

**TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN**

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**NO. 03-15-00239-CR**

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**Tracy Larance Gordon, Appellant**

**v.**

**The State of Texas, Appellee**

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**FROM THE DISTRICT COURT OF BELL COUNTY, 264TH JUDICIAL DISTRICT  
NO. 71325, HONORABLE MARTHA J. TRUDO, JUDGE PRESIDING**

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**MEMORANDUM OPINION**

Tracy Larance Gordon was arrested and charged with burglary of a habitation. *See* Tex. Penal Code § 30.02(a) (prohibiting crime of burglary), (c)(2) (providing that burglary of habitation is second-degree felony). The indictment also contained an enhancement paragraph alleging that Gordon had previously been convicted of a prior felony offense. Later, the State filed a notice to enhance the permissible punishment range and alleged additional prior felony convictions. After a trial before the district court, the court found Gordon guilty of the alleged offense. At the start of the punishment phase, Gordon entered a plea of true to five of the enhancement allegations, and the State agreed to waive one of the enhancements. Once the punishment phase concluded, the district court sentenced Gordon to imprisonment for life. *See id.* § 12.42(d) (elevating permissible punishment range for felony offense if person “has previously been finally convicted of two felony offenses” sequentially). On appeal, Gordon challenges the sufficiency of the evidence establishing that the structure at issue was a habitation. We will affirm the district court’s judgment of conviction.

## GOVERNING LAW AND STANDARD OF REVIEW

Under the Penal Code, an individual commits burglary “if, without the effective consent of the owner, the person . . . enters a building or habitation and commits or attempts to commit a felony, theft, or an assault.” Tex. Penal Code § 30.02(a)(3). As mentioned above, Gordon does not challenge the sufficiency of the evidence showing that he entered a structure without the effective consent of the owner and attempted to or did commit theft; on the contrary, he only asserts that the evidence was insufficient to show that the structure was a habitation. The Penal Code defines “[h]abitation” as “a structure or vehicle that is adapted for the overnight accommodation of persons, and includes: (A) each separately secured or occupied portion of the structure or vehicle; and (B) each structure appurtenant to or connected with the structure or vehicle.” *Id.* § 30.01(1). A determination regarding whether a particular structure is suitable for overnight accommodations involves complex and subjective fact questions. *Salazar v. State*, 284 S.W.3d 874, 877 (Tex. Crim. App. 2009). When making this determination, the fact-finder may consider “the type of structure,” “its typical use,” and its contents, “including bedding, electricity, plumbing, or furniture.” *Id.* The jury may also consider “whether someone was using the structure . . . as a residence at the time of the offense” as well as “whether the structure is of such a character that it was probably intended to accommodate persons overnight (e.g., house, apartment, condominium, sleeping car, mobile home, house trailer).” *Blankenship v. State*, 780 S.W.2d 198, 209 (Tex. Crim. App. 1989) (op. on reh’g). “All of these factors are relevant; none are essential or necessarily dispositive.” *Id.*

In a legal-sufficiency review, appellate courts view the evidence in the light most favorable to the verdict 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). When performing this analysis, a reviewing court must bear in mind that it is the fact-finder's duty to weigh the evidence, to resolve conflicts in the testimony, and to make reasonable inferences "from basic facts to ultimate facts." *Id.* Furthermore, reviewing courts must "determine whether the necessary inferences are reasonable based upon the combined and cumulative force of all the evidence when viewed in the light most favorable to the verdict." *Hooper v. State*, 214 S.W.3d 9, 16-17 (Tex. Crim. App. 2007). Moreover, reviewing courts presume that conflicting inferences were resolved in favor of the conviction and defer to that resolution. *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007).

## **DISCUSSION**

As set out above, Gordon asserts in a single issue on appeal that the evidence presented during the trial was insufficient to support a determination that the structure at issue was a habitation. In particular, Gordon notes that the utilities to the structure had been turned off, that there was no furniture inside, and that the structure had been vacant for some time.

The structure at issue was a house owned by Norma Bourgeois and her former husband Jerrick Bourgeois, and the indictment alleged that the offense occurred in March 2013. As pointed out by Gordon on appeal, Norma did testify that there was no one living in the home in the seven months leading up to the offense, that she had turned the utilities off, and that there was no bedding or furniture in the home. Similarly, Franklin Adams, who was hired by Norma to sell the property, explained in his testimony that the utilities had been turned off and that there was no furniture inside. Unquestionably, those factors bear upon whether the structure is a habitation. *See Hicks v. State*, 204 S.W.3d 505, 506-07 (Tex. App.—Amarillo 2006, no pet.) (mem. op.).

