NO. 12-10-00150-CR

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

ALFRED RAY MOYE, APPELLANT	***§***	***APPEAL FROM THE 217TH***
V.	***§***	***JUDICIAL DISTRICT COURT***
THE STATE OF TEXAS, APPELLEE	***§***	***ANGELINA COUNTY, TEXAS***

MEMORANDUM OPINION

Alfred Ray Moye appeals his conviction for burglary of a habitation, for which he was sentenced to imprisonment for ten years. Appellant raises four issues on appeal. We affirm.

BACKGROUND

Appellant was charged by indictment with burglary of a habitation and pleaded "not guilty." The matter proceeded to a bench trial.

At trial, Edward McFarland testified as the State's first witness. McFarland stated that he maintained an office at 303 Groesbeck in Lufkin, Texas. He further stated that he used a room off the office in the same building as his residence. He also testified that he had been the victim of previous burglaries. Moreover, McFarland testified that on the night of the burglary, he locked the deadbolt on the door between his residence and his office. He stated that, in this instance, his vehicle, which was ordinarily parked in front of the building, was stolen. McFarland retrieved the vehicle with the assistance of the police. He stated that the keys to the vehicle were kept in his bedroom. He also identified a photograph depicting that one of his office windows had been broken and the window screen had been removed. McFarland identified Appellant and stated that he had not given Appellant permission to enter his building or to take his car keys. On cross

examination, McFarland testified that he previously may have been Appellant's attorney and that he had known Appellant's father for approximately five years. He further testified that Appellant had come to him and volunteered to provide information about the burglaries of which McFarland had been a victim in exchange for money.[1] According to McFarland, he declined to give Appellant money for this information. McFarland also stated that he did not believe that Appellant had acted alone.

Lufkin Police Officer Nicholas Malone testified as the State's next witness. Malone testified that he was dispatched at approximately 5:30 a.m. to a location near McFarland's office based on a report of suspicious behavior by an individual in the area. He further testified that when he arrived, he noticed that a window at the front of the building had been knocked out. Malone stated that McFarland was contacted and granted him access to the building. He further stated that he observed coins around the broken window and determined that McFarland's vehicle was missing. Malone testified that the window and McFarland's desk were dusted for fingerprints. On cross examination, Malone stated that there was no indication of forced entry into the bedroom. Malone further stated that McFarland told him that the bedroom was locked with a dead bolt. He indicated that the bedroom door could not be opened without a key. Malone also testified that McFarland told him that, when he awoke, the bedroom door was unlocked.

Lufkin Police Officer Cody Jackson next testified on the State's behalf. Jackson stated that, on April 2, 2009, he located McFarland's vehicle. Jackson further stated that the vehicle was unlocked and the keys were in the ignition. He also testified that he remained with the vehicle until McFarland and the crime scene investigator arrived.

Lufkin Police Department Crime Scene Investigator Debra Walsh testified as the State's final witness. Walsh offered testimony concerning fingerprint analysis. She testified that no two persons have identical fingerprints and described the standards for making positive fingerprint identifications. She also identified photographs of the front window of the building in question. Walsh testified that she lifted a latent fingerprint from the tinted side[2] of a broken piece of glass on the floor and secured a blood sample from blood located on the window sill. She stated that the blood sample was packaged and sent to the Texas Department of Public Safety (DPS) crime lab in

[1] McFarland stated that he had been the victim of burglaries following Appellant's arrest.

[2] Walsh explained that the tinted side of the glass was located on the inside of the window.

Houston, Texas. She also offered testimony concerning a fingerprint card containing Appellant's fingerprints. Walsh testified that Appellant's known fingerprints positively matched the latent fingerprint taken from the broken glass. Walsh further testified that she obtained a buccal swab from Appellant that she also sent to the DPS lab for comparison with the blood sample taken from the window sill. She also stated that the DPS lab's analysis concluded to a reasonable degree of scientific certainty that Appellant was the source of the blood sample. Following Walsh's testimony, the State rested.

