Affirmed and Majority Memorandum Opinion filed July 9, 2020.

In The

Fourteenth Court of Appeals

NO. 14-18-00671-CR

JOHN MCKEE, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 427th District Court
Travis County, Texas
Trial Court Cause No. D-1-DC-17-204789

MAJORITY MEMORANDUM OPINION

Appellant John McKee was charged with the offense of burglary of a habitation with the intent to commit the felony offense of robbery pursuant to the Penal Code §30.02(a). The jury found McKee guilty, and assessed punishment of 30 years imprisonment, which was enhanced pursuant to the habitual-offender provision of the Penal Code. *See* TEX. PENAL CODE § 12.42(d). McKee timely filed a notice of appeal.

McKee presents two issues on appeal. His first issue challenges the legal sufficiency of the evidence to support his conviction. His second issue alleges the trial court erred by admitting hearsay evidence and by refusing his request to instruct the jury to disregard part of this evidence. We overrule both issues and affirm the judgment of the trial court.[1]

I. BACKGROUND

On July 11, 2017, an intruder entered the apartment of two complainants located in Austin, Texas. Neither saw the face of the intruder who entered their apartment or heard him speak. The intruder first encountered The first complainant and silently motioned with a handgun for The first complainant to get on the ground. The first complainant remained face down on the floor while the intruder went through the apartment. The intruder removed a wallet and cellphone from The first complainant's pockets while he was on the floor. The first complainant testified at trial that the intruder took $1,300 from the first complainant's wallet. However, the investigating officer testified that the first complainant initially reported only $300 stolen.

The intruder then went to the second complainant's room and silently instructed him to get on the floor. The second complainant covered himself with a blanket and remained on the floor until the intruder left. The second complainant told police that he believed the gun used by the intruder was a .45 caliber, but later admitted that he did not know the caliber. The second complainant testified that the intruder took approximately $50 from his room.

After the intruder left, the first complainant ran outside to tell coworkers, who

[1] The Texas Supreme Court ordered the Third Court of Appeals to transfer this appeal to the Fourteenth Court of Appeals. We must therefore decide the case in accordance with the precedent of the Third Court of Appeals if our decisions otherwise would have been inconsistent with that court's precedent. *See* Tex. R. App. P. 41.3.

had been waiting to pick him up for work, that he had been robbed. The first complainant testified, without objection, that he was told by his coworkers the intruder had gone "among -- into other apartments." None of complainants' coworkers testified at trial.

The complainants then flagged down a maintenance worker employed by the apartment complex, Lorenzo Diaz. Diaz testified that, just after the complainants ran out and told him they had been robbed, he saw a man run to a car and leave the parking lot so quickly that the tires spun. The second complainant also testified that he saw the man run through the complex and get into a car. The second complainant memorized the license plate number and Diaz took a picture of the car, which they provided to the police.

The investigating officer testified the complainants were in a state of high emotional distress when they were interviewed, and he had no reason to believe they were lying. On cross-examination, the first complainant testified he sought a work permit on the basis that he was the victim of a crime.

The police determined that the vehicle leaving the complainants' apartment complex was registered to McKee. The police found the vehicle parked outside McKee's residence. The police set up a perimeter and began watching McKee. When McKee was approached by police, he attempted to flee. The police took McKee into custody. The police secured a search warrant and searched McKee's residence. They found $1,386 in cash, two cell phones, ammunition for a .45 caliber gun and a BB gun that looks like a replica of a Smith & Wesson that matched the general description of the gun used in the burglary.

Initially, the complainants reported to the police that their cell phones were stolen, but later discovered they were mistaken. The first complainant did not notify police that his cell phone had not been stolen until September 15, 2017.

After his arrest, McKee made three phone calls from jail, the recordings of which were played for the jury. In the first call, made the same day of the crime, he asked the person who answered to check on the right side of his furnace for something there. McKee said it was in a closet and that it is "what you use" when "you go to the range." He then said, "they'll try to use that." In the second and third phone calls, McKee admitted that he was at the complainants' apartment complex and that a picture of his vehicle was taken while he was trying to leave. He also said "this [was his] story, and [he was] sticking to it", and that this was how he could "beat the rap."

II. ANALYSIS

A. STANDARD OF REVIEW

"Due process requires that the State prove, beyond a reasonable doubt, every element of the crime charged." *Lang v. State*, 561 S.W.3d 174, 179 (Tex. Crim. App. 2018). "When reviewing the sufficiency of the evidence to support a conviction, we consider all the evidence in the light most favorable to the verdict to determine whether, based on that evidence and the reasonable inferences therefrom, any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt." *Temple v. State*, 390 S.W.3d 341, 360 (Tex. Crim. App. 2013) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). In a sufficiency review, we must consider all the evidence in the record, whether direct or circumstantial, properly or improperly admitted, or submitted by the prosecution or the defense. *Thompson v. State*, 408 S.W.3d 614, 627 (Tex. App.—Austin 2013, no pet.). "Our review of 'all of the evidence' includes evidence both properly and improperly admitted." *Jenkins v. State*, 493 S.W.3d 583, 599 (Tex. Crim. App. 2016) (quoting *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007)). We assume that the trier of fact resolved conflicts in the testimony, weighed the evidence, and drew

reasonable inferences in a manner that supports the verdict. *Jackson*, 443 U.S. at 319. We consider only whether the factfinder reached a rational decision. *Arroyo v. State*, 559 S.W.3d 484, 487 (Tex. Crim. App. 2018) (citing *Morgan v. State*, 501 S.W.3d 84, 89 (Tex. Crim. App. 2016) (observing that the reviewing court's role on appeal "is restricted to guarding against the rare occurrence when a fact finder does not act rationally")).