However, during the trial, Norma also testified that she lived in the home with her husband from “June of 2008 to March of 2011” and that it was located in a residential neighborhood. Further, she described the structure as a four bedroom home with a “[k]itchen, dining room, formal dining room, formal study, fireplace, gameroom, two car garage,” and “[t]wo and a half bath[s].” In addition, she related that no business was conducted at the residence and that the sole purpose of the structure was to serve as their habitation. Moreover, she explained that although they continued to own the home, she and her husband rented the property from “March 2011 to the first of August of 2012” after they were transferred out of the State because of his job. Further, she testified that the renters used the home as a residence during that time and used the utilities. After mentioning that the renters moved out in August 2012, Norma related that she decided to sell the home after the renters left. In her testimony, Norma explained that all of her appliances were still in the house and that there was nothing wrong with any of the utilities. In fact, she explained that the home was move-in ready and that she had only turned off the utilities in order prevent the possibility of receiving a high energy or water bill. Moreover, she related that she had not abandoned the home, that she had hired a lawn service to mow the lawn every two weeks, that she continued to receive mail at the home until February 2013, and that the realtor (Adams) would drive to the property to make sure that the structure was secure.<sup>1</sup>

Similarly, Adams testified that the appliances were still in the home and that he was actively trying to sell the home. In his testimony, he agreed that if someone bought or rented the

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<sup>1</sup> In addition to having Norma testify, the State also called several police officers to the stand to testify regarding what they observed when they responded to the scene. When describing the structure and its contents, the officers’ testimonies were consistent with that of Norma’s.

home, that person could move in and live in the home almost immediately. Regarding the utilities, Adams testified that those could be turned back on by simply requesting service again. Further, Adams related that he had checked on the property approximately ten days before the offense occurred and that the inside was generally “[b]room swept clean.”

In addition to the testimony from Norma and Adams, the State introduced into evidence photographs of the structure. Those pictures reveal that the structure was a single-family home with a brick and rock exterior, a roof, an attached garage, a paved driveway, a fenced yard, and neighboring homes on either side. *See Jones v. State*, No. 01-09-00267-CR, 2010 WL 5395682, at \*5-6 (Tex. App.—Houston [1st Dist.] Dec. 30, 2010, no pet.) (mem. op., not designated for publication) (concluding that structure was habitation after considering, among other evidence, photos showing “that the house was a fully-enclosed, brick, one-story, single-family dwelling with a roof, a paved driveway, and an attached garage” and explaining that single-family residences are intended to be used to accommodate people overnight). Moreover, the pictures seem to depict that the structure was fully enclosed and show that there were numerous appliances in the home and that the home was wired for electricity and had indoor plumbing.<sup>2</sup>

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<sup>2</sup> When asserting that the structure was not a habitation because it had been vacant for several months, Gordon principally relies on *Jones v. State*, 532 S.W.2d 596 (Tex. Crim. App. 1976). In that case, the court of criminal appeals determined that a “completed but vacant and unused house in the instant case with no furniture and where water but no other utilities had been connected was” not a habitation. *Id.* at 599-600. However, the court later overruled *Jones*, determined that the standard used in that case to decide whether a structure was a habitation was incorrect because the standard was too narrow, and explained that a determination that a structure is a habitation may “be overturned on appeal only if the appellant can show that no reasonable trier of fact could have found the place to have been a habitation under the” relevant criteria described in the opinion. *See Blankenship v. State*, 780 S.W.2d 198, 208-10 (Tex. Crim. App. 1989) (op. on reh’g). Accordingly, we believe that Gordon’s reliance on *Jones* is misplaced.

In light of all of the evidence summarized above as well as the reasonable inferences that the fact-finder could have made from that evidence and given that the standard of review for legal-sufficiency challenges obligates appellate courts to defer to the fact-finder's resolution of conflicts in the testimony and to review the evidence in the light most favorable to the verdict, *see Jackson*, 443 U.S. at 319; *Clayton*, 235 S.W.3d at 778; *Hooper*, 214 S.W.3d at 16-17, we cannot conclude that the evidence was legally insufficient to support the district court's determination that the structure was a habitation, *see Blankenship*, 780 S.W.2d at 210 (upholding determination that structure was habitation where evidence showed, among other things, that structure was "rented from time to time," had living room and bedrooms, was wired for electricity, had "water readily available," had air-conditioning installed, and was close to victim's current residence); *Hollander v. State*, No. 09-05-00448-CR, 2006 WL 2623279, at \*2-3 (Tex. App.—Beaumont Sept. 13, 2006, pet. ref'd) (mem. op., not designated for publication) (concluding that jury could have determined that mobile home was habitation even though it was unoccupied at time of burglary and had no furniture and even though owner did not know if utilities were turned on because evidence showed that owner was remodeling with intent to rent property again, that structure had "'hook-ups' for water and electricity," and that structure would be habitable if someone brought bedding); *cf. Hicks*, 204 S.W.3d at 507-08 (determining that "minimal evidence cited by" defendant would not have permitted "a rational factfinder to conclude that . . . [structure] was only a building and not a habitation" even though structure was vacant and had no furnishings when evidence showed that owner was attempting to rent property out at time of burglary and that structure was designed to be lived in, was wired for electricity, had running water and gas, had kitchen and bathroom, and had

appliances and noting that “no other evidence appears of record suggesting that the structure lacked the status as a habitation”); *In re E.P.*, 963 S.W.2d 191, 193 (Tex. App.—Austin 1998, no pet.) (concluding that evidence was sufficient to show that vacant unit was habitation when evidence showed, among other things, that apartment was surrounded by other units, had running electricity and water, and had “a kitchen, bathroom, and bedroom”).

Accordingly, we overrule Gordon’s issue on appeal.

### **CONCLUSION**

Having overruled Gordon’s sole issue on appeal, we affirm the district court’s judgment of conviction.

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David Puryear, Justice

Before Justices Puryear, Pemberton, and Bourland

Affirmed

Filed: July 8, 2016

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