In the
Court of Appeals
Second Appellate District of Texas
at Fort Worth

No. 02-19-00369-CR

LUCAS BERTOTTI, Appellant

V.

THE STATE OF TEXAS

On Appeal from County Criminal Court No. 3
Denton County, Texas
Trial Court No. CR-2019-02281-C

Before Sudderth, C.J.; Birdwell and Womack, JJ.
Memorandum Opinion by Justice Birdwell

MEMORANDUM OPINION

Appellant Lucas Bertotti challenges the sufficiency of the evidence to support his conviction for misdemeanor evading arrest. We affirm.

In 2019, a postal inspector notified detectives that he had intercepted a package with narcotics in it. Officers conducted a controlled delivery in which they allowed the package to be delivered and waited for someone to pick it up. Kyle Bonham picked up the package, and officers arrested him. Bonham gave officers consent to search his apartment for contraband.

When Detective Adam Frederick approached the apartment with his team, they smelled the odor of marijuana emanating from inside. Bonham opened the door, and the officers rushed in with guns drawn and shouted, "Police department, don't move."[1] Officers detained two occupants of the apartment.

Police soon learned, however, that there had been four people in the apartment. A third person, Justin Stout, had jumped off the balcony and lay crumpled with a broken leg on the ground.

The question in this appeal is whether there is sufficient evidence to show that Bertotti was the fourth person. At trial, the State's theory was that Bertotti had also jumped off the balcony as police entered the apartment, but that unlike Stout, Bertotti had made a safe landing and run away.

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[1]The first two officers inside were wearing clothing with police patches as well as black bullet-proof vests with "Police" written on them.

To that end, Detective Frederick testified that as he entered the apartment, he saw movement on the balcony, though he could not definitively make out a face or what the person was doing.[2] Detective John Martinez testified that around the same time, he was just driving up to the apartment, and he saw Bertotti sprinting away from the area in pants and sandals. Detective Martinez testified that it was common for people to try to elude arrest by jumping off balconies, but it did not occur to him that Bertotti might be fleeing the scene until he arrived at the apartment and learned that officers were looking for a fourth person.

Detective Martinez doubled back to his vehicle and went in the direction that he saw Bertotti heading. According to Detective Martinez, as he drove, he saw Bertotti running and looking over his shoulder to see if anyone was following him. Detective Martinez testified that he pulled in front of Bertotti, got out with his Taser drawn and his police vest on, and shouted, "Stop police, stop police." Bertotti did as instructed.

By Detective Martinez's account, Bertotti was exhausted and breathing heavily, but he did not seem to be surprised by the detention. Detective Martinez testified, and his body camera footage confirmed, that Bertotti said, "What's going on?" Detective Martinez said, "You tell me, you're the one running." Bertotti replied, "You saw me running" and "Ha, ha, damn." According to Detective Martinez, Bertotti did not seem

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[2]Detective Frederick conceded that the video from his body camera did not appear to show movement on the balcony, but he believed that this was due to the limitations of the camera as compared to the human eye.

surprised when he was taken back to the apartment. Based on their investigation, officers came to believe that Bertotti lived at the apartment.

Bertotti recalled events differently. In Bertotti's telling, he admitted that prior to the day in question, he had been in the apartment many times. However, he maintained that he did not live at the apartment and had not been in the apartment on the day of the raid. Instead, he had been at his friend Daniel's apartment in the same complex when Stout texted him, inviting him over to smoke marijuana. Bertotti testified that he walked towards Stout's apartment, and he was nearing the apartment when he saw police pull up. According to Bertotti, he paused beneath the balcony for roughly ten seconds. It was then, in Bertotti's account, that his friend Stout fell on him from above. On cross-examination, Bertotti was confronted with the fact that body cameras showed that roughly two minutes, not ten seconds, passed between the time police pulled up and when they entered the apartment. Regardless, Bertotti testified that after Stout fell on him, he wanted to get away from the scene of the raid, so he began walking briskly back to Daniel's apartment. Bertotti said he stopped halfway to make calls to warn people about the raid, but no one picked up, so he began sprinting toward Daniel's apartment while looking over his shoulder. He recalled that he had tired of running and had resumed walking towards Daniel's apartment when Detective Martinez pulled up and detained him. According to Bertotti, he did not know why he was being arrested.

In his sole point on appeal, Bertotti asserts that the trial court erred in denying his motion for directed verdict. Bertotti challenges the legal sufficiency of the evidence to establish his identity as a person who fled from police. He does not dispute that if he were in the apartment, the evidence would be sufficient to demonstrate that he evaded arrest. However, he asserts that there is no evidence beyond thin conjecture and "imagination" to place him within the apartment to begin with. To the contrary, we hold that the circumstantial evidence is sufficient to establish Bertotti's presence in the apartment.

