NO. 12-16-00201-CR

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

PHILLIP WESLEY BASS, APPELLANT	***§***	***APPEAL FROM THE 217TH***
V.	***§***	***JUDICIAL DISTRICT COURT***
THE STATE OF TEXAS, APPELLEE	***§***	***ANGELINA COUNTY, TEXAS***

MEMORANDUM OPINION

Phillip Wesley Bass appeals his conviction for burglary of a habitation. In two issues, he contends that the evidence is insufficient to support his conviction, and that the trial court erred in denying his motion for a directed verdict. We affirm.

BACKGROUND

Appellant was indicted for burglary of a habitation alleged to have occurred on or about September 15, 2015 in Angelina County, Texas. The indictment accused Appellant of entering William Agnew's home without his consent and with the intent to commit theft. Appellant entered a plea of "not guilty" and the matter proceeded to a jury trial.

The evidence at trial showed that Officer Marcus Perkins was dispatched to Agnew's home because a home security alarm activated. When he arrived on scene, Officer Perkins saw a silver sedan driving out of the area behind the home near the carport. Officer Perkins activated his emergency lights and Appellant, the driver, exited his vehicle and approached Officer Perkins. Appellant claimed that he was trying to speak with the homeowner about the house being for sale. Appellant said that he had knocked on the back and front doors. When Agnew arrived on scene, Officer Perkins let Appellant and his passenger, Davante Anthony, leave the scene. Agnew testified that he went in his home and noticed that his television set had been

unplugged and his laptop computers had been moved. Agnew further testified that he believes his back door may have been unsecured. Agnew indicated he had an old English bulldog in the home.

Anthony, who at the time of trial was serving an eight year sentence for this burglary, testified that Appellant drove them to Agnew's home. While there, Appellant handed him a screwdriver and instructed him to try to gain entry through a door at the home, but Anthony testified that he was unsuccessful. Anthony testified that Appellant moved his vehicle to the back of the house to make it easier to load items from the home into the vehicle. Anthony stated that, at Appellant's direction, he eventually gained entry to the home through a window. He testified that he saw an old tan dog, opened a door, unplugged the television set, and moved the laptops by stacking them one on top of the other. He admitted to attempting to take the laptop computers and the television set. However, Appellant came in and urgently told him it was "time to go." Anthony testified that he and Appellant ran out through the back door and got in the silver sedan to leave the home when they encountered Officer Perkins. Anthony testified that Appellant told the officer they were attempting to rent the home, but indicated that was a lie. He testified that Officer Perkins let them leave because "he did not know what we was attempting to do." Anthony admitted initially telling a detective that Appellant did not enter the home. On cross-examination, Anthony admitted to having a lengthy criminal history, including a prior burglary, and making several inconsistent statements to officers about the details of the burglary of Agnew's home.

A representative from the alarm company, Bud Parham, testified that on the day of the burglary, Agnew's alarm system activated at both the front and back doors of the home. Parham testified that the door must be opened at least one inch for the door sensor to activate. Parham further testified that only some of the home's windows were equipped with system activating sensors.

At the conclusion of trial, the jury found Appellant "guilty" of burglary of a habitation and punishment was assessed at imprisonment for eight years. This appeal followed.

SUFFICIENCY OF THE EVIDENCE

In Appellant's first issue, he argues that the evidence is insufficient to support his conviction for burglary of a habitation. In his second issue, he argues that the trial court erred in

denying his motion for directed verdict. Appellant argues the evidence is insufficient to support his conviction because the State did not prove he entered Agnew's home, no physical evidence connects him to the offense, and Anthony's testimony was not sufficiently corroborated.

