

In The
Court of Appeals
Ninth District of Texas at Beaumont

NO. 09-15-00460-CR

DAT TAT PHAM, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the Criminal District Court
Jefferson County, Texas
Trial Cause No. 14-19791

MEMORANDUM OPINION

Appellant, Dat Tat Pham¹, appeals his conviction for arson. Pham presents six issues for our review. Pham’s first, second, and third issues complain of the interpreter that the trial court appointed to translate the proceedings between English and Pham’s native language—Vietnamese. Pham’s fourth, fifth, and sixth issues

¹Dat Tat Pham is also known as Hung Nguyen.

challenge the sufficiency of the evidence. We overrule Pham's issues and affirm the judgment.

I. Background

A Jefferson County grand jury indicted Pham for arson under Texas Penal Code Section 28.02(a)(2). At the outset of the trial proceedings, the trial court observed that Pham did not appear to speak English very well, remarking that Pham spoke "broken English" or only "a little bit" of English, and sua sponte appointed an interpreter. The trial judge reviewed the interpreter's background and qualifications, including the fact that she had interpreted Vietnamese and English in other legal proceedings, and approved her to serve as Pham's translator. Nothing in the record reveals that Pham or the State objected to the appointment of the translator, questioned the interpreter's qualifications, or requested a different interpreter.

During the trial, the State solicited testimony from the fire marshal and the arson investigator who were responsible for investigating a pattern of similar fires being set under houses and buildings in the city of Port Arthur, Texas. The investigators testified that their observation drew their attention to Pham, who was present or near the scene of several of the fires.

The investigators testified that during their search for the serial arsonist, they came across an eyewitness who told them of yet another fire—the fire at issue in this case. The eyewitness testified that she witnessed a man, whom she identified as Pham, starting the fire under a home in the city. The eyewitness was able to lead the investigators to the house, where they discovered remnants of the fire under the home as well as smoke stains on the structure. The State entered video footage into evidence at trial that the investigators had obtained from a nearby church’s security camera, which happened to encompass the house in its surveillance of the church’s parking lot. The video footage showed a man apparently attempting to start a fire under the house while the eyewitness’s vehicle is shown to drive past the man and come to a stop at a nearby intersection. As smoke begins to come out from under the house, the man walks off, past the eyewitness’s vehicle.

The investigators testified that this fire fit the pattern of arson under their investigation. Specifically, this fire was intentionally set with similar combustible material placed underneath the structure, and the house was located along the same pathway as the other fires.

At the conclusion of the trial, the jury found Pham guilty as charged in the indictment and assessed his punishment at twenty years imprisonment.

II. Court-Appointed Interpreter

Both the United States Constitution and the Texas Constitution grant a defendant the right to be present at his trial to confront the witnesses against him. *See* U.S. Const. amend. VI; Tex. Const. art. I, § 10. The right to be present includes not only the right to attend proceedings but also to comprehend those proceedings. *Garcia v. State*, 149 S.W.3d 135, 140 (Tex. Crim. App. 2004). For non-English speakers, that right includes the assistance of an interpreter during trial proceedings. *See Cantu v. State*, 993 S.W.2d 712, 721 (Tex. App.—San Antonio 1999, pet. ref'd) (providing that “[a]n accused’s constitutional right to confront witnesses encompasses the right to have trial proceedings interpreted to the accused in a language he can understand”).

In a criminal case, section 57.002 of the Texas Government Code and article 38.30 of the Texas Code of Criminal Procedure govern the trial court’s appointment of an interpreter. *See* Tex. Gov’t Code Ann. § 57.002 (West Supp. 2016); Tex. Code Crim. Proc. Ann. art. 38.30 (West Supp. 2016). Under article 38.30, an individual appointed as an interpreter is not required to have any specific qualifications or training but need only have sufficient skill in translating and familiarity with the use of slang. Tex. Code Crim. Proc. Ann. art. 38.30(a). Under section 57.002, an individual appointed as an interpreter generally must be a licensed court interpreter.

Tex. Gov't Code Ann. § 57.002(a), (b). However, a court located in a county with a population of 50,000 or more

may appoint a spoken language interpreter who is not a certified or licensed court interpreter if:

(1) the language necessary in the proceeding is a language other than Spanish; and

(2) the court makes a finding that there is no licensed court interpreter within 75 miles who can interpret in the language that is necessary in a proceeding.

Id. at § 57.002(d). If the court appoints a spoken language interpreter who is not a licensed court interpreter, that person: “(1) must be qualified by the court as an expert under the Texas Rules of Evidence; (2) must be at least 18 years of age; and (3) may not be a party to the proceeding.” *Id.* at § 57.002(e).