Appellant testified on his own behalf. Appellant testified that McFarland had represented him as his attorney on two prior occasions. He further testified that McFarland previously asked him to come over to discuss the break-ins that had occurred. Appellant stated that he told McFarland that he had seen a person running from the residence a few days before that time and asked McFarland if he was alright. He further stated that he told McFarland that the person who fled his residence was either a light skinned African-American man or an Hispanic man. Appellant testified that he offered to help McFarland find the responsible parties and told McFarland that "you could give me something for helping you." Appellant further testified that he was on the premises on the morning of the burglary doing his own investigation at McFarland's request. According to Appellant, at that time, he touched the window and may have touched the window sill. Appellant stated that he previously had cut himself while mowing, but did not know how his blood came to be on the window sill. However, he speculated that the blood could have been left on the window sill when he was conducting his investigation for McFarland. Appellant further speculated that the window may have broken when he touched it during his investigation. But he denied committing the burglary and stated that he was asleep at his parents' house at the time in question.

Following the bench trial, the trial court found Appellant "guilty" as charged and sentenced him to imprisonment for ten years. This appeal followed.

EVIDENTIARY SUFFICIENCY

In his first issue, Appellant argues that the evidence is legally insufficient to support the trial court's determination of his identity as the person who entered the premises. In his second issue, Appellant contends that the evidence is legally insufficient to support the trial court's determination that the premises constituted a "habitation." In his third issue, Appellant argues

that the evidence is legally insufficient to support the trial court's determination that entry was made into any portion of the premises considered a "habitation." Finally, in his fourth issue, Appellant contends that the evidence is legally insufficient to support the trial court's determination that any entry into a habitation was made without McFarland's effective consent.

Standard of Review and Governing Law

The ***Jackson v. Virginia***[3] legal sufficiency standard is the only standard that a reviewing court should apply in determining whether the evidence is sufficient to support each element of a criminal offense that the state is required to prove beyond a reasonable doubt. *See* ***Brooks v. State***, 323 S.W.3d 893, 895 (Tex. Crim. App. 2010). Legal sufficiency is the constitutional minimum required by the Due Process Clause of the Fourteenth Amendment to sustain a criminal conviction. *See* ***Jackson***, 443 U.S. at 315-16, 99 S. Ct. at 2786-87; *see also* ***Escobedo v. State***, 6 S.W.3d 1, 6 (Tex. App.–San Antonio 1999, pet. ref'd). The standard for reviewing a legal sufficiency challenge is whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *See* ***Jackson***, 443 U.S. at 320, 99 S. Ct. at 2789; *see also* ***Johnson v. State***, 871 S.W.2d 183, 186 (Tex. Crim. App. 1993). The evidence is examined in the light most favorable to the verdict. *See* ***Jackson***, 443 U.S. at 320, 99 S. Ct. at 2789; ***Johnson***, 871 S.W.2d at 186. A successful legal sufficiency challenge will result in rendition of an acquittal by the reviewing court. *See* ***Tibbs v. Florida***, 457 U.S. 31, 41-42, 102 S. Ct. 2211, 2217-18, 72 L. Ed. 2d 652 (1982).

The sufficiency of the evidence is measured against the offense as defined by a hypothetically correct jury charge. *See* ***Malik v. State***, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997). Such a charge would include 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 is tried." ***Id.***

To satisfy the elements of burglary of a habitation, the State was required to prove that Appellant, without the consent of the owner, entered a habitation with intent to commit theft. *See* TEX. PENAL CODE ANN. § 30.02 (West 2011).

Identity

In his first issue, Appellant argues that the evidence is legally insufficient to support the

[3] 443 U.S. 307, 315-16, 99 S. Ct. 2781, 2786-87, 61 L. Ed. 2d 560 (1979).

trial court's determination of his identity as the person who entered the premises. Specifically, Appellant argues that the fingerprint and blood sample evidence are not sufficient to prove his identity because there is no evidence showing that this evidence was left by Appellant at the time of the crime.