A person commits the offense of evading arrest or detention if he intentionally flees from a person he knows is a peace officer attempting lawfully to arrest or detain him. Tex. Penal Code Ann. § 38.04(a). We review a challenge to the denial of a motion for directed verdict as a challenge to the legal sufficiency of the evidence. *Lucio v. State*, 351 S.W.3d 878, 905 (Tex. Crim. App. 2011) (citing *Williams v. State*, 937 S.W.2d 479, 482 (Tex. Crim. App. 1996)). In our evidentiary-sufficiency review, we view all the evidence in the light most favorable to the verdict to determine whether any rational factfinder could have found the crime's essential elements beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979); *Queeman v. State*, 520 S.W.3d 616, 622 (Tex. Crim. App. 2017). We must presume that the factfinder resolved any conflicting inferences in favor of the verdict, and we defer to that resolution. *Murray v. State*, 457 S.W.3d 446, 448–49 (Tex. Crim. App. 2015). The standard of review is the same for direct and circumstantial evidence; circumstantial evidence is as probative as

direct evidence in establishing guilt. *Jenkins v. State*, 493 S.W.3d 583, 599 (Tex. Crim. App. 2016). Thus, the State may prove a defendant's identity by either direct or circumstantial evidence, coupled with all reasonable inferences from that evidence. *Gardner v. State*, 306 S.W.3d 274, 285 (Tex. Crim. App. 2009).

Though no officer directly saw Bertotti in the apartment, the circumstantial evidence nonetheless pointed to his presence there. There was evidence that Bertotti lived at the apartment. There was also evidence that four people were in the apartment before the raid but that only three of those people were accounted for. Officers saw a flash of movement on the balcony as they entered the apartment. The jury heard testimony that it was common for people to try to evade detention by jumping off of balconies. Police testified, and Bertotti admitted, that he was in the immediate vicinity during the raid and when his friend Stout jumped from the balcony. It was also undisputed that an exhausted Bertotti was apprehended sprinting away from the apartment while looking over his shoulder to see if anyone was following him. According to police testimony, Bertotti was unsurprised by his detention and laughingly said "damn" when the officer related that he had seen Bertotti running from the area.

It was simply for the jury to determine whether the police's version or Bertotti's version was the more plausible explanation for Bertotti's presence at and flight from the scene. In the police's account, Bertotti jumped from the balcony in an attempt to evade detention, just as Stout had done. In Bertotti's account, he happened to be walking toward the apartment (with an intent to smoke the marijuana that police had

already smelled wafting from the apartment) when Stout fell on him from above, and then Bertotti sprinted away without attending to his friend even though he had not done anything wrong. The jury could have rationally believed that Bertotti's tale—an extraordinary coincidence that placed him just near enough to the apartment to explain his presence in the vicinity but not so close that he could be held criminally liable—was the less credible of the two. We defer to the jury's resolution of that credibility question. *See Murray*, 457 S.W.3d at 448–49.

We therefore hold that the evidence is legally sufficient to support the only aspect of the case that Bertotti has challenged.[3] The trial court did not err in denying Bertotti's

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[3]In his brief, Bertotti also cites a variety of concepts that are past their legal shelf-life. For instance, Bertotti argues, "This case is one based on factual sufficiency," and he offers an extended summary of *Watson v. State*, apparently in defense of the view that factual-sufficiency review remains a viable means of attacking the State's case. *See generally* 204 S.W.3d 404, 406–15 (Tex. Crim. App. 2006). However, factual-sufficiency review was largely done away with in *Brooks v. State*, 323 S.W.3d 893, 912 (Tex. Crim. App. 2010). Bertotti also raises an argument based on the following language from *King v. State*: "[a] conviction based on circumstantial evidence cannot be sustained if the circumstances do not exclude every other reasonable hypothesis except that of the guilt of the defendant; proof amounting only to a strong suspicion or mere probability is insufficient." 638 S.W.2d 903, 904 (Tex. Crim. App. [Panel Op.] 1982). However, that sort of reasonable-hypothesis analysis was disposed of in *Geesa v. State*, 820 S.W.2d 154, 159–61 (Tex. Crim. App. 1991), *overruled on other grounds by Paulson v. State*, 28 S.W.3d 570, 571 (Tex. Crim. App. 2000); *see Wise v. State*, 364 S.W.3d 900, 903 (Tex. Crim. App. 2012). Because these forms of review are no longer good law in Texas, we do not consider Bertotti's arguments based on them. *See* Tex. Standards App. Conduct, Lawyer's Duties to the Court 4; *see also* Tex. Disciplinary R. Prof'l Conduct 3.03, *reprinted in* Tex. Gov't Code Ann., tit. 2, subtit. G, app. A. Instead, we confine our discussion to Bertotti's legal-sufficiency challenge.

motion for directed verdict. We overrule Bertotti's sole point and affirm the trial court's judgment of conviction.

/s/ Wade Birdwell

Wade Birdwell
Justice

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Delivered: August 13, 2020