# In The
# Court of Appeals
# Seventh District of Texas at Amarillo

No. 07-19-00130-CR

JONATHAN PADILLA AVILA, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

On Appeal from the 441st District Court
Midland County, Texas
Trial Court No. CR47793; Honorable Jeffery Todd Robnett, Presiding

June 29, 2020

## MEMORANDUM OPINION

Before QUINN, C.J., and PIRTLE and PARKER, JJ.

Appellant, Jonathan Avila, appeals from his conviction, after a bench trial, of the offense of burglary of a habitation with intent to commit a felony assault[1] and the resulting sentence of imprisonment for a term of eight years. Through one issue, Appellant argues the evidence was insufficient to prove he entered the complainant's home or that he

[1] TEX. PENAL CODE ANN. § 30.02(a)(1) (West 2019). As indicted, the offense was punishable as a first degree felony. *Id.* at § 30.02(d) (burglary of a habitation with intent to commit a felony other than theft). The judgment, however, reflects a conviction for the lesser-included offense of burglary, a second degree felony. *Id.* at § 30.02(c)(2) (burglary of a habitation with intent to commit an assault).

entered the home with the intent to commit a felony assault.[2] We affirm the judgment of the trial court.

**BACKGROUND**

Appellant and the complainant, Courtney Mueller, dated for approximately four years and they had a son together. At the time of the alleged offense, Appellant and Courtney were no longer dating but they did maintain a relationship that included sexual intimacy.

On the night at issue, Courtney went to dinner with Appellant and two of their mutual friends. Courtney's stepsister stayed with Courtney's two children at Courtney's home. Courtney picked Appellant up at his home and the two met their friends for dinner. After dinner, they decided to go to an establishment called Rockin' Rodeo. Everyone drank and enjoyed themselves; however, toward the end of the evening, Appellant became drunk and had an altercation with another female. Courtney described Appellant's behavior when he was drunk as "[o]ut of control, wild, sometimes aggressive—most of the time aggressive, out of control, basically."

Following that incident, Courtney drove Appellant home. During that drive, Appellant asked Courtney several times to take him to her home. She told him "no" and, instead, took him to his residence. When he got out of her vehicle, he immediately sent her a text message saying, "I'm going to your house." She again said "no," but Appellant

[2] Originally appealed to the Eleventh Court of Appeals, this appeal was transferred to this court by the Texas Supreme Court pursuant to its docket equalization efforts. TEX. GOV'T CODE ANN. § 73.001 (West 2013). Should a conflict exist between precedent of the Eleventh Court of Appeals and this court on any relevant issue, this appeal will be decided in accordance with the precedent of the transferor court. TEX. R. APP. P. 41.3

got on his motorcycle and "took off." When she arrived home, Appellant was "waiting there, at my gate." She said when she saw him, she was "[v]ery scared" because she "just knew it wasn't going to go well. From everything that's happened in the past, I knew it wasn't going to go well." She also told the court Appellant was trained in "MMA" or mixed martial arts—and that added to her fear.

Courtney tried to go up to her door, but Appellant followed her. She did not want him inside her home because she had already told him several times to go home and her stepsister and two children were inside the home. She testified the two of them stayed outside for what "seemed like forever" but was "about an hour" with her "trying to get inside." She said she was scared because in the past her "phone would get smashed into the ground, so I remember trying not to make him mad or press any buttons or anything to happen." Appellant eventually asked if he could charge his phone and she said she had a charger in her car. The two got into her car and as soon as Appellant got in and was looking at his phone, Courtney "ran out of the car and ran as fast as I could up my stairs, and I got inside and I locked the door."[3]

Appellant came up to the door of her residence and "started to bang on the door, ringing the doorbell multiple times." She said she sat on the kitchen floor crying because she did not know what was going to happen. Courtney's stepsister came into the kitchen after "a loud bang on the door" woke her up. She testified the "banging on the front door had stopped and it came to the back door." Courtney then received a text message from

[3] The responding officer, Deputy Ryan Stafford, testified Courtney told him that night that after she went inside, Appellant knocked on her door and asked for a phone charger. She opened the door and gave him a charger and then closed the door.