When a trial court knows a defendant cannot understand English, the trial court must appoint an interpreter unless the defendant expressly waives the appointment. *Garcia v. State*, 429 S.W.3d 604, 606–07 (Tex. Crim. App. 2014); *see also Sanchez v. State*, No. 09-04-101-CR, 2005 WL 913445, at *1 (Tex. App.—Beaumont Apr. 20, 2005, no pet.) (mem. op., not designated for publication). Once the trial court appoints an interpreter, however, the defendant must object at trial to preserve a complaint regarding the qualifications or competency of the interpreter. *See, e.g., Franco v. State*, No. 04-16-00090-CR, 2017 WL 781033, at *2 (Tex. App.—San Antonio Mar. 1, 2017, no pet.) (mem. op., not designated for publication)

(“A complaint regarding the competency of an interpreter appointed by the trial court . . . is waived if the defendant does not object to the appointment at trial.”); *Colunga–Pina v. State*, No. 05–15–01337–CR, 2016 WL 3877865, at *1 (Tex. App.—Dallas July 13, 2016, no pet.) (mem. op., not designated for publication) (holding appellant waived complaint about the trial court’s failure to establish the credentials of the interpreter by failing to object); *Phommathep v. State*, No. 07–12–00503–CR, 2014 WL 561813, at *3 (Tex. App.—Amarillo Feb. 11, 2014, no pet.) (mem. op., not designated for publication) (holding appellant waived complaint that the trial court appointed an interpreter without making the findings required by section 57.002(e) where appellant did not make proper objection at trial); *Montoya v. State*, 811 S.W.2d 671, 673 (Tex. App.—Corpus Christi 1991, no pet.) (“The trial court was not under a duty to interrogate the interpreter to determine his qualifications; rather, if there was a question concerning his qualifications, appellant should have objected and made a record.”). The competency of an individual to act as an interpreter is a question for the trial court, and the trial court’s determination of the individual’s competency is reviewed on appeal under an abuse of discretion standard. *Linton v. State*, 275 S.W.3d 493, 500 (Tex. Crim. App. 2009). Appellate courts must apply an abuse of discretion standard when reviewing whether the trial court took adequate

steps to ensure that a defendant sufficiently understands the proceedings to be able to assist in his own defense. *Id.* at 502.

Additionally, a presumption of regularity attaches to the proceedings in the trial court and to the court's judgment. *Light v. State*, 15 S.W.3d 104, 107 (Tex. Crim. App. 2000); *Ridge v. State*, 205 S.W.3d 591, 597 (Tex. App.—Waco 2006, pet. ref'd). An appellant bears the burden of overcoming this presumption. *Marras v. State*, 741 S.W.2d 395, 407 (Tex. Crim. App. 1987), *overruled on other grounds*, *Garrett v. State*, 851 S.W.2d 853, 860 (Tex. Crim. App. 1993).

A. Interpreter's Qualifications

Pham argues in his first issue that the record does not reflect that the court-appointed interpreter met the licensure requirements under section 57.002(b) of the Texas Government Code, and that the record does not reflect that the court declared the interpreter an expert under section 57.002(e).

As a prerequisite to presenting a complaint for appellate review, the record must show the complaint was made to the trial court by a timely objection that stated the grounds for the ruling sought from the trial court and that the trial court ruled on the objection. Tex. R. App. P. 33.1(a). In this case, Pham waived his complaints concerning the qualifications and competency of the interpreter by failing to make a

trial objection. *See Montoya*, 811 S.W.2d at 673 (by failing to object, defendant waived his right to complain of use of bailiff as interpreter).

Even assuming Pham had preserved his complaint for appeal, the record contains no indication that the appointed interpreter was unqualified or failed to provide adequate translation services. Pham does not contend or attempt to show the interpreter was actually unlicensed, but rather argues the court erred by failing to establish on the record that the interpreter was licensed. The trial judge has wide discretion in determining the adequacy of interpretive services. *Linton*, 275 S.W.3d at 500. “[W]e will not find error from a silent record. To do so would be to find error on the basis of speculation, which we cannot do.” *Ridge*, 205 S.W.3d at 597 (refusing to find error without evidence in the record to support defendant’s contention that the court-appointed interpreter was not licensed). Here, Pham has failed to sustain his burden of overcoming the presumption of regularity.

We overrule Pham’s first issue.

B. Adequacy of Translation

Pham’s second and third issues challenge the Constitutional sufficiency of the translation services rendered during trial, complaining that the record does not reflect that the court-appointed interpreter simultaneously translated the witnesses’ testimony for Pham. *See* U.S. Const. amend. VI; XIV. Again, however, Pham

waived his complaints concerning the sufficiency of the translation by failing to object at any point during trial. *See Montoya*, 811 S.W.2d at 673.

On appeal, Pham argues that it is “unclear from the [r]ecord whether [his trial counsel] used the interpreter to go over the testimony of the [f]ire [d]epartment witnesses with [Pham] before he cross-examined each one”; however, a silent record does not overcome the presumption of regularity. *Light*, 15 S.W.3d at 107; *Ridge*, 205 S.W.3d at 597. Nothing in the record suggests that the interpreter did not translate the proceedings for Pham. Rather, the record indicates that the trial judge instructed the interpreter to sit next to Pham during the trial proceedings and to translate the testimony for him. At no point in the record does it appear that Pham complained to the court that the proceedings were not being properly or adequately translated for him.