Standard of Review

A challenge to a trial court's ruling on a motion for directed verdict is a challenge to the sufficiency of the evidence to support a conviction, and is reviewed under the same standard. ***Williams v. State***, 937 S.W.2d 479, 482 (Tex. Crim. App. 1996); *see also* ***Rios v. State***, 982 S.W.2d 558, 560 (Tex. App.—San Antonio 1998, pet ref'd). When determining if evidence is sufficient to sustain a conviction, the court must apply the ***Jackson v. Virginia*** standard. *See* ***Brooks v. State***, 323 S.W.3d 893, 902, 912 (Tex. Crim. App. 2010). This standard requires the court to determine whether, considering all the evidence in the light most favorable to the verdict, the jury was rationally justified in finding guilt beyond a reasonable doubt. ***Jackson v. Virginia***, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789, 61 L. Ed. 2d 560 (1979); ***Brooks***, 323 S.W.3d at 899. In order to consider the evidence in the light most favorable to the verdict, we must defer to the jury's credibility and weight determinations, because the jury is the sole judge of the witnesses' credibility and the weight to be given to their testimony. ***Brooks***, 323 S.W.3d at 899; *see* ***Jackson***, 443 U.S. at 319, 99 S. Ct. at 2789. This standard recognizes "the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." ***Jackson***, 443 U.S. at 319, 99 S. Ct. at 2789; *see also* ***Adames v. State***, 353 S.W.3d 854, 860 (Tex. Crim. App. 2011).

The fact finder is entitled to judge the credibility of the witnesses, and can choose to believe all, some, or none of the testimony presented by the parties. ***Chambers v. State***, 805 S.W.2d 459, 461 (Tex. Crim. App. 1991); *see also* ***Wise v. State***, 364 S.W.3d 900, 903 (Tex. Crim. App. 2012). When conflicting evidence is presented, we must resolve those conflicts in favor of the verdict and defer to the fact finder's resolution. ***Jackson***, 443 U.S. at 326, 99 S. Ct. at 2793. We may not substitute our own judgment for that of the fact finder. *See* ***id.***, 443 U.S. at 319, 99 S. Ct. at 2789; ***Thornton v. State***, 425 S.W.3d 289, 303 (Tex. Crim. App. 2014); ***King v. State***, 29 S.W.3d 556, 562 (Tex. Crim. App. 2000). Circumstantial evidence is as probative as direct evidence in establishing the guilt of an actor and can be alone sufficient to establish guilt. ***Hooper v. State***, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007).

The Law of Parties

In Texas, the law of parties provides that a person is criminally responsible as a party to an offense if the offense is committed by his own conduct, by the conduct of another for which he is criminally responsible, or both. TEX. PENAL CODE ANN. § 7.01(a) (West 2011). Furthermore, each party to an offense may be charged with commission of the offense. ***Id.*** § 7.01(b). "[U]nder the law of parties, the State is able to enlarge a defendant's criminal responsibility to acts to which he may not be the principal actor." ***Goff v. State***, 931 S.W.2d 537, 544 (Tex. Crim. App. 1996).

The Texas law of parties abolishes all traditional distinction between accomplices and principals, and each party to an offense may be charged and convicted without alleging that he acted as a principal or accomplice. TEX. PENAL CODE ANN. § 7.01(c); ***Powell v. State***, 194 S.W.3d 503, 506 (Tex. Crim. App. 2006) ("[A] person can be convicted as a party even if the indictment does not explicitly charge him as a party"). An individual is criminally responsible for an offense committed by the conduct of another if he acts with intent to promote or assist the commission of the offense, and solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense. TEX. PENAL CODE ANN. § 7.02(a)(2) (West 2011).

Accomplice Witness Testimony

"A conviction cannot be had upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the offense committed; and the corroboration is not sufficient if it merely shows the commission of the offense." TEX. CODE CRIM. PROC. ANN. art. 38.14 (West 2005). A witness is an accomplice as a matter of law if that individual has been or could have been indicted for the same offense. ***Cocke v. State***, 201 S.W.3d 744, 747-748 (Tex. Crim. App. 2006). If a witness is an accomplice as a matter of law, the trial court must provide an accomplice witness instruction to the jury. ***Id.*** Under Article 38.14, the appellate court must eliminate all of the accomplice testimony from consideration and then examine the remaining portions of the record to see if there is any evidence that tends to connect the accused with the commission of the crime. ***Castillo v. State***, 221 S.W.3d 689, 691-92 (Tex. Crim. App. 2007); *see also* TEX. CODE CRIM. PROC. ANN. art. 38.14.