Appellant telling her she had five minutes to come talk to him or he was going to "bust through [her] window." Appellant continued to send messages to Courtney and many of those messages were introduced into evidence.

Courtney's stepsister called police and while she was on the phone with them, the two of them went into the bedroom with the two children. They put their "backs up against the door" and had their feet against the bedframe. Courtney testified that for a while, they continued to hear "banging." Then, it became quiet until they heard "stuff moving around." Shortly thereafter, they heard "stuff crash through the kitchen." She recalled hearing glass hit the floor and told the court she had wine glasses as decoration on the top of the bar. She heard "stuff fly through the air and those glasses knocking over." She also heard her "cat slamming up against the door that we were up against." Courtney's stepsister testified she could hear the air conditioning window unit being moved and then heard "things fly across the living room." She called police again, saying, "He's inside. We can hear things getting thrown around. We hear the cat getting thrown around. And we have ourselves up against the door." Courtney told the court that while she could not see what was happening, based on the text messages from Appellant and what she was hearing, she believed Appellant "was coming through the window." Courtney's stepsister testified similarly, noting she too was scared.

After police arrived, Courtney looked at items in her home. She testified that prior to that evening the air conditioning unit was sealed and level in her window; however, afterwards it was not. She also noted that a cup that had been on a table right in front of the window was on the floor after the incident. She also identified other items that were out of place. Photographs of the items were admitted into evidence. Courtney's

stepsister testified that before she had gone to bed, she straightened the home and she did not leave cups and drinks and a mess on the floor by the window. She also said the blinds on top of the air conditioning unit were "usually stacked pretty neatly on top of the AC unit" but they were not after the incident. She testified the "AC unit is usually centered in the window and there's no open gap for [sic] the house from the outside." Deputy Ryan Stafford testified to seeing "disturbed or broken" blinds near the air conditioning unit and said he saw "fresh" footprints "behind that window unit, behind the house." Crime scene photographs taken by Deputy Stafford were admitted into evidence.

At trial, Courtney said that at the time of the incident, she thought Appellant had gotten into the house.[4] However, by the time of trial, she believed Appellant "did not fully get in. I think that part of him was in through that part of the window."[5] She also said she was scared because she was not sure what would happen if Appellant got in. She was concerned that things that had happened in the past, such as "choking or slamming on the floor or slamming up against the wall" would happen again.

**ANALYSIS**

When reviewing the sufficiency of the evidence, we view all evidence in the light most favorable to the verdict to determine whether any rational fact finder could have found the essential elements of the offense beyond a reasonable doubt. *Jackson v.*

[4] Deputy Stafford agreed during cross-examination that Courtney told him she knew Appellant had gone into her house and made the mess and that he moved the air conditioning unit to get inside and probably went out the same way.

[5] Courtney's stepsister testified during redirect examination that Courtney initially said Appellant came into the house but later said "[h]e didn't come in all the way." She elaborated, saying, "That night, we thought that he had came [sic] in all the way. But then later on she came to the realization he didn't come all the way in, that it was just part of his body."

*Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); *Adames v. State*, 353 S.W.3d 854, 859 (Tex. Crim. App. 2011) (holding that *Jackson* standard is the only standard to use when determining sufficiency of evidence). We measure sufficiency of the evidence according to "the elements of the offense as defined by" a hypothetically correct jury charge for the case. *Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1990). Furthermore, the finder of fact is the exclusive judge of the facts, the credibility of witnesses, and the weight to be given to the testimony. *Bartlett v. State*, 270 S.W.3d 147, 150 (Tex. Crim. App. 2008). Accordingly, we do not resolve any conflicts of fact, weigh any evidence, or evaluate the credibility of any witnesses, *Dewberry v. State*, 4 S.W.3d 735, 740 (Tex. Crim. App. 1999), and we must resolve any inconsistencies in the evidence in favor of the adjudication. *Matson v. State*, 819 S.W.2d 839, 843 (Tex. Crim. App. 1999).