Fingerprints alone may be sufficient to convict if the evidence shows that they must necessarily have been made at the time of the crime. *See* ***Bowen v. State***, 460 S.W.2d 421, 423 (Tex. Crim. App. 1970). In ***Phelps v. State***, 594 S.W.2d 434 (Tex. Crim. App. 1980), the defendant could not be identified, and the only evidence tending to connect him with the crime was two fingerprints found on the door of the closet in the bedroom where the crime occurred. *See* ***Anderson v. State***, 672 S.W.2d 14, 15 (Tex. App.–Houston [14th Dist.] 1984, no pet.). The ***Phelps*** court reiterated the ***Bowen*** standard and then explained that this standard "was never intended to alter the well-established standard for determining sufficiency that applies in circumstantial evidence cases." ***Phelps***, 594 S.W.2d at 436. The court further stated that "[t]he mere possibility that a defendant's fingerprints may have been left at [another] time . . . does not necessarily render the evidence insufficient." ***Id.***; ***Anderson***, 672 S.W.2d at 15. The ***Phelps*** court focused on the general accessibility of the surface on which the fingerprint was found, the defendant's access to that surface, and the fact that there was no evidence the defendant had been on the premises prior to the night of the crime. *See* ***Phelps***, 594 S.W.2d at 436.

In ***Anderson***, the victim was sexually assaulted by a man she could not identify. *See* ***Anderson***, 672 S.W.2d at 14-15. The victim testified that her assailant entered her house through the window. ***Id***. at 15. The only evidence introduced at trial that tended to connect the appellant to the crime was a single fingerprint that was found on an outside window pane of the house. ***Id.*** Following the court of criminal appeals' analysis in ***Phelps***, the court of appeals noted that there was a screen ordinarily covering the window on which the appellant's fingerprints were found, and that screen was found bent and unhooked the day after the crime occurred. *See* ***Anderson***, 672 S.W.2d at 15. The court further noted that these screens diminished the general public's access to the windows. ***Id.*** The police officer who lifted the fingerprint from the glass testified that the print was found in the upper left hand corner of the lower pane, the place where a person ordinarily would place his fingers to lift the window. ***Id.*** The court concluded that (1) although the outside of a window may be a place generally accessible to the public, a window covered by a screen is not, (2) the appellant could not have placed his fingerprint in that location had he not first removed

the screen, and (3) the appellant had never been on the premises before. ***Id.*** Accordingly, the court held that there was sufficient evidence to support the element of the appellant's identity. ***Id.*** at 15-16.

Anderson is helpful; however, under our analysis, the State is not required to exclude every other reasonable hypothesis other than the guilt of the defendant.[4] The facts of this case, though not identical to those in ***Anderson***, are nonetheless analogous. Here, Walsh testified that Appellant's fingerprint was lifted from the tinted side of the glass and that the tint was located on the inside portion of the glass. Further, Appellant's fingerprint was not the only evidence of his identity. Finally, Appellant testified that he was on the property the morning before the crime was committed.

In the instant case, there were two key pieces of evidence linking Appellant to the burglary—his fingerprint and his blood. McFarland testified that the window screen covering the window at issue was in place when he went to bed the night before the burglary. Thus, as in ***Anderson***, this screen diminished the general public's access to the windows. Appellant testified that he had performed an investigation of prior burglaries on the premises at McFarland's behest and believed that he touched the window at that time. However, the record does not indicate that Appellant had access to the inside portion of this window. Appellant further speculated that he may have been bleeding at that time, which resulted in the blood found on the window sill.

Though Appellant testified that he was on the premises the morning before the burglary and may have touched the window glass, he offered no testimony concerning the presence or absence of a window screen that he would have had to remove in order to touch the glass. On the other hand, McFarland testified that the screen was in place the night before the burglary. Further, the photographic evidence indicates that the screen had been removed during the course of the burglary. Yet, more significant is the fact that Appellant's fingerprint was lifted from the interior tinted side of the broken glass found inside the building. Appellant's presence outside the building does not account for how his fingerprint could have been left on the tinted interior side of the window glass. Considering all of the aforementioned evidence in a light most favorable to the

[4] In 1991, the court of criminal appeals brought an end to the "reasonable hypothesis analytical construct." *See* ***Geesa v. State***, 820 S.W.2d 154, 155, 159 (Tex. Crim. App. 1991), *overruled on other grounds*, ***Paulson v. State***, 28 S.W.3d 570 (Tex. Crim. App. 2000). The reasonable hypothesis analytical construct required that "[a] conviction based on circumstantial evidence must exclude every other reasonable hypothesis except the guilt of the accused." ***Carlsen v. State***, 654 S.W.2d 444, 447 (Tex. Crim. App. 1983), *overruled by* ***Geesa***, 820 S.W.2d at 161. The court in ***Geesa*** abolished this construct because it "effectively places the reviewing court in the posture of a 'thirteenth juror.'" ***Geesa***, 820 S.W.2d at 159.

verdict, we conclude that the evidence indicates that Appellant's fingerprint was left at the time of the crime. *See* ***Bowen***, 460 S.W.2d at 423.