The trier of fact is the sole judge of the weight and credibility of the evidence. *See Zuniga v. State*, 551 S.W.3d 729, 733 (Tex. Crim. App. 2018); *see also* TEX. CODE CRIM. PROC. art. 36.13 (explaining that "the jury is the exclusive judge of the facts"). Thus, when performing an evidentiary-sufficiency review, we may not re-evaluate the weight and credibility of the evidence and substitute our judgment for that of the factfinder. *Arroyo*, 559 S.W.3d at 487.

Because factfinders are permitted to make reasonable inferences, "[i]t is not necessary that the evidence directly proves the defendant's guilt; circumstantial evidence is as probative as direct evidence in establishing the guilt of the actor, and circumstantial evidence alone can be sufficient to establish guilt." *Carrizales v. State*, 414 S.W.3d 737, 742 (Tex. Crim. App. 2013). "On appeal, the same standard of review is used for both circumstantial and direct evidence cases." *Jenkins*, 493 S.W.3d at 599.

Juries are permitted to draw multiple reasonable inferences from the facts so long as each is supported by the evidence presented at trial. *Tate v. State*, 500 S.W.3d 410, 413 (Tex. Crim. App. 2016) (citing *Jackson*, 443 U.S. at 319); *Hooper v. State*, 214 S.W.3d 9, 16–17 (Tex. Crim. App. 2007). "[A]n inference is a conclusion reached by considering other facts and deducing a logical consequence from them." *Id*. at 16; *see also Winfrey v. State*, 393 S.W.3d 763, 771 (Tex. Crim. App. 2013). Further, jurors may use common sense and apply common knowledge, observation,

and experience gained in ordinary affairs of life when drawing inferences from the evidence. *Acosta v. State*, 429 S.W.3d 621, 625 (Tex. Crim. App. 2014); *Boston v. State*, 373 S.W.3d 832, 837 (Tex. App.—Austin 2012), *aff'd*, 410 S.W.3d 321 (Tex. Crim. App. 2013).

A person commits burglary of a habitation if the person, without the effective consent of the owner, enters a habitation with the intent to commit theft or enters a habitation and commits or attempts to commit theft. *See* TEX. PENAL CODE § 30.02(a)(1)(3). A person commits theft if he unlawfully appropriates property with intent to deprive the owner of it. *Id.* § 31.03(a).

B. SUFFICIENCY OF THE EVIDENCE

McKee argues that the evidence is legally insufficient to prove he was the burglar. Specifically, McKee argues the evidence is insufficient because: (1) the police reached false conclusions from the search of McKee's home; (2) the complainants never saw the burglar's face; (3) one of the complainants had a motive to perpetrate a fraudulent claim; (4) there was no DNA or surveillance evidence proving that McKee is the person who entered the complainants' apartment; and (5) McKee's jailhouse calls lack probative value. As discussed below, each of these arguments lacks merit.

1. The Search of McKee's Home

McKee argues that "false conclusions" were drawn by police from the search of his home. McKee focuses on difference between the amount of money reported stolen in the police report and the amount the complainants testified to at trial. At trial, Officer York testified that the first complainant reported $300 stolen. At trial, the first complainant testified that the amount was around $1,300. The State's explanation at trial was that this discrepancy was due to an error in translation from Spanish to English during the interview of the first complainant. This court presumes

that the jury resolved this conflict in favor of the State and we must defer to the jury's resolution of this conflict. *See Jackson*, 443 U.S. at 326; *Tate*, 500 S.W.3d at 413; *see also Rangel v. State*, 179 S.W.3d 64, 69 (Tex. App.—San Antonio 2005, pet. ref'd) (holding that jury was free to believe victim's testimony that defendant did not have consent to enter the home on the day of the burglary, and to disregard victim's inconsistent testimony that the defendant "always" had permission to enter). A jury may believe a witness even though the witness's testimony has been contradicted and a jury may accept any part of a witness's testimony and reject the rest. *Sharp v. State*, 707 S.W.2d 611, 614 (Tex. Crim. App. 1986), *cert. denied*, 488 U.S. 872 (1988).

McKee also argues that complainants' failure to notify the police for two months that the cell phones they reported stolen were not stolen caused the police to erroneously conclude that the cash found in McKee's home belonged to the complainants. However, the issue before this court is not whether the police formed an inaccurate conclusion, but whether the evidence is legally sufficient to support the jury's verdict. The jury could have rationally found that McKee stole cash based on complainants' testimony that cash was taken and that cash was found in McKee's home. Nor was the jury misled. The complainants admitted at trial their cell phones were not stolen.