An individual commits the offense of burglary if, without the effective consent of the owner, he enters a habitation or building (or any portion of a building) not then open to the public, with the intent to commit a felony, theft, or an assault. TEX. PENAL CODE ANN. § 30.02(a)(1) (West 2019). For purposes of section 30.02, "enter" means to intrude with (1) any part of the body or (2) any physical object connected with the body. *State v. Ingram*, No. 12-18-00329-CR, 2020 Tex. App. LEXIS 92, at *4 (Tex. App.—Tyler Jan. 8, 2020, pet. ref'd.) (mem. op., not designated for publication) (citing TEX. PENAL CODE ANN. § 30.02(b)(1)-(2)).

For purposes of the primary offense of burglary, a person commits the offense of assault if he intentionally, knowingly, or recklessly causes bodily injury to another; or, intentionally or knowingly threatens another with imminent bodily injury; or, intentionally

or knowingly causes physical contact with another when the person knows or should reasonably believe the other will regard the contact as offensive or provocative. TEX. PENAL CODE ANN. § 22.01(a)(1)-(3) (West 2019). A fact finder may infer intent from a defendant's conduct and the surrounding facts and circumstances. *Lapoint v. State*, 750 S.W.2d 180, 182 (Tex. Crim. App. 1986); *McGee v. State*, 923 S.W.2d 605, 608 (Tex. App.—Houston [1st Dist.] 1995, no pet.).

Both parties concede the evidence does not support a finding that Appellant entered his entire body into Courtney's home. However, entry of the entire body is not required to find "entry" under the burglary statute. *See* TEX. PENAL CODE ANN. § 30.02(b)(1)-(2). Rather, entry of any part of the body or any physical object connected with the body is sufficient. *Id. See also Martinez v. State*, 304 S.W.3d 642, 659-60 (Tex. App.—Amarillo 2010, pet. ref'd). And, proof of entry and intent may be shown by circumstantial evidence. *Richardson v. State*, No. 14-04-00764-CR, 2006 Tex. App. LEXIS 3109, at *8 (Tex. App.—Houston [14th Dist.] Apr. 20, 2006, pet. ref'd) (mem. op., not designated for publication) (citing *Clark v. State*, 543 S.W.2d 125, 127 (Tex. Crim. App. 1976); *Boudreaux v. State*, 757 S.W.2d 139, 147 (Tex. App.—Houston [1st Dist.] 1988, pet. ref'd)).

Here, the trial court had before it evidence from which it could have inferred the air conditioning unit had been moved from its usual position. Deputy Stafford testified he saw fresh footprints behind the window unit. Photographs of those prints were admitted into evidence. The record also shows that items inside the home, including glasses, cups, and a basket had been moved from their positions prior to the incident. Photographs of those items, as they appeared after the incident, were also admitted into evidence.

Additionally, Courtney testified she heard glass breaking and other items being thrown around inside the residence. Both Courtney and her stepsister testified they heard the cat being slammed into the bedroom door. The trial judge, as fact finder, could have rationally inferred that none of those events could have occurred without entry by either some body part of Appellant's body or by some object connected to Appellant. *See Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007) (circumstantial evidence is as probative as direct evidence in establishing guilt and circumstantial evidence alone may be sufficient to support a conviction); *Moore v. State*, 54 S.W.3d 529, 539 (Tex. App.—Fort Worth 2001, pet. ref'd) (intent may be inferred from the defendant's conduct and surrounding circumstances). As such, there is little question that the evidence supports the trial court's implicit finding that, without Courtney's effective consent, some part of Appellant's body, or some physical object connected with his body, entered her habitation. *Martinez*, 304 S.W.3d at 660 (testimony along with the photographs taken by the officer were sufficient for the jury to find beyond a reasonable doubt that "some part of the burglar's body, presumably either a shoulder or foot, breached the plane" of the residence, establishing the element of "entry").