The sufficiency of non-accomplice evidence is judged according to the particular facts and circumstances of each case. ***Smith v. State***, 332 S.W.3d 425, 442 (Tex. Crim. App. 2011). The direct or circumstantial non-accomplice evidence is sufficient corroboration if it shows that

rational jurors could have found that it sufficiently tended to connect the accused to the offense. ***Id.*** When there are conflicting views of the evidence—one that tends to connect the accused to the offense and one that does not—we will defer to the fact finder's resolution of the evidence; it is not the role of the appellate court to independently construe the non-accomplice evidence. ***Id.*** Testimony of an accomplice need be corroborated only as to facts tending to connect the defendant with the offense committed and not as to the corpus delicti itself. ***Castillo***, 221 S.W.3d at 691. The non-accomplice evidence does not have to directly link the defendant to the crime, or independently establish his guilt beyond a reasonable doubt. ***Id.*** There simply must be some non-accomplice evidence which tends to connect the defendant to the commission of the offense alleged in the indictment. ***Id.*** While an accused's mere presence in the company of the accomplice before, during, and after the commission of the offense is not sufficient alone to corroborate accomplice testimony, evidence of such presence, coupled with other suspicious circumstances, may tend to connect the accused to the offense. ***Dowthitt v. State***, 931 S.W.2d 244, 249 (Tex. Crim. App. 1996); *see also* ***McAfee v. State***, 204 S.W.3d 868, 871 (Tex. App.—Corpus Christi 2006, pet. ref'd); ***Rios***, 982 S.W.2d at 561. Even insignificant incriminating circumstances may sometimes afford satisfactory evidence of corroboration. ***Dowthitt***, 931 S.W.2d at 249; *see also* ***McAfee***, 204 S.W.3d at 871.

Analysis

In this case, Appellant was charged with burglary of a habitation with the intent to commit theft. Thus, the State had to prove that Appellant entered Agnew's habitation, without Agnew's effective consent, with the intent to commit theft. *See* TEX. PENAL CODE ANN. § 30.02(a)(1) (West 2011). Appellant argues that the State did not offer sufficient evidence to prove that Appellant "entered" the property as defined by the statute. *See* ***id.*** § 30.02(b) (defining "enter" to intrude "(1) any part of the body; or (2) any physical object connected with the body[]"). With regard to his complaint regarding a lack of physical evidence that he entered the home, the court of criminal appeals has held that circumstantial evidence is just as probative as direct evidence. *See* ***Hooper***, 214 S.W.3d at 13. Moreover, the jury was instructed on the law of parties.[1] Thus, the jury could have convicted Appellant regardless of whether they believed he

[1] At trial, Appellant objected to the inclusion of the law of parties instruction in the jury charge, but he does not challenge the instruction on appeal.

entered the home during the course of the burglary.[2] *See* TEX. PENAL CODE ANN. § 7.01(c); *see also* ***Powell***, 194 S.W.3d at 506.

