Affirmed and Memorandum Opinion filed June 16, 2020.

In The

Fourteenth Court of Appeals

NO. 14-19-00209-CR

M. L. BURKS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 179th District Court
Harris County, Texas
Trial Court Cause No. 1620909

MEMORANDUM OPINION

Appellant M. L. Burks appeals his conviction for aggravated assault with serious bodily injury. *See* Tex. Penal Code Ann. § 22.02(a)(1). In a single issue, appellant challenges the sufficiency of the evidence to support his conviction. We affirm.

BACKGROUND

On the day of the offense several people including the complainant and

appellant were gathered outside the T & C food store. Crystal Thompson testified that she frequented the T & C food store near where she was living at the time of the shooting. On the day of the shooting Thompson had been outside the food store since approximately 9:00 that morning "prostituting." Thompson was outside the store with her godmother, the complainant, and appellant. Thompson knew the complainant's son but not the complainant. The complainant's son had recently been shot by an unknown person. While they were standing outside the food store the complainant and appellant began to argue. Thompson recorded the argument on her phone. At one point during the argument the complainant tried to disengage and walk away. The complainant walked across the street to an empty field where she sat down on some discarded tires.

Appellant threatened the complainant several times saying, "I'm gonna shoot the fuck out you, don't walk up on me, I'm gonna shoot the fuck out you." Appellant eventually left the area where the complainant was sitting. The owner of the store told Thompson and the others that the police were on their way and that they needed to disperse.[1] Thompson walked across the street to a motel where she was staying. When Thompson heard a gunshot, she came out of her motel room and saw the complainant lying on the ground. Thompson turned over the video she took to the police. The video was admitted into evidence without objection and played for the jury.

The video corroborated Thompson's testimony that appellant threatened to shoot the complainant. When the argument began appellant was sitting in a wheelchair but as the argument escalated, he stood up and threatened to shoot the complainant and "blow [her] head off." The video showed appellant following the

[1] The store owner had called the police about an unrelated shoplifting at the store.

complainant after she walked away from the argument. As appellant wheeled past the complainant, he told her, “You stay right there.”

Michael Payne also frequents the T & C food store. Payne had known the complainant for approximately 20 years. Payne knew appellant as a frequent visitor to the store. Payne also witnessed the argument between appellant and the complainant. Payne testified that he heard appellant say, “he’s going home, get his gun, come back, and kill that bitch.” Appellant repeated this statement several times as he wheeled toward his apartment.

After appellant left the area Payne went into the store and bought a beer and some scratch-off lottery tickets. As Payne was sitting in his car scratching off the tickets, he saw the police arrive on an unrelated shoplifting call. The police stayed for 10 to 15 minutes to investigate the shoplifting call and left. Shortly after the police left Payne heard a loud gunshot and saw the complainant fall. Payne and several others called 911. Both police and ambulance arrived quickly. Appellant was not at the store at the time Payne heard the shot, but appellant returned to the store while the police and ambulance were at the scene.

Timothy Johnson testified that on the day of the shooting appellant knocked on Johnson’s apartment door. Appellant told Johnson that if Johnson heard shooting not to worry about it because appellant and his boys were going hunting the following week. Johnson could see appellant’s apartment from his window. Appellant left and Johnson watched appellant go into his apartment. Johnson saw appellant come onto his apartment balcony carrying a rifle with a scope. Appellant placed the rifle on the balcony rail and pointed the rifle in the direction of the T & C food mart. Appellant “took his time” looking through the scope then shot the rifle.

A few minutes after Johnson saw appellant shoot the rifle, he saw appellant leave the apartment without the rifle and go toward the food store. Johnson

subsequently saw emergency vehicles driving toward the food store. Johnson did not report what he saw and heard until police officers asked sometime later.

Damon Adams of the Houston Police Department was one of the responding officers on the shoplifting call and the shooting call. Adams and his partner Kenny Camble first investigated the shoplifting call, but the thieves had left the area by the time they arrived. As Adams and Camble were driving away they heard the dispatch about the shooting and returned to the area. Emergency medical technicians were loading the complainant into an ambulance when the officers arrived back at the scene. Adams interviewed witnesses at the food store and learned that appellant had threatened to kill the complainant in an argument earlier in the day.

