In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-14-00123-CR

RICARDO DALE TRAVIS, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

On Appeal from the 108th District Court
Potter County, Texas
Trial Court No. 68,567-E; Honorable Douglas R. Woodburn, Presiding

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March 17, 2016

MEMORANDUM OPINION

Before QUINN, C.J., and HANCOCK and PIRTLE, JJ.

Following a plea of not guilty, Appellant, Ricardo Dale Travis, was convicted by a jury of arson, enhanced by a prior felony conviction, and sentenced to twenty years confinement.[1] By a sole issue, Appellant challenges the sufficiency of the evidence to

[1] TEX. PENAL CODE ANN. § 28.02(a)(2)(D) (West 2011). As charged, the offense is a first degree felony. *Id.* at (d)(2). Punishment was enhanced by a prior conviction. *See id.* at 12.42(c)(1) (West Supp. 2015).

support his conviction. Specifically, he maintains there was no evidence that tied him to the ignitable liquid or that he started the fire. We affirm.

BACKGROUND

Traci Marsh and her three children, as well as her mother, were tenants in an apartment building. They had lived there for over twelve years. On September 11, 2012, Traci's teenage son became ill and was sent home from school. She left work early and arrived home around 2:00 p.m. Appellant, who was an acquaintance of the Marsh family and whose mother lived a few houses away, was in her house visiting with her son. After her son fell asleep, Appellant mentioned he was looking for something. According to Traci, he was angry, and over defense counsel's objection, she testified that Appellant was looking for a baggie of Xanax pills. The pills were not found and Appellant left without incident.

Shortly thereafter, Ms. Marsh left to pick up her daughters from school. When they returned home, her older daughter was waiting for her boyfriend to come visit. When he arrived, she observed him exit his vehicle and run to the back of the building. He testified he saw smoke and went to investigate. He saw Appellant walking approximately ten to fifteen feet from a mattress that was on fire. The Marshes' neighbor, who had smelled gasoline, came outside at that time and extinguished the fire with a hose. Ms. Marsh's daughter and the neighbor both called the fire department. Investigators were dispatched to the scene.

Several witnesses testified that after the fire was discovered, they saw Appellant get into his SUV. He drove in front of the Marshes' apartment and said not to mention

his name. The Marshes' neighbor added that he could not hear exactly what Appellant said but the gist was that Appellant was coming back to kill everyone.

Several hours after the fire department and investigators concluded their on-site investigation, the Marshes' neighbor again smelled smoke and noticed a second fire had been set at the same site. The fire was small and he quickly extinguished it. He advised Ms. Marsh about the second fire and she called the arson investigator who had investigated the first fire.

After an investigation and the collection of evidence, Appellant was charged with starting a fire using an ignitable liquid with intent to damage or destroy the habitation of Sam McLaughlin.[2] He was eventually tried and convicted by a jury. By this appeal, he challenges the sufficiency of the evidence to support his conviction.

STANDARD OF REVIEW

The only standard that a reviewing court should apply in determining whether the evidence is sufficient to support each element of a criminal offense the State is required to prove beyond a reasonable doubt is the standard set forth in *Jackson v. Virginia*, 443 U.S. 307, 33 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). *See Adames v. State*, 353 S.W.3d 854, 859 (Tex. Crim. App. 2011); *Brooks v. State*, 323 S.W.3d 893, 912 (Tex. Crim. App. 2010). Under that standard, this court considers all the evidence in the light most favorable to the verdict and determines whether, based on that evidence and reasonable inferences to be drawn therefrom, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson*, 443 U.S. at

[2] McLaughlin, the owner of the apartments, was out of town when the fires occurred. He testified as to the damage caused to the habitation and confirmed that Appellant did not have permission to set his property on fire.

