In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-16-00197-CR

JERARD DRAKE CERBANTEZ, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

On Appeal from the 242nd District Court
Swisher County, Texas
Trial Court No. B-4580-15-12, Honorable Kregg Hukill, Presiding

August 28, 2017

MEMORANDUM OPINION

Before QUINN, CJ., and CAMPBELL and PIRTLE, JJ.

Appellant Jerard Drake Cerbantez appeals from his conviction by jury of the third degree felony offense of burglary of a building[1] and the resulting sentence of six years of imprisonment. Through one issue, appellant contends the evidence presented at trial was insufficient to support his conviction. We will affirm.

[1] TEX. PENAL CODE ANN. § 30.02 (West 2016).

Background

The indictment alleged appellant did, "with intent to commit theft, enter a building or a portion of a building not then open to the public, without the consent of [the owner]." The State's evidence showed that on a school morning in November 2015, employees of the Kress, Texas school district were told a stranger was on the high school campus. The two employees, one the principal of the school and the other the maintenance and transportation director, drove around the campus and spotted a person standing on the corner of the tennis courts. They followed the person to a residence of a former student, Noriega. The principal was familiar with Noriega and his blue Dodge Ram pickup truck, seen in the driveway of the home. The principal approached the truck, introduced herself to the passenger, appellant, and told him "we had seen him on the campus, and that he didn't need to be over there."

The next day, the principal and the director were outside preparing for an outdoor student activity when they saw, from about 80 yards away, someone throwing "two of my speakers" over the fence at the football field. They then watched as the person put the speakers into Noriega's blue truck. The person, identified by both the principal and the director as appellant, got into the passenger side and the truck drove away. The director testified he was positive it was appellant who put the speakers over the fence. He recognized the person as appellant and noted the person was wearing the same flannel shirt as the person with whom they spoke the previous day. The principal also testified she was positive she saw appellant take the speakers because she recognized his profile and he was wearing the same flannel shirt jacket he had been wearing the day before when she spoke with him. The principal also told the jury she looked at

appellant's face through the zoom lens of her camera she had with her for the purpose of taking pictures of the students' activity.

The principal and the director testified that after seeing appellant put the speakers into the truck, they got into a vehicle and followed the blue truck. The director testified he recognized the truck as belonging to Noriega and as the truck he had followed the previous day. He said it was "very identifiable" because of its dents. The director was unable to catch up with the speeding truck, and called 911 to report the taking of the speakers.

Chief Deputy Brewer responded to the call. When he arrived, he noted the door frame to the football field's press box had been broken near the lock and wood chips were on the grate. The deputy testified the principal and the director told him the speakers had been on the second level of the press box, accessible only by entering the locked press box. Two hours after he responded to the call, the deputy saw appellant and the former student together in the truck. They denied being at the school earlier in the day. Appellant was subsequently arrested and indicted.

After hearing the evidence, the jury found appellant guilty as charged in the indictment and assessed punishment as noted. This appeal followed.

Analysis

Via a single appellate issue, appellant challenges the sufficiency of the evidence to support his conviction for burglary of a building. In particular, appellant challenges the sufficiency of the evidence to support his identification as the person who committed the burglary.

In evaluating the sufficiency of the evidence, we review all the evidence in the light most favorable to the trial court's judgment to determine whether any rational jury could have found the essential elements of the offense beyond a reasonable doubt. *Brooks v. State,* 323 S.W.3d 893, 912 (Tex. Crim. App. 2010) (plurality op.) (citing *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)). The jury is the "sole judge of a witness's credibility, and the weight to be given the testimony." *Isassi v. State,* 330 S.W.3d 633, 638 (Tex. Crim. App. 2010). Accordingly, we examine sufficiency under the direction of *Brooks*, while giving deference to the responsibility of the jury "to fairly resolve conflicts in testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007) (*citing Jackson,* 443 U.S. at 318-19).

