NUMBER 13-19-00333-CR

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI – EDINBURG

JULIAN HUFF, **Appellant,**

v.

THE STATE OF TEXAS, **Appellee.**

On appeal from the 214th District Court of Nueces County, Texas.

MEMORANDUM OPINION

Before Chief Justice Contreras and Justices Benavides and Longoria
Memorandum Opinion by Chief Justice Contreras

Appellant Julian Huff was convicted of burglary of a habitation, a second degree felony, and obstruction or retaliation, a third degree felony. *See* TEX. PENAL CODE ANN. §§ 30.02(c)(2), 36.06(c). He was sentenced to prison terms of twelve and six years,

respectively, for the two offenses.[1] On appeal, he argues: (1) the evidence was insufficient to support the burglary conviction; and (2) the trial court erred by admitting letters allegedly written by appellant as punishment evidence. We affirm.

I. BACKGROUND

A Nueces County grand jury indicted appellant on three offenses, all alleged to have been committed on May 1, 2018: burglary of a habitation (Count I), *see id.* § 30.02(c)(2); assault/family violence by impeding breath or circulation, a third degree felony (Count II), *see id.* § 22.01(b)(2)(B); and obstruction or retaliation (Count III). *See id.* § 36.06(c).

Trial evidence established that, at around 6:30 a.m. on May 1, 2018, Corpus Christi police received a report of a man trying to climb through a window at the La Armada apartment complex. Lisa Ann Flores, a resident of the complex, told police that appellant had entered her apartment through the window, "put his palm against her throat" and threatened to kill her. She reported a bruise and pain on the right side of her neck. Flores's roommate took photos of appellant, who appeared to be asleep and laying partially across the windowsill.

According to police, appellant had been arrested for public intoxication at the La Armada apartment complex the previous evening, and he had been released on bond. Appellant's bond paperwork, as well as the belt he was wearing when he was previously arrested, were found at the scene on the morning of May 1. Appellant was not at the scene when police arrived that morning; however, he was soon located near the

[1] Though not specified by the trial court at sentencing or in its judgment, the sentences must run concurrently because the offenses arose out of the same criminal episode. *See* TEX. PENAL CODE ANN. § 3.03(a).

apartment complex and he was arrested again.

Flores testified she dated appellant for a few months and the relationship ended in March or April of 2018. She said that, on the night of April 30, appellant was intoxicated and "acting crazy" outside her apartment; she said he threw a rock at her truck and "swung his hand in the window," striking her and causing her glasses to fall off. Her roommate called 911. When police arrived, they found appellant asleep on Flores's porch and they arrested him for public intoxication.

Flores testified that her roommate was awakened at around 6:00 a.m. the next morning when appellant tried to enter their apartment through a window. Her roommate found appellant asleep across the windowsill. At the time, Flores was not in the apartment, but her roommate called her and Flores returned. Flores testified:

> I guess when he heard us talking, he woke up. He jumped through the window and he grabbed me by my neck. And I told him, I am on the phone and I am talking to the police. Get out. He didn't care. He then grabbed me by my neck, yanked the phone out and took off without knowing that the dispatcher was on the phone the whole time.

Flores testified appellant "was choking [her]" and that she had trouble breathing. She stated appellant told her not to talk to police, but she "told him it was too late."

Appellant testified he lived with Flores from November of 2017 until the day he was arrested. He said that he was moving out because he discovered Flores was married. He denied entering Flores's apartment or assaulting Flores.

The jury found appellant not guilty on Count II but guilty on Counts I and III.

At the punishment phase, the trial court granted the State's request to admit all of the evidence submitted at the guilt/innocence phase. The State then offered the following exhibits into evidence without objection: (1) a 2013 judgment convicting appellant of misdemeanor assault/family violence and sentencing him to sixty days in jail; (2) a 2011

order placing appellant on deferred adjudication community supervision for six years following three charges of assault on a public servant; and (3) a 2013 judgment adjudicating appellant guilty of assault on a public servant and sentencing him to five years' imprisonment.