Additionally, the presence of Appellant's blood on the window sill where entry into the building occurred tends to further prove Appellant's identity as the person who entered the building. Appellant's testimony concerning how the blood may have come to be there was speculative. Appellant offered extensive testimony concerning an injury he sustained while operating a lawn mower to explain how his blood may have ended up in McFarland's car.[5] However, Appellant's testimony was hardly definite concerning how his blood came to be on the window sill.

Based on our review of the record, examined in the light most favorable to the verdict, we conclude that a rational trier of fact could have found beyond a reasonable doubt that Appellant was the person who entered the building on the night in question. Accordingly, we hold that there is legally sufficient evidence to support the trial court's determination of Appellant's identity. Appellant's first issue is overruled.

Entry Into "Habitation"

In his second issue, Appellant contends that the evidence is legally insufficient to support the trial court's determination that the premises constituted a "habitation." In his third issue, Appellant argues that the evidence is legally insufficient to support the trial court's determination that entry was made into any portion of the premises considered a "habitation."

There is a hierarchy of properties that carry distinct levels of forbidden entry. ***Salazar v. State***, 284 S.W.3d 874, 876 (Tex. Crim. App. 2009). In this case, we are concerned with two levels of this hierarchy—buildings and habitations. The first level of property we consider is a "building." According to the Texas Penal Code, a "building" is defined as "any enclosed structure intended for use or occupation as a habitation or for some purpose of trade, manufacture, ornament, or use." TEX. PENAL CODE ANN. § 30.01(2) (West 2011); *see* ***Salazar***, 284 S.W.3d at 877. Buildings are typically commercial properties, government offices, or professional places of employment. *See* ***Salazar***, 284 S.W.3d at 877.

The other level of property we consider carries the highest threshold for privacy—the "habitation." *See* ***id.*** A "habitation" is defined by the penal code as "a structure or vehicle that is

[5] Apparently, Appellant was under the mistaken impression that his blood was located in McFarland's vehicle. In fact, the record does not indicate that any blood samples were recovered from McFarland's vehicle.

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." TEX. PENAL CODE ANN. § 30.01(1). The most significant element of the definition is the adaptation "for the overnight accommodation of persons." ***Salazar***, 284 S.W.3d at 877. "What makes a structure 'suitable' or 'not suitable' for overnight accommodation is a complex, subjective factual question fit for a jury's determination." ***Id.*** In considering this element, the fact finder may look to a host of considerations including (1) whether the structure was being used as a residence at the time of the crime, (2) whether the structure contained bedding, furniture, utilities, or other belongings common to a residential structure, and (3) whether the structure was of such character that it was likely intended to accommodate persons overnight. *See* ***Blankenship v. State***, 780 S.W.2d 198, 209 (Tex. Crim. App. 1989).

In the instant case, McFarland testified that he resided in the same building in which his law office was located. The residence portion, where McFarland was sleeping on the night in question, consisted of a room within the building and contained a bed and a dresser. The room was separated from the rest of the office by an interior door that could be locked with a deadbolt. Malone testified that a key was required to open the deadbolt from the outside. McFarland testified that on the night of the burglary, he locked the deadbolt. Malone stated that McFarland told him that, when he awoke, the bedroom door was unlocked. McFarland also testified that he kept his car keys on the dresser in his bedroom. However, there is other evidence that the keys may have been in McFarland's coat pocket located near his bed. In either event, McFarland's car keys were located within the residence. When police recovered McFarland's car, the keys were located in the ignition.

Based on our review of the record, we conclude that the back room in McFarland's building qualifies as a "habitation." *See* ***Blankenship v. State***, 780 S.W.2d at 209. Moreover, there is ample evidence to support that Appellant entered McFarland's residence. McFarland testified that he locked his bedroom door when he went to sleep that night. The record further reflects that McFarland told Malone that when he awoke the next morning, the door to his residence was unlocked. Moreover, the evidence is undisputed that McFarland's keys were located in the residence, either on his dresser or in his coat pocket. However, following the burglary, the keys were found in the ignition of McFarland's car. From this evidence, a trier of fact could reasonably conclude beyond a reasonable doubt that Appellant entered the building

through the window, was able to unlock the door to McFarland's residence, entered the residence, and took McFarland's car keys. Accordingly, we hold that the evidence is legally sufficient to support the trial court's finding that Appellant entered McFarland's habitation.