As to the matter of whether Appellant's entry into Courtney's residence was with the intent to commit an assault—because such intent may be inferred from circumstantial evidence, we must look to the entire record to determine whether the trial judge, as a rational fact finder, could have made such a finding beyond a reasonable doubt. Appellant vigorously contests the sufficiency of the evidence to support such a finding. In evaluating the evidence, it is important to remember that the critical question is not whether an

assault was committed, but rather whether the non-consensual entry was made with the intent to commit an assault.

Appellant argues the State failed to present any evidence to support a conclusion that he entered the residence with the intent to commit an assault. He argues the text messages he sent to Courtney show he simply wanted to speak with her. He also points to the video footage provided by the doorbell camera that shows he was calm and was not banging on the door or acting in an aggressive manner.[6] He further contends the evidence indicating he committed prior acts of violence showed only that he was acting in conformity with prior behavior, not that he entered Courtney's home with intent to commit an assault. Lastly, he points to photographs of Courtney and himself earlier in the evening and argues those photographs show the two were on friendly terms.

However, the record also includes evidence tending to support the trial court's implicit finding that it was Appellant's intent to commit assault when he entered Courtney's home. *See Hernandez v. State,* 819 S.W.2d 806, 810 (Tex. Crim. App. 1991) (intent may be inferred from acts, words, and conduct of the accused). The record shows that on the evening in question, Appellant had been drinking and was possibly intoxicated. Earlier that evening he got into an altercation with another female and Courtney testified that when he drank, he was "wild," "aggressive," and "out of control." Courtney testified that despite her numerous refusals of Appellant's requests to come to her home, and despite the fact that she had taken him to his residence, he did not remain at his home or otherwise stay away from Courtney's residence. Courtney testified she was scared when

[6] Courtney described Appellant as ringing the doorbell "[w]ith attitude."

she saw him at her gate and she was scared to let him into her home. She even testified that she had to use deception in order to make entry into her residence without Appellant immediately following her. She mentioned previous occasions on which Appellant had choked her and slammed her into the wall and the floor.[7] Courtney testified that during this incident, she was frightened when he banged on her front door, when he continued sending her text messages, and when she believed he was inside her residence when she heard items being thrown around inside. Courtney's stepsister testified she too was scared. While the trial court had before it evidence from the doorbell camera showing Appellant's outwardly calm demeanor, text messages to Courtney indicating he loved her and desired only to speak with her, and photographs showing the two enjoyed their evening out, the trial court, as the fact finder, was still free to believe the testimony of the two women, as well as the other evidence supporting their testimony, and find Appellant entered the residence with the intent to commit an assault. *See Chambers v. State,* 805 S.W.2d 459, 461 (Tex. Crim. App. 1991) (a fact finder is entitled to judge the credibility of witnesses and can choose to believe all, some, or none of the testimony presented by the parties).

Overall, viewed in the light most favorable to the verdict, we find the evidence supports the trial court's finding that Appellant entered the residence with the intent to assault the Courtney. Accordingly, we overrule Appellant's sole issue on appeal.

[7] The State argues, citing *Barfield v. State*, 63 S.W.3d 446, 450-51 (Tex. Crim. App. 2001), that evidence presented in the punishment phase concerning other instances of Appellant's violent acts may be considered in determining the sufficiency of the evidence supporting Appellant's intent to commit assault because this was a trial before the bench and was not bifurcated. Because we find the evidence is sufficient to support the trial court's finding of Appellant's intent without consideration of evidence admitted during the punishment phase of trial, we do not address this aspect of the State's argument.

## CONCLUSION

Having resolved Appellant's sole issue against him, we affirm the judgment of the trial court.

Patrick A. Pirtle
Justice

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