In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-16-00264-CR

JDAN LAVOY UPHAM, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

On Appeal from the 443rd District Court
Ellis County, Texas
Trial Court No. 38,955CR, Honorable Cynthia Ermatinger, Presiding

February 8, 2017

MEMORANDUM OPINION

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

Jdan Lavoy Upham appeals his felony conviction for Assault Family Violence. The trial judge served as the fact-finder, as opposed to a jury. His sole issue involves the sufficiency of the evidence supporting that conviction. We affirm.[1]

Background

Pollins, a "patrol officer" with the Ellis County Sheriff's Office, responded to a dispatch involving a person in need of medical treatment due to head injury from a

[1] Because this appeal was transferred from the Tenth Court of Appeals, we are obligated to apply its precedent where available, in the event of a conflict. TEX. R. APP. P. 41.3.

baseball bat. Upon arrival at the scene, the officer learned that one of the parties to the incident had left the scene and the injured party was inside the residence. The person identified as needing medical attention was appellant. He was found in a bedroom with a towel over his head, in and out of consciousness and was "very confused." At that time, appellant was unable to explain what had happened to him.

The officer then interviewed two witnesses present during the initial investigation. They were able to tell the officer that appellant and his wife "got into a verbal altercation; it turned physical." The physical altercation occurred because appellant "got mad at his wife. They got into an argument over some Facebook messages and he started hitting her and she was defending herself." Furthermore, the officer learned that it was appellant's son who hit him over the head with the metal bat while believing he was defending his mother.

In investigating the crime scene, Pollins discovered "a knife that was beside a broken-down white vehicle. It was fully extended. It was a pocket knife with a wooden handle, I believe with gold edges, and then a baseball bat by the tree." During her investigation, the officer received a call from Baylor Hospital and was informed that another party to the incident was presently receiving medical attention and expressed a desire to file charges against appellant. The party was appellant's wife, Windy Gandy Upham.

Pollins traveled to the hospital and spoke with Windy. According to Windy, the knife found was used by appellant in an attempt to "slit her throat." Windy also had a "busted lip," bruising all over her chest, and a bruise on the back of her neck with a small line.

Pollins eventually learned that appellant had "life-threatening injuries and that they were going to transport him [to] Dallas." According to the officer, the only injuries observed on appellant were those caused by the bat.

Appellant's sister testified that they had been at home the day of the incident and appellant had retired to his bedroom. Windy had come home too but remained outside and refused to come into the house. In time, Windy entered the abode, began to pack her belongings, and continued to go in and out of the house as she placed items in her car.

Eventually, appellant's sister heard the couple yelling out front in the yard and went to see what was occurring. At that point, she observed Windy and appellant "just swinging at each other." Appellant "was holding . . . the side of his face and said, 'You shouldn't f'ing hit me in the face.'" This led Windy to reply: "'You shouldn't have put your hands on me,'" according to the sister. Thereafter appellant grabbed Windy and punched her. This resulted in the sister physically interceding to stop appellant and telling him to let Windy go. As this transpired, appellant's son approached from around the back of the house and hit appellant in the head with the bat.

Appellant's sister also testified that 1) appellant's injuries were caused not only by the bat but also by his wife, 2) she did not see a knife in appellant's hands, 3) she did not see a knife being used by either party, 4) the knife found by the officer belonged to appellant, and 5) appellant had previously been convicted in 2009 of assaulting Windy. The judgment manifesting that prior conviction subsequently was admitted into evidence.

Appellant's son who had hit him in the head testified that he and his brother had been in their room all day playing video games. He did not remember the circumstances leading up to his striking his father other than that he thought his mother was in danger. That is, he "thought [his] dad was going after [his] mom with a knife." This was so because "[i]t looked like he was gripping a knife, but [he] could not tell you if he was or not because it's been a while [since the day of the offense]." He did "remember screaming and stuff, like just yelling, but [couldn't] remember . . . any words or anything like that." Nevertheless, he acknowledged hitting his father in the head with the bat.

The victim (Windy) testified that physical violence and verbal abuse occurred in her sixteen-year marriage to appellant. Since the assault underlying this prosecution, the couple had divorced. Windy attributed the abusive relationship to appellant's anger issues and his use of drugs and alcohol.

On the evening of the altercation, Windy had returned home from work and found appellant in the kitchen cooking dinner. After she had gone to change clothes, she encountered appellant on the back porch "smoking K-2." She then went into the bedroom, and appellant followed. An argument ensued which concerned comments made on Facebook. This resulted in Windy attempting to pack her car so she could leave. Appellant began not only yelling that she was not going to leave but also rummaging through the items she had removed from the house. After telling him to stop, she testified that "he turned around and . . . came at [her] and he had this like a pocket knife in his hand." She succeeded in pushing him back, but then he "grabbed [her] head in a headlock and started pounding on [her]." He was "beating on [her] head

and just beating on [her] side." When asked what she did at that point, the witness stated that she was "[t]rying to get away from him," "[t]rying to push him off of [her], trying to get out from underneath him." She also said:

> [a]ll I know is at one point, I ended up on the ground and he was kicking me. I was doubled over and I was laying there and he just started kicking me. And all I know was that I heard Cassandra's voice and it stopped. So I went to get up and I looked over and she had him pinned up against the truck. And at that point, I struggled to get up. I managed to get up and tried to get in my car. When I hit my car door, I yelled that I'm calling the police. At that point, it looked like Cassandra let him go. Just reached over and just said -- like this. And he came at me a second time. And I'm in my car kicking my legs trying to keep him from getting in the car.