318-19. The jury is the sole judge of the credibility and weight to be attached to the testimony of witnesses. We permit a jury to draw multiple reasonable inferences from facts as long as each is supported by the evidence presented at trial. *Hooper v. State*, 214 S.W.3d 9, 16-17 (Tex. Crim. App. 2007).[3] We measure the sufficiency of the evidence by the elements of the offense as defined by a hypothetically correct jury charge. *Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997). In our review, we must evaluate all of the evidence in the record, both direct and circumstantial, whether admissible or inadmissible. *Dewberry v. State*, 4 S.W.3d 735, 740 (Tex. Crim. App. 1999), *cert. denied*, 529 U.S. 1131, 120 S. Ct. 2008, 146 L. Ed. 2d 958 (2000). Furthermore, we must give deference to the responsibility of the trier of fact 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.

ANALYSIS

A person commits arson if the person starts a fire, regardless of whether the fire continues after ignition, or causes an explosion with intent to destroy or damage a habitation knowing that it was located on property belonging to another. TEX. PENAL CODE ANN. § 28.02(a)(2)(D) (West 2011). Appellant denied setting the fires which required the State to prove beyond a reasonable doubt that he was the person who

[3] Relying on *Massey v. State*, 154 Tex. Crim. 263, 226 S.W.2d 856, 859 (1950), Appellant contends the State's circumstantial case rests "on an inference based upon an inference" which is impermissible. The rule against inference stacking evolved from civil cases. *Hooper v. State*, 214 S.W.3d 9, 15 (Tex. Crim. App. 2007) (citing *Lozano v. Lozano*, 983 S.W.2d 787, 789 (Tex. App.—Houston [14th Dist.] 1998), *aff'd in part and rev'd in part on other grounds*, 52 S.W.3d 141, 144 (Tex. 2001)). Under modern criminal law, a rule against inference stacking is unnecessary. *Hooper*, 214 S.W.3d at 15. The *Jackson* test permits juries to draw multiple reasonable inferences as long as each inference is supported by the evidence presented at trial. *Id.* A conclusion reached by speculation and not facts or evidence does not support a finding beyond a reasonable doubt. *Id.* at 16.

started the fires or was "criminally connected therewith." *Merritt v. State*, 368 S.W.3d 516, 525 (Tex. Crim. App. 2012). Circumstantial evidence is as probative as direct evidence in establishing the guilt of an accused, and circumstantial evidence alone can be sufficient to establish guilt. *Hooper*, 214 S.W.3d at 13.

According to the arson investigators, the first fire resulted from a gas can being placed underneath a mattress which was then placed against the building. Paper was inserted into the gas can opening to serve as a wick. Results from a Grace Hydrocarbon Detector showed the presence of gasoline as the accelerant. One of the arson investigators testified that the second fire was caused by a piece of wood, a tree branch, and a wooden pallet being ignited.[4] The materials were placed against the same part of the building where the first fire occurred.[5] The fire was extinguished quickly, again by the Marshes' neighbor.

The State's witnesses all testified they did not see who set the fires. However, Ms. Marsh and her older daughter testified they saw Appellant walking behind their building after the first fire. The daughter's boyfriend placed Appellant in close proximity to the fire. Ms. Marsh's neighbor also saw Appellant walking behind the building before the fire. After the fire, Appellant was seen walking toward his vehicle. He started his vehicle, drove in front of the Marshes' home, and threatened "to come back and kill everybody there." Ms. Marsh and her daughter both testified that Appellant yelled out his window not to mention his name.

[4] According to one of the investigators, the materials were readily available on property located across the street from where Appellant's mother lived.

[5] The materials for the second fire were not at the scene when the first fire was investigated.

The investigator who interviewed Appellant testified that Appellant admitted walking "right next to where the fire was in the alley" on his way to meet a girl named Wendy but did not provide information on how to contact her. Appellant admitted he was upset that a baggie containing forty Xanax pills had been stolen by Ms. Marsh's son but denied being angry enough to start a fire. He told the investigator he got into his vehicle after the first fire and drove by the Marshes' home "to calm them down" because they were making accusations that he set the fire.

After the second fire, when Appellant was questioned by one of the arson investigators, he consented to a search of his vehicle. A tree branch and wood chips consistent with wood from the pallet used in the second fire were found in the vehicle. However, no forensic testing was conducted on those materials.