Circumstantial evidence is as probative as direct evidence in establishing the guilt of an actor and the standard of review on appeal is the same for both direct and circumstantial evidence cases. *Guevara v. State,* 152 S.W.3d 45, 49 (Tex. Crim. App. 2004); *Smith v. State*, 56 S.W.3d 739, 744 (Tex. App.—Houston [14th Dist.] 2001, no pet.). Identity may be proven through direct or circumstantial evidence, and with the aid of inferences. *Smith,* 56 S.W.3d at 744; *Mabra v. State*, 997 S.W.2d 770, 774 (Tex. App.—Amarillo 1999, pet. ref'd). In a circumstantial-evidence case, it is unnecessary for every fact to point directly and independently to the defendant's guilt; rather, it is sufficient if the finding of guilt is supported by the cumulative force of all the incriminating evidence. *Powell v. State,* 194 S.W.3d 503, 507 (Tex. Crim. App. 2006).

As charged in the indictment in the case before us, to uphold appellant's conviction, we must find the State proved, beyond a reasonable doubt, that (1)

appellant; (2) entered a building; (3) without the effective consent of the owner; and (4) with intent to commit a theft. TEX. PENAL CODE ANN. § 30.02(a)(1) (West 2016). As noted, appellant's challenge focuses on the proof of his identity as the burglar.

Presence at the crime scene is a circumstance tending to prove guilt when combined with other facts. *Valdez v. State,* 623 S.W.2d 317, 321 (Tex. Crim. App. 1979). And, while evidence of flight from a crime scene alone is not enough to support a guilty verdict, it is also a circumstance from which an inference of guilt may be drawn. *Id.; Clayton v. State,* 235 S.W.3d 772, 780 (Tex. Crim. App. 2007).

Appellant emphasizes that the State did not have direct proof appellant entered the press box. Appellant correctly points out the State's case required the jury to infer that he did so. And, appellant argues, the jury was required to do so "based on the allegation that he was in possession of the items taken from the press box." Arguing the jury could not properly draw such an inference, appellant notes the speakers were never recovered.[2] From that fact appellant contends the State did not prove that appellant was in possession of the items taken from the press box.

We see flaws in appellant's reasoning. First, we cannot agree that the evidence supporting the necessary inference is limited to appellant's possession of the speakers. The witnesses did not merely see appellant in possession of the speakers; they saw him remove the speakers from the school's premises. Appellant's act of throwing the speakers over the fence drew the principal's attention, and she and the director watched as he loaded them into the truck. That appellant thus was seen completing the job of

[2] Also missing was a propane heater. That item also was not recovered.

removing the speakers from the school's premises suggests that he also was the person who began the job by entering the locked press box. That is particularly true since no one else was observed at the time in possession of the speakers.

Appellant's argument would have required the jury also to evaluate the likelihood that the speakers appellant possessed were not the same speakers taken from the press box. The director referred to the speakers he saw being thrown over the fence as "my speakers." The principal described them as "large black speakers" with "a big eye bolt that was drilled on the top one of them to hang." We think the inference that the speakers appellant removed from the football field were the same speakers missing from the interior of the press box is, on the evidence presented here, much easier to draw than the inference appellant suggests.

The principal testified the speakers were last used the previous week, at a home football game. She and the director testified that the press box was locked and not open to the public. There was evidence of a forced entry. We acknowledge that it is possible someone other than appellant entered the press box and removed the speakers but left them where appellant came into their possession before throwing them over the fence. However, the cumulative force of the incriminating circumstances points to appellant as the burglar to a degree sufficient to permit a rational conclusion of his guilt.

Noriega testified for appellant. He told the jury appellant was with him the morning the State's witnesses described, and the two of them did not go to the school. The jury was free to believe some, all or none of any of the witness testimony presented

at trial. *Chambers v. State,* 805 S.W.2d 459, 461 (Tex. Crim. App. 1991). From its verdict, it is clear the jury believed the State's witnesses and disbelieved Noriega's version of events. Considered in the light most favorable to the verdict, the evidence permitted a rational jury to conclude beyond a reasonable doubt that appellant was guilty of burglary of the press box. *See Hooper*, 214 S.W.3d at 13 (jury's responsibility to draw reasonable inferences from the evidence). The evidence is sufficient to support the verdict. Accordingly, we overrule appellant's sole issue.

Conclusion

Having overruled appellant's sole issue on appeal, we affirm the judgment of the trial court.

James T. Campbell
Justice

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