The officers were familiar with appellant because they had been called out to appellant's apartment approximately two months earlier on a weapons disturbance. During that call officers found a rifle and scope in appellant's apartment. Approximately two hours after officers arrived, appellant consented to the search of his apartment. Officers found no weapons during the search but found rifle ammunition. Appellant told Adams that he did not need to shoot the complainant, that because she was a woman, he would "just beat her with his fists." Appellant said if he planned to shoot someone, he would kill them.

The officers transported appellant to the police station where he was interviewed, and his hands were tested for gunshot residue. Appellant was wearing gloves the entire time the officers talked with him at the scene. During the interview appellant described the argument he had with the complainant but denied threatening her. Appellant told the officers that the rifle they had seen two months earlier belonged to his sister and took 7.62 caliber ammunition. Appellant also told officers that he had served in the military as a sniper and was an expert marksman. Appellant said his eyesight was bad but he could still hit a target at 200 to 300 yards without a

scope and up to half a mile with a scope.

Sergeant Karl Mokwa was the Houston Police Officer assigned to investigate the shooting. Mokwa testified that the gunshot residue tests taken on appellant's hands were negative. Through use of a range finder Mokwa estimated the distance between appellant's second-floor apartment balcony and the location where the complainant was shot at 75-80 yards.

Dr. John Harvin of Memorial Herman Hospital testified to the extent of the complainant's injuries after the shooting. The complainant was unable to breathe or eat on her own and lost the use of her legs.

The complainant died from complications associated with the gunshot wound and metastatic cancer. The bullet was not removed from her body until after her death. After the complainant's death, Detective Dillon Nabors of the Houston Police Department homicide division was assigned the case. Nabors collected a 7.62 caliber bullet from the complainant's body. Nabors accessed phone calls appellant made from jail two months after the shooting. In one of those calls, appellant asked the person on the other end of the line, "Did you take my rifle and take it up to your house and put it up?" The other person responded, "I did everything you told me to do." In another call, appellant said, "They knew I had that rifle, but I gave it to my Mexican partner and let him keep it over there." In a third call, appellant said, "My neighbor who lived across from me, he had gone and took the gun into the house. He went up there and got my gun and everything and took it to his house. Ain't nobody got the same kind of guns I got, nobody got the same kind of guns, same caliber." Nabors testified that when appellant talked about his neighbor retrieving the gun the time period he was describing was the time gap between the shooting and when appellant had gone back to the scene of the shooting.

The jury found appellant guilty of aggravated assault causing serious bodily

injury and assessed punishment at life in prison.

ANALYSIS

In a single issue on appeal appellant challenges the sufficiency of the evidence to support his conviction.

I. Standard of review

In reviewing the sufficiency of the evidence to support a conviction, we determine "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Johnson v. State*, 364 S.W.3d 292, 293–94 (Tex. Crim. App. 2012) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). In our review, we consider all of the evidence in the record, whether admissible or inadmissible. *Winfrey v. State*, 393 S.W.3d 763, 767 (Tex. Crim. App. 2013). The jury is the sole judge of the credibility of witnesses and the weight afforded their testimony. *Montgomery v. State*, 369 S.W.3d 188, 192 (Tex. Crim. App. 2012). The jury may choose to believe or disbelieve all or a portion of a witness's testimony, and we presume that the jury resolved any conflicts in the evidence in favor of the prevailing party. *See Marshall v. State*, 479 S.W.3d 840, 845 (Tex. Crim. App. 2016).

The jury may not draw conclusions based on speculation but may draw multiple reasonable inferences from facts as long as each is supported by the evidence presented at trial. *Hooper v. State*, 214 S.W.3d 9, 15 (Tex. Crim. App. 2007). An inference is a conclusion reached by considering other facts and deducing a logical consequence from them, while speculation is mere theorizing or guessing about the possible meaning of facts and evidence presented. *Winfrey*, 393 S.W.3d at 771.

II. The evidence is sufficient to support appellant's conviction.

A person commits aggravated assault by intentionally, knowingly, or recklessly causing serious bodily injury to another. *See* Tex. Pen. Code Ann. §§ 22.01(a)(1) & 22.02(a)(1). On appeal appellant does not challenge the evidence supporting the facts that the complainant suffered serious bodily injury due to a gunshot wound. Appellant contends the evidence is insufficient to establish that he was the individual who fired the gun.