Moreover, the record indicates that Pham spoke and understood at least some English. Prior to trial, a psychiatrist evaluated Pham and submitted a written report to the court that stated: “[Pham] is able to speak English, although, he speaks somewhat ‘broken English.’” The doctor’s report further noted: “[Pham] did appear to be able to understand my questions and his answers were coherent; although, he speaks rather rapidly and frequently gestures as a part of his effort to communicate.” Additionally, the arson investigator testified that he had previously spoken with

Pham thirty to forty times and that Pham appeared to speak English. At no point did Pham object or request to have any witness slow down or to have an opportunity to re-examine a witness because he did not follow the testimony. Here, Pham has failed to sustain his burden of overcoming the presumption of regularity.

We overrule Pham’s second and third issues.

III. Sufficiency of the Evidence

We will address Pham’s fourth, fifth, and sixth issues together as they all challenge the sufficiency of the evidence.

A. Identification of Pham

Pham’s fourth and fifth issues challenge the sufficiency of the evidence to show Pham was the arsonist.

When evaluating the sufficiency of the evidence, we view all of the evidence in the light most favorable to the prosecution and 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, 319 (1979); *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007). We “must 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.’” *Hooper*, 214 S.W.3d at 13 (quoting *Jackson*, 443 U.S. at 319). “The jury is the sole judge of credibility

and weight to be attached to the testimony of witnesses.” *Merritt v. State*, 368 S.W.3d 516, 525 (Tex. Crim. App. 2012). In this role, the jury may choose to believe all, some, or none of the testimony presented by the parties. *Chambers v. State*, 805 S.W.2d 459, 461 (Tex. Crim. App. 1991).

During trial, an eyewitness testified that while sitting in her vehicle, she saw Pham starting a fire under the house in question. The jury viewed video surveillance footage that depicted a man setting a fire underneath the house, then walking directly toward the eyewitness’s car, almost to her window. Pham testified during trial, and argues on appeal, that the man shown on the surveillance video lacks his distinguishing characteristics, thereby negating the eyewitness’s identification. Yet, Pham admits on appeal that “the image is too blurry and indistinct to allow any meaningful identification.” Other witnesses for the State testified that the image of the man in the video, while unclear, resembled Pham and appeared to be Pham.

The jury is the sole judge of the credibility and weight to be attached to the testimony and evidence. *See Merritt*, 368 S.W.3d at 525. We conclude that there was sufficient evidence to allow a rational jury to identify Pham as the perpetrator of the crime. We overrule Pham’s fourth and fifth issues.

B. Corpus Delecti

Pham's sixth issue argues that the evidence was insufficient to establish the *corpus delecti* of arson because the State did not show that fire "consumed" any part of the house.

To prove that Pham committed the offense of arson, the State must show beyond a reasonable doubt that Pham started a fire, regardless of whether the fire continued after ignition, with intent to destroy or damage any habitation, and that Pham knew that the habitation was located within the limits of an incorporated city or town. *See* Tex. Penal Code Ann. § 28.02(a)(2)(A) (West 2011); *Merritt v. State*, 368 S.W.3d at 525. The offense is complete when the actor starts a fire with the requisite culpable mental state, even if no damage actually occurs. *Beltran v. State*, 593 S.W.2d 688, 90 (Tex. Crim. App. [Panel Op.] 1980).

A person charged with arson acts with specific intent to damage or destroy a habitation if it is his conscious objective or desire to engage in the conduct or cause the result. *See* Tex. Pen. Code Ann. § 6.03(a) (West 2011); *Beltran*, 593 S.W.2d at 689. Intent is almost always proved by circumstantial evidence and may be inferred from any facts that tend to prove its existence, such as the acts, words, and conduct of the accused. *See e.g., In re State ex rel. Weeks*, 391 S.W.3d 117, 125 n.36 (Tex. Crim. App. 2013); *Carrizales v. State*, 397 S.W.3d 251, 255 (Tex. App.—Corpus

Christi), *aff'd on other grounds*, 414 S.W.3d 737 (Tex. Crim. App. 2013); *Dominguez v. State*, 125 S.W.3d 755, 761 (Tex. App.—Houston [1st Dist.] 2003, pet. ref'd).

The State's witnesses testified that a fire was started under the house with the intention to damage the house. The State submitted into evidence photographs of the remnants of the fire, including the smoke stains along the side of the house. The State's eyewitness to the crime testified that she saw Pham starting an actual fire and smoke emerging from underneath the house. Smoke was visible in the surveillance video footage of the event. There was sufficient evidence for the jury to find that Pham intentionally started a fire with the conscious objective or desire to destroy or damage the habitat. *See* Tex. Penal Code Ann. § 28.02(a). We conclude there was sufficient evidence for the jury to find the *corpus delicti* of arson.

We overrule Pham's sixth issue.

Having overruled all of Pham's issues, we affirm the judgment.

AFFIRMED.

CHARLES KREGER
Justice

Submitted on June 17, 2016
Opinion Delivered May 31, 2017
Do Not Publish

Before Kreger, Horton, and Johnson, JJ.