Timothy Rivas, an investigator with the Nueces County Sheriff's Office, testified that Flores contacted him on October 16 or 17, 2018, and gave him four sealed letters which she said had been deposited in her mailbox; the letters were entered into evidence as State's Exhibit 25. Rivas also obtained four sealed envelopes and two open envelopes which had been deposited in the outgoing mail from the jail unit in which appellant was housed; those items were entered into evidence as State's Exhibit 24. The letters in Exhibits 24 and 25 are handwritten and addressed to Flores (though some of them use vulgar and derisive nicknames in lieu of Flores's real name) and several contain explicit physical threats against Flores, her husband, and her children.

John McDonald, a corrections officer with the Nueces County Sheriff's Office, testified that appellant gave him an envelope to place in the mail when appellant was in the county jail. McDonald gave the envelope to his supervisor, who later provided it to Rivas. The letter in the envelope, which was entered into evidence as State's Exhibit 23, contained handwriting, drawings, and other content similar to those in Exhibits 24 and 25.

Two of the envelopes in Exhibits 24 and 25 contained appellant's name and inmate identification number in the return address. The others listed "Felipe Simmons"—Flores's husband—and Simmons's identification number in the return address. Rivas testified that Simmons had previously assaulted Flores but was transferred to the penitentiary in November of 2017 and had not been housed in the jail since that time. Appellant objected

to Exhibits 24 and 25 on grounds of hearsay and lack of authentication, but the trial court overruled the objections.

The court sentenced appellant as set forth above, and this appeal followed.

II. Discussion

A. Evidentiary Sufficiency

To satisfy constitutional due process requirements, a criminal conviction must be supported by sufficient evidence. *See Laster v. State*, 275 S.W.3d 512, 517 (Tex. Crim. App. 2009). In reviewing sufficiency of the evidence to support a conviction, we consider the evidence in the light most favorable to the verdict to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Griffin v. State*, 491 S.W.3d 771, 774 (Tex. Crim. App. 2016); *see Brooks v. State*, 323 S.W.3d 893, 895 (Tex. Crim. App. 2010) (plurality op.) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). We resolve any evidentiary inconsistencies in favor of the verdict, keeping in mind that the jury is the exclusive judge of the facts, the credibility of the witnesses, and the weight to give their testimony. *Brooks*, 323 S.W.3d at 899; *see* Tex. Code Crim. Proc. Ann. art. 38.04.

We measure the legal sufficiency of the evidence against the elements of the offense as defined by a hypothetically correct jury charge for the case. *Byrd v. State*, 336 S.W.3d 242, 246 (Tex. Crim. App. 2011). Such a charge is one that "accurately sets out the law, is authorized by the indictment, does not unnecessarily increase the State's burden of proof or unnecessarily restrict the State's theories of liability, and adequately describes the particular offense for which the defendant was tried." *Id.* (citing *Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997)).

Appellant argues by his first issue that the "evidence does not establish any intent to commit an assault beyond a reasonable doubt." However, as the State correctly notes, there was no need to prove that appellant had any such intent. Burglary is defined in § 30.02 of the penal code, which states:

> A person commits an offense if, without the effective consent of the owner, the person:
>
> (1) enters a habitation, or a building (or any portion of a building) not then open to the public, with intent to commit a felony, theft, or an assault; or
>
> (2) remains concealed, with intent to commit a felony, theft, or an assault, in a building or habitation; or
>
> (3) enters a building or habitation and commits or attempts to commit a felony, theft, or an assault.