The record supports the following circumstances of appellant's guilt:

- Appellant was videotaped threatening to kill the complainant shortly before the shooting. *See Ross v. State*, 133 S.W.3d 618, 621 (Tex. Crim. App. 2004) (defendant threatened the complainant with violence not long before the murder);
- Police officers observed a rifle with scope in appellant's apartment two months before the shooting and appellant told officers the rifle shot the same caliber ammunition as the bullet found in the complainant's body. *See Guevara v. State*, 152 S.W.3d 45, 51 (Tex. Crim. App. 2004) (defendant was seen shooting a gun of the same caliber as the murder weapon a month before the murder);
- Appellant was seen on video telling the complainant to stay seated on the tires in the field as he left the scene saying he was going to get his gun and kill her. *See Palomo v. State*, 352 S.W.3d 87, 90 (Tex. App.—Houston [14th Dist.] 2011, pet. ref'd) (defendant told complainant to go to the place where the complainant was killed);
- Appellant was seen at the location of the crime shortly before the shooting and told his neighbor that the neighbor might hear gunfire. *See Wolfe v. State*, 917 S.W.2d 270, 275 (Tex. Crim. App. 1996) (defendant was seen within a few blocks of the crime scene shortly before and after the murder);
- Appellant's neighbor observed appellant rest the scope-equipped rifle on the apartment balcony railing and fire a shot. *See Price v. State*, 502 S.W.3d 278, 281 (Tex. App.—Houston [14th Dist.]

2016, no pet.) (testimony of a single eyewitness can be sufficient to support a conviction); and

- Appellant concealed evidence by asking a friend to take the rifle from his apartment. *See Guevara*, 152 S.W.3d at 50 (defendant's attempt to conceal evidence is a circumstance of guilt).

Appellant argues that the evidence is insufficient to support his conviction because (1) there was evidence that another individual could have shot the complainant; (2) appellant did not confess; (3) appellant's eyesight was bad; (4) no rifle was recovered from appellant's apartment; (5) no gunshot residue was found on appellant's hands; (6) the area where the complainant was shot was a high-crime area; (7) evidence showed there was not a clear line of sight between appellant's apartment and the location of the shooting; and (8) while in jail appellant told his sister that he did not shoot the complainant.

The jury heard evidence of other individuals in the area but also heard evidence that appellant was the individual who threatened to kill the complainant. Appellant did not confess and made a self-serving denial to his sister while talking with her on the phone. The jury heard appellant's other phone calls in which he admitted hiding his rifle because it was unique and no one else had a rifle similar to it. While the jury heard there was no gunshot residue, they also heard that the gunshot residue test was performed several hours later, and that appellant had been wearing gloves to assist in using his wheelchair. The jury also heard evidence about the line of sight and distance between appellant's apartment balcony and the location where the complainant was shot. The jury saw photographs of the area and the line of sight. A rational jury could have concluded that appellant threatened to retrieve a gun and kill the complainant, retrieved that gun, braced it on his apartment balcony railing, looked through the scope on the rifle, and shot the complainant.

It is not necessary that the evidence directly prove the defendant's guilt;

circumstantial evidence is as probative as direct evidence in establishing a defendant's guilt, and circumstantial evidence can alone be sufficient to establish guilt. *Nisbett v. State*, 552 S.W.3d 244, 262 (Tex. Crim. App. 2018). Although the parties may disagree about the logical inferences that flow from undisputed facts, where there are two permissible views of the evidence, the jury's choice between them cannot be clearly erroneous. *Braughton v. State*, 569 S.W.3d 592, 608 (Tex. Crim. App. 2018). Viewing the evidence in the light most favorable to the verdict, we conclude the evidence was sufficient to establish that appellant was the individual who shot the complainant. *See Zuniga v. State*, 551 S.W.3d 729, 733 (Tex. Crim. App. 2018) ("[J]uries are permitted to draw any reasonable inferences from the facts so long as each inference is supported by the evidence presented at trial."). We overrule appellant's sole issue on appeal.

CONCLUSION

Having overruled appellant's issue challenging the sufficiency of the evidence to support his conviction we affirm the trial court's judgment.

/s/ Jerry Zimmerer
Justice

Panel consists of Justices Christopher, Wise, and Zimmerer.

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