Nevertheless, Appellant argues that Anthony's testimony was not sufficiently corroborated to support the jury's verdict. Anthony was an accomplice as a matter of law and the jury received an accomplice witness instruction. *See* ***Cocke***, 201 S.W.3d at 747-748. The record demonstrates that Appellant was seen at Agnew's home shortly after Officer Perkins arrived because Agnew's security system had activated. The front and back door sensors had activated the alarm, and Appellant told the officer he had knocked on both doors. However, Parham testified the sensors would only activate if the doors were opened at least one inch. Furthermore, Appellant was found driving a vehicle out from behind the home, which is consistent with Anthony's testimony that (1) Appellant drove around the back of Agnew's home to make it easier to load items, and (2) just before Officer Perkins arrived, Appellant told Anthony they needed to leave. Also, Appellant told Officer Perkins he was interested in contacting the homeowner to buy the home, which is consistent with Anthony's testimony that Appellant lied about wanting to rent the home to explain their presence. Anthony's testimony was also corroborated by much of Agnew's testimony. For instance, Anthony identified an old tan dog in the home, and Agnew testified his old bulldog was inside. Further, Anthony testified he moved the laptops and unplugged the television, which Agnew confirmed in his testimony.

While a defendant's mere presence at the crime scene alone is not sufficient to corroborate accomplice testimony, courts have held that a defendant keeping company with the accomplice at or near the time of the offense is a significant factor in determining corroboration. *See* ***Hernandez v. State***, 939 S.W.2d 173, 177-178 (Tex. Crim. App. 1997) (evidence that appellant was in the company of the accomplice at or near the time or place of a crime is proper corroborating evidence to support a conviction); *see also* ***Jackson v. State***, 745 S.W.2d 4, 13 (Tex. Crim. App. 1988) (although presence of accused in the company of the accomplice, near the offense, while not conclusive, it nevertheless is an important factor in determining corroboration). The fact that Appellant was driving the car with Anthony as they left the scene

[2] In closing arguments, the State argued that it was not necessary for the jury to decide whether Appellant actually entered the home, because Anthony's testimony regarding the burglary was sufficiently corroborated by independent evidence and Appellant was guilty under the law of parties. *See* ***Goff***, 931 S.W.2d at 544-45 (in a murder case the facts best supported the theory that appellant was the principal actor, however, there was sufficient evidence to support the inference that he acted as a party to the offense based on testimony elicited); *see also* ***Jackson***, 443 U.S. at 319, 99 S. Ct. at 2789.

of the burglary, combined with the other non-accomplice evidence discussed above supports the jury's finding of guilt. *See* ***Jackson***, 443 U.S. at 319, 99 S. Ct. at 2789; *see also* ***Castillo***, 221 S.W.3d at 691-92. To the extent that Anthony made inconsistent statements regarding Appellant's involvement in this case, the jury resolved those conflicts in favor of Appellant's guilt, which must be given deference by this Court. *See* ***Smith***, 332 S.W.3d at 442; ***Jackson,*** 443 U.S. at 326, 99 S. Ct. at 2793. Accordingly, the jury could reasonably conclude that Appellant acted with intent to promote or assist the commission of the offense, and solicited, encouraged, directed, aided, or attempted to aid Anthony to commit the offense. *See* TEX. PENAL CODE ANN. § 7.02(a)(2).

Thus, viewing the evidence in the light most favorable to the verdict, we conclude that the jury was rationally justified in finding Appellant guilty of burglary of a habitation, beyond a reasonable doubt. *See* ***Jackson***, 443 U.S. at 319, 99 S. Ct. at 2789; *see also* ***Brooks***, 323 S.W.3d at 899. Because the evidence is sufficient to support Appellant's conviction, the trial court properly denied his motion for directed verdict. We overrule Appellant's first and second issues.

DISPOSITION

Having overruled Appellant's issues one and two, we ***affirm*** the trial court's judgment.

JAMES T. WORTHEN
Chief Justice

Opinion delivered July 12, 2017.
Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.

(DO NOT PUBLISH)

COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT OF TEXAS

JUDGMENT

JULY 12, 2017

NO. 12-16-00201-CR

PHILLIP WESLEY BASS,
Appellant
V.
THE STATE OF TEXAS,
Appellee

Appeal from the 217th District Court
of Angelina County, Texas (Tr.Ct.No. 2015-0930)

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.

James T. Worthen, Chief Justice.
Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.