Furthermore, while she was trying to keep appellant away from her, she saw her son hit him on the head with the bat. Appellant then stumbled backwards and hit his head on another car located nearby. She and her sons then entered the car while appellant was "stumbling" to the front porch and drove to the hospital. At the hospital, it was determined that she had a concussion, two fractured ribs, contusions on her back, and a split lip.

Appellant elected to testify and stated that Windy came home around 7:30 or 8:00 on the evening of the offense. He was cooking dinner and observed her and his son outside talking. He denied smoking K-2 but admitted to smoking marijuana. Afterwards, he went to his bedroom to go to sleep where he is awakened by Windy going through the closet and putting items on the bed. Eventually, an argument erupted between the two. Additionally, appellant saw her carrying a box from the abode and sought to discover its contents. She allegedly permitted him to look in the box, and he used his knife to cut the tape.

Upon cutting the tape, appellant placed the knife on the back bumper of Windy's car and began searching the box. At that point, according to appellant, Windy slapped at his hand, cut his lip, and kneed him in the face. During cross-examination, appellant admitted to hitting Windy in the past. So too did he acknowledge that it was reasonable for her to believe he might hit her the night of the altercation. Yet, appellant testified that he could not recall striking Windy during the assault at issue. The record indicates that he sustained cuts on his knees, five broken bones in his face, a laceration to his right temporal lobe, and neck injuries as a result of the altercation.

Appellant's niece testified that she was present during the fight, heard arguing, looked out of her room, and saw appellant "go towards [Windy] when she got in her car." That was when appellant was struck by the bat. The witness observed appellant getting hit in the head but nothing more.

Issue – Sufficiency of the Evidence

Appellant's sole issue concerns the sufficiency of the evidence supporting his guilt beyond a reasonable doubt. Allegedly, it was insufficient to prove that he assaulted his wife or disprove that he acted in self-defense. We overrule the issue.

To prove the charge of assault family violence enhanced, the State was required to show that appellant "intentionally, knowingly, or recklessly cause[d] bodily injury to another, including the person's spouse." TEX. PENAL CODE ANN. § 22.01(a)(1) (West Supp. 2016). Such an "offense . . . is a felony of the third degree if the offense is committed against . . . a person whose relationship to or association with the defendant is described by Section 71.0021(b), 71.003, or 71.005, Family Code, [or] if it is shown on the trial of the offense that the defendant has been previously convicted of an

offense . . . against a person whose relationship to or association with the defendant is described by Section 71.0021(b), 71.003, or 71.005, Family Code." *Id.* § 22.01(b)(2)(A).

Next, in viewing the legal sufficiency of the evidence we must determine whether, after viewing the evidence in the light most favorable to the verdict, any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt.[2] *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); *Brooks v. State*, 323 S.W.3d 893, 902-03, 912 (Tex. Crim. App. 2010); *Wesbrook v. State*, 29 S.W.3d 103, 111 (Tex. Crim. App. 2000). Under the *Jackson* standard, the reviewing court 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 v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007) (quoting *Jackson*, 443 U.S. at 318-19).

Regarding the defense of justification or self-defense, we review appellant's contention under the well-known standards for sufficiency of the evidence to support the rejection of a defense. *See* TEX. PENAL CODE ANN. § 2.03(d) (West 2011); *Jackson v. Virginia, supra*; *Saxton v. State*, 804 S.W.2d 910, 914 (Tex. Crim. App. 1991); *Wagner v. State*, No. 10-15-00397-CR, 2016 Tex. App. LEXIS 7699, at *4 (Tex. App.—Waco July 20, 2016, no pet.) (mem. op., not designated for publication).

Admittedly, appellant testified that Windy was the aggressor. Her testimony, as described above, contradicted that version of events. The fact-finder was free to reject

[2] Appellant cites *Berry v. State*, 233 S.W.3d 847 (Tex. Crim. App. 2007), as discussing the pertinent standard of review and mentions passages therefrom that related to a factual sufficiency attack. Such an attack is no longer viewed as a lawful means of challenging a conviction, however. *See Brooks v. State*, 323 S.W.3d 893, 912 (Tex. Crim. App. 2010).

his version and accept hers. *See Mosley v. State*, 983 S.W.2d 249, 254 (Tex. Crim. App. 1998) (stating that as fact-finder, the trial court was the exclusive judge of the credibility of the witnesses and of the weight to be given their testimony, and it had the exclusive province of the fact-finder to reconcile conflicts in the evidence). And, should it have accepted her version, it was more than ample to illustrate his commission of the crime at issue and negate his claim of self-defense.

The judgment is affirmed.

Per Curiam

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