Appellant's second and third issues are overruled.

Consent

In his fourth issue, Appellant argues that the evidence is legally insufficient to support the trial court's determination that any entry into a habitation was without McFarland's effective consent. Appellant bases his contention on the following exchange between the prosecuting attorney and McFarland:

> [Prosecuting Attorney]: I'll ask you[,] on April the 2nd - - you know, the day that your vehicle was taken and the day that your - - your residence and building was broken into - - did you give permission to Alfred Moye or anybody else for that matter to break into or enter your vehicle - - break into or enter your building and/or take your vehicle?
>
> [McFarland]: No, I did not.

This testimony, according to Appellant, does not support that McFarland declined to give consent to Appellant with regard to entry into his residence. We disagree.

As set forth previously, a "building" is defined as "any enclosed structure intended for use or occupation as a habitation or for some purpose . . . or use." TEX. PENAL CODE ANN. § 30.01(2). From our review of the record, it is apparent from McFarland's testimony he did not give Appellant permission to enter the building. Moreover, it is undisputed that McFarland's residence was a room located within this building. Thus, based on McFarland's testimony that he did not give Appellant permission to enter the building, a trier of fact could reasonably conclude beyond a reasonable doubt that McFarland did not give Appellant his permission to enter any room located within that building. Accordingly, we hold that there is legally sufficient evidence to support that Appellant's entry into McFarland's habitation was made without McFarland's consent. Appellant's fourth issue is overruled.

DISPOSITION

Having overruled Appellant's first, second, third, and fourth issues, we ***affirm*** the trial court's judgment.

SAM GRIFFITH
Justice

Opinion delivered March 19, 2012.
Panel consisted of Worthen, C.J., Griffith, J., and Hoyle, J.

(DO NOT PUBLISH)

COURT OF APPEALS
TWELFTH COURT OF APPEALS DISTRICT OF TEXAS
JUDGMENT

MARCH 19, 2012

NO. 12-10-00150-CR

ALFRED RAY MOYE,
Appellant
V.
THE STATE OF TEXAS,
Appellee

Appeal from the 217th Judicial District Court
of Angelina County, Texas. (Tr.Ct.No. CR-29,001)

THIS CAUSE came to be heard on the appellate record and briefs filed herein, and the same being considered, it is the opinion of this court that there was no error in the judgment.

It is therefore ORDERED, ADJUDGED and DECREED that the judgment of the court below **be in all things affirmed**, and that this decision be certified to the court below for observance.

Sam Griffith, Justice.
Panel consisted of Worthen, C.J., Griffith, J., and Hoyle, J.

THE STATE OF TEXAS
M A N D A T E

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TO THE 217TH DISTRICT COURT of ANGELINA COUNTY, GREETING:

Before our Court of Appeals for the 12th Court of Appeals District of Texas, on the 19th day of March, 2012, the cause upon appeal to revise or reverse your judgment between

ALFRED RAY MOYE, Appellant

NO. 12-10-00150-CR; Trial Court No. CR-29,001

Opinion by Sam Griffith, Justice.

THE STATE OF TEXAS, Appellee

was determined; and therein our said Court made its order in these words:

"THIS CAUSE came to be heard on the appellate record and briefs filed herein, and the same being considered, it is the opinion of this court that there was no error in the judgment.

It is therefore ORDERED, ADJUDGED and DECREED that the judgment of the court below be in all things affirmed, and that this decision be certified to the court below for observance."

WHEREAS, WE COMMAND YOU to observe the order of our said Court of Appeals for the Twelfth Court of Appeals District of Texas in this behalf, and in all things have it duly recognized, obeyed, and executed.

WITNESS, THE HONORABLE JAMES T. WORTHEN, Chief Justice of our Court of Appeals for the Twelfth Court of Appeals District, with the Seal thereof affixed, at the City of Tyler, this the _____ day of _____, 201____.

CATHY S. LUSK, CLERK

By:_____
Deputy Clerk