TEX. PENAL CODE ANN. § 30.02(a). Count I of the indictment alleged only that, "on or about May 01, 2018, in Nueces County, Texas, [appellant] did then and there intentionally or knowingly enter a habitation, without the effective consent of Lisa Ann Flores, the owner thereof, and attempted to commit or committed the offense of Assault." *See id.* § 30.02(a)(3). The indictment did not allege that appellant entered a habitation with the intent to commit a felony, theft, or assault; nor did it allege that he remained concealed with intent to commit a felony, theft, or assault.[2] Accordingly, consistent with the indictment, the jury charge in this case correctly instructed the jury to find appellant guilty

[2] The indictment contained a caption listing the charged offenses, in which Count I was listed as "BURGLARY HABITATION INTENT OTHER FELONY" under penal code § 30.02(d). But "the caption of an indictment is not part of the charging instrument; when the caption lists a different offense from the one alleged in the body of the indictment, as in this case, the body of the indictment controls." *See, e.g.*, *Stansbury v. State*, 82 S.W.2d 962, 964 (Tex. Crim. App. 1935) (per curiam); *Villarreal v. State*, 504 S.W.3d 494, 508 n.6 (Tex. App.—Corpus Christi–Edinburg 2016, pet. ref'd) ("If the caption identifies the charged offense as one different than what is actually charged in the charging instrument proper, this is of no significance. It does not constitute a defect in the charging instrument, nor does it give rise to some sort of fatal variance when the proof at trial shows the offense charged in the instrument proper rather than the offense specified by name in the caption.") (quoting 42 GEORGE E. DIX & JOHN M. SCHMOLESKY, TEXAS PRACTICE: CRIMINAL PRACTICE & PROCEDURE § 25.24 (3d ed. 2011)).

of burglary of a habitation if he: (1) intentionally or knowingly entered Flores's habitation (2) without Flores's effective consent, and (3) therein attempted to commit or committed the offense of assault. *See id.* The State did not need to prove that appellant had the specific intent to commit assault. Appellant does not dispute that the evidence was sufficient to support the necessary elements as set forth above.

Appellant's first issue is overruled.

B. Admission of Evidence

Appellant argues by his second issue that the trial court erred in admitting State's Exhibits 24 and 25 at the punishment phase, and that the error affected his substantial rights. *See* TEX. R. APP. P. 44.2(b). He contends that the documents were not properly authenticated as written by him. We review a trial court's decision on the admissibility of evidence for an abuse of discretion. *Johnson v. State*, 490 S.W.3d 895, 908 (Tex. Crim. App. 2016). Under this standard, we must uphold the decision of the trial court unless the ruling falls outside the zone of reasonable disagreement. *Id.*

Rule of Evidence 901 provides generally that, "[t]o satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is." TEX. R. EVID. 901(a). Evidence may be authenticated circumstantially. *Tienda v. State*, 358 S.W.3d 633, 638 (Tex. Crim. App. 2012). "The appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances," may be sufficient to authenticate an item. TEX. R. EVID. 901(b)(4).

Appellant cites *Butler v. State*, in which the court of criminal appeals noted that "a letter bearing the return address of a purported author, combined with other

circumstances including its appearance and contents, may be sufficient to authenticate a letter as having been sent by the person purported to be its author." 459 S.W.3d at 602. He notes that, out of all the envelopes in State's Exhibits 24 and 25, only two featured appellant's name and identification number on the return address, and the content of those particular letters was largely "apologetic and non-threatening in tone." That may be true, but the letters in Exhibits 23, 24 and 25 all contained very similar content, including drawings and references to past events, and they were all written on the same variety of pre-stamped envelope. Moreover, Rivas testified that Simmons was not housed at the county jail, where the letters originated, whereas appellant was housed at the jail for the entire time between his arrest and trial. The trial court could have determined from the evidence that appellant wrote all of the letters, even those with Simmons's name in the return address. Accordingly, there was no abuse its discretion in its admission of the letters. Appellant's second issue is overruled.

III. CONCLUSION

We affirm the trial court's judgment.

DORI CONTRERAS
Chief Justice

Do not publish.
TEX. R. APP. P. 47.2(b).

Delivered and filed the
6th day of August, 2020.