The evidence and expert testimony supported the State's theory that the fires were deliberately set. However, no direct evidence was introduced to connect Appellant to the gas can and accelerant used in the fires. The lack of direct evidence notwithstanding, identity of a perpetrator in an arson case can be proved by circumstantial evidence. *Greene v. State*, 124 S.W.3d 789, 792 (Tex. App.—Houston [1st Dist.] 2003, pet. ref'd). Additionally, although not elements of arson, motive and opportunity can be considered as circumstances indicative of guilt. *Merritt*, 368 S.W.3d at 526.

Appellant's potential motive was his belief that Ms. Marsh's son had stolen his Xanax pills. Appellant also had an opportunity to set the fires by his presence at the

scene and his flight from the scene permitted the jury to draw an inference of guilt. *Clayton v. State*, 235 S.W.3d 772, 780 (Tex. Crim. App. 2007).

Witnesses testified that Appellant made death threats to the Marsh family and yelled at them not to mention his name as he drove by the apartment. One of the investigators testified that Ms. Marsh and her daughter "appeared to be scared" to speak with him. Appellant was seen at the site of the fires before, during, and after the fires. Materials similar to those used to start the second fire were found in Appellant's vehicle.

In isolation, these facts may well be insufficient to support Appellant's conviction. However, considering the logical force of the combined circumstantial evidence coupled with reasonable inferences to be drawn therefrom, we find the evidence sufficient under *Jackson* to support Appellant's arson conviction. *Evans v. State*, 202 S.W.3d 158, 166 (Tex. Crim. App. 2006). Appellant's sole issue is overruled.

REFORMATION OF JUDGMENT

This court has the power to modify the judgment of the court below to make the record speak the truth when we have the necessary information to do so. TEX. R. APP. P. 43.2(b). *Bigley v. State*, 865 S.W.2d 26, 27-28 (Tex. Crim. App. 1993). Appellate courts have the power to reform whatever the trial court could have corrected by a judgment *nunc pro tunc* where the evidence necessary to correct the judgment appears in the record. *Ashberry v. State*, 813 S.W.2d 526, 529 (Tex. App..—Dallas 1991, pet. ref'd). The power to reform a judgment is "not dependent upon the request of any party,

nor does it turn on the question of whether a party has or has not objected in the trial court." *Id.* at 529-30.

In reviewing the record to evaluate Appellant's issue, it has come to this court's attention that the trial court's judgment contains clerical errors. The summary portion of the judgment under the headings "Plea to 1st Enhancement Paragraph" and "Findings on 1st Enhancement Paragraph" both reflect "N/A." However, the record indicates the State gave notice of its intent to use a prior conviction to enhance the punishment range and that the jury made a finding of true on the enhancement allegation.

We also note that the judgment assesses court costs against Appellant "[a]s per attached Bill of Costs" and that the *Bill of Costs* includes court-appointed attorney's fees of $4,500. The record does not contain a pronouncement, determination, or finding that Appellant had financial resources that would enable him to pay all or any part of the fees paid his court-appointed counsel, and we are unable to find any evidence to support such a determination. Therefore, we conclude that the order to pay attorney's fees was improper. *See Mayer v. State,* 309 S.W.3d 552, 555-56 (Tex. Crim. App. 2010). No objection is required to challenge the sufficiency of the evidence regarding a defendant's ability to pay. *Id.* When the evidence does not support an order to pay attorney's fees, the proper remedy is to delete the order. *Id.* at 557.

Accordingly, we reform the *Judgment of Conviction by Jury* to reflect "NOT TRUE" under "Plea to 1st Enhancement Paragraph" and "TRUE" under "Findings on 1st Enhancement Paragraph" in the summary portion of the judgment. We further modify the judgment to delete the requirement that Appellant pay $4,500 in court-appointed

attorney's fees by adding the following provision at page 2 beneath the heading "Furthermore, the following special findings or orders apply:" *As used herein the term court costs does not include court appointed attorney's fees*. In addition, the District Clerk is ordered to prepare an amended *Bill of Costs* and to provide the same to this court, as well as to Appellant and the Texas Department of Criminal Justice.

CONCLUSION

As reformed, the trial court's judgment is affirmed.

Patrick A. Pirtle
Justice

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