery requires that an assault occur while in the commission of a theft and that the evidence at trial was insufficient for any "rational jury[[1]] to conclude beyond a reasonable doubt that a theft occurred." While admitting that the complaining witness alleged that Johnson stole her purse, Johnson argues that the complaining witness's testimony "proved itself to be tainted by apparent and uncontroverted

[1] This was a bench trial.

misrepresentations[]" such that "there truly is no evidence to support the finding of guilt for robbery and, more specifically, the element of 'theft[.]'"[2]

STANDARD OF REVIEW

When reviewing the sufficiency of the evidence supporting a conviction, an appellate court considers all of the evidence in the light most favorable to the verdict to decide whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Temple v. State*, 390 S.W.3d 341, 360 (Tex. Crim. App. 2013). We may not substitute our judgment for that of the factfinder by re-evaluating the weight and credibility of the evidence. *See Isassi v. State*, 330 S.W.3d 633, 638 (Tex. Crim. App. 2010) (quoting *Dewberry v. State*, 4 S.W.3d 735, 740 (Tex. Crim. App. 1999)). We defer to the factfinder's responsibility to fairly resolve conflicts in testimony, weigh the evidence, and draw all reasonable inferences from basic facts to ultimate facts. *See Isassi*, 330 S.W.3d at 638 (quoting *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007)). The factfinder can choose to believe all, some, or none of the testimony presented by the parties. *See Chambers v. State*, 805 S.W.2d 459, 461 (Tex. Crim. App. 1991).

[2] Johnson's brief on appeal does not challenge the legal sufficiency of the evidence as to any other element of the offense of robbery.

ROBBERY

> A person commits the offense of robbery if
>
> > . . . in the course of committing theft as defined in Chapter 31 and with intent to obtain or maintain control of the property, he:
> > (1) intentionally, knowingly, or recklessly causes bodily injury to another; or
> > (2) intentionally or knowingly threatens or places another in fear of imminent bodily injury or death.

Tex. Penal Code Ann. § 29.02(a). Theft, in turn, occurs when "[a] person . . . unlawfully appropriates property with intent to deprive the owner of property." *Id.* § 31.03(a) (West Supp. 2015). However, "while the offense of *theft* has an acquisitive component, commission of the offense of *robbery* requires only that the person be *in the course of committing* a theft." *Holberg v. State*, 425 S.W.3d 282, 287 (Tex. Crim. App. 2014) (emphasis in original). "In the course of committing theft" means "conduct that occurs in an attempt to commit, during the commission, or in immediate flight after the attempt or commission of theft." Tex. Penal Code Ann. § 29.01(1) (West 2011). The actual commission of theft is not a prerequisite to the commission of a robbery, and robbery may include conduct that falls short of a completed theft. *See Watson v. State*, 532 S.W.2d 619, 622 (Tex. Crim. App. 1976); *Franklin v. State*, 219 S.W.3d 92, 95 (Tex. App.—Houston [1st Dist.] 2006,

no pet.) ("[R]obbery does not require the actual commission of theft, since taking is not an essential element of the case.").

ANALYSIS

In this case, D.R., the complainant, testified that Johnson took her purse, which contained her wallet, credit cards, and money. She also testified that she never received any of these items back. D.R. testified that it was her belief that Johnson took these items in order to sell them for money to buy drugs and that she had previously made him leave her house for stealing from her. Officer Pratt testified that he did not recall whether the report from the officer who responded to the call regarding the incident described a purse. Johnson himself denied that he took D.R.'s purse.

Johnson's brief on appeal places emphasis upon the evidentiary value of the recorded calls to 911 and argues that no witness testimony evidence, except D.R.'s testimony, supports the notion that Johnson intentionally and knowingly caused bodily injury to D.R. "while in the commission of a theft[.]" D.R. testified at trial that Johnson took her purse and other items and left the scene *after* the police had arrived. Because the 911 dispatcher terminated the calls when the police arrived, anything the callers to 911 witnessed after the police arrived would not have been included in their recorded calls. In any event, the trial court as the trier of fact

could have believed D.R.'s testimony that Johnson intentionally and knowingly caused her bodily injury "in the course of committing a theft" and could have disbelieved Johnson's testimony denying that he took D.R.'s purse. The State was not required to prove that a completed theft actually occurred. *See Holberg*, 425 S.W.3d at 287; *Franklin*, 219 S.W.3d at 95. After viewing the evidence in the light most favorable to the verdict, we conclude that a rational factfinder could have found the essential elements of the offense of robbery beyond a reasonable doubt. Accordingly, we overrule Johnson's issue.

Johnson also argues on appeal that even if this Court finds the evidence is sufficient to support his conviction, that the judgment should be reformed because the trial court's final judgment incorrectly states "JUDGMENT OF CONVICTION BY JURY[,]" "Verdict of Jury: GUILTY[,]" and recites "N/A" as to Johnson's pleas to the enhancements for prior felony convictions.[3] This Court has the authority to reform the trial court's judgment to correct clerical errors. *See* Tex. R. App. P. 43.2(b); *Bigley v. State*, 865 S.W.2d 26, 27 (Tex. Crim. App. 1993); *Asberry v. State*, 813 S.W.2d 526, 531 (Tex. App.—Dallas 1991, pet. ref'd). We delete the portion of the judgment stating "CONVICTION BY JURY" and substitute "JUDGMENT OF CONVICTION BY COURT – WAIVER OF JURY

[3] The State's appellate brief does not disagree or otherwise address these errors in the final judgment.

TRIAL[.]" We delete the portion of the judgment stating "Verdict of Jury[]" and substitute "Verdict of Court[.]" We delete the portion of the judgment stating "N/A" as to Johnson's pleas to the enhancement paragraphs and substitute that Johnson pleaded "True" to three enhancements.

Having overruled Johnson's single issue on appeal, we affirm the judgment of the trial court as reformed.

AFFIRMED AS REFORMED.

_____

LEANNE JOHNSON
Justice

Submitted on November 3, 2015
Opinion Delivered January 13, 2016
Do Not Publish

Before Kreger, Horton, and Johnson, JJ.