2. Complainants' Failure to See the Burglar's Face

McKee argues that the evidence is insufficient to prove that he was the burglar because the complainants did not see his face.

A defendant's identity may be proven by direct or circumstantial evidence, coupled with all reasonable inferences from that evidence. *Balderas v. State*, 517 S.W.3d 756, 766 (Tex. Crim. App. 2016), *cert. denied*, 137 S. Ct. 1207 (2017).

McKee's argument fails because the State proved McKee's identity through evidence other than complainants' recognition of McKee's face. The first complainant testified that he was able to see the general physical appearance of the intruder and that the intruder was wearing black pants, a gray or brownish jacket, black tennis shoes and a hat. He further testified that in comparison to himself, the intruder was taller and "had a bigger body." Shortly after the burglary, Diaz and complainants saw a man running through the apartment complex who fit the general physical description of the burglar who got into a vehicle registered to McKee. The jury heard evidence that McKee left the apartment complex quickly, spinning the wheels of his vehicle. The jury heard evidence that the police found the vehicle parked outside McKee's residence. The jury heard testimony about the cash, the replica gun and the ammunition the police found in McKee's home, as well as the recordings of McKee's three jailhouse calls, in which he instructed the person he called to retrieve "what you use at the range." Such evidence is legally sufficient to support the jury's implied finding that McKee was the burglar. *See Benitez v. State*, No. 03-10-00185-CR, 2010 WL 4909954 (Tex. App.—Austin Dec. 1, 2010, no pet.) (mem. op., not designated for publication) (sufficiency of the evidence upheld where witness was not able to see appellant's face and there was no evidence placing him inside the burglarized residence).

3. Complainant's Motive to Perpetrate a Fraudulent Claim

McKee argues that the complainants had a motive to be dishonest because the jury heard testimony from the first complainant that he subsequently applied for a work permit on the basis he was a victim of a crime. The defense was able to cross-examine the first complainant on this issue and argue credibility and motive to the jury. We reject McKee's argument because the jury could have believed the first complainant's testimony notwithstanding any motive he may have had to testify

falsely. The jury is the sole judge of the witnesses' credibility and the weight to be given their testimony. *See Brooks v. State*, 323 S.W.3d 893, 899 (Tex. Crim. App. 2010).

4. Absence of Physical Evidence

McKee also points out the lack of physical evidence, such as video surveillance or DNA evidence, to show that he is the person who entered complainants' apartment. However, the lack of physical evidence does not render the evidence supporting McKee's conviction legally insufficient. *See Shaw v. State*, 329 S.W.3d 645, 657–58 (Tex. App.—Houston [14th Dist.] 2010, pet. ref'd) (concluding that "DNA evidence was not necessary to convict appellant" in case where complainant's testimony "by itself" was sufficient to support conviction)); *Harmon v. State*, 167 S.W.3d 610, 614 (Tex. App.—Houston [14th Dist.] 2005, pet. ref'd) (concluding that victim's testimony "standing alone" was sufficient to support aggravated robbery conviction and that "a rational jury could have found appellant guilty of [the offense] without DNA evidence, fingerprint evidence, or evidence of the gun or cash [the victim] gave to appellant").

Because a criminal conviction may be based on circumstantial evidence, we reject McKee's argument that the lack of DNA or video surveillance evidence means that the evidence is legally insufficient. *See Acosta*, 429 S.W.3d at 625. As discussed above, the jury's implied finding that McKee was the burglar is supported by other legally sufficient evidence.

5. Probative Value of the Telephone Calls

McKee argues that his jailhouse telephone calls are not probative of his guilt. The recordings of three telephone calls McKee made from jail were played for the jury. On the same day of the crime, he made the first call and asked the person who

answered to check on the right side of Appellant's furnace for something. He said it was in a closet and that it is "what you use" when "you go to the range." He then said, "they'll try to use that." In the second and third calls, he admitted that he was at the complainants' apartment complex and that a picture of his vehicle was taken while he was trying to leave. He also said "this [was his] story, and [he was] sticking to it", and that this is how he could "beat the rap." The jury was entitled to determine what weight to give this evidence. *See Brooks*, 323 S.W.3d at 899. Viewed in the light most favorable to the verdict, we conclude that this evidence has probative value that supports the jury's verdict.

Reviewing all the evidence in the light most favorable to the jury's verdict, we conclude a rational jury could have found McKee guilty of all the elements of the offense of burglary beyond a reasonable doubt. *See Jackson*, 443 U.S. at 319; *Temple*, 390 S.W.3d at 360. We overrule McKee's first issue.

C. ADMISSION OF OUT-OF-COURT STATEMENTS OF COWORKERS

In his second issue, McKee argues that the trial court erred by overruling his hearsay objections to the complainants' testimony regarding statements that were made to them by their coworkers and by refusing McKee's request to instruct the jury to disregard testimony regarding anything that the second complainant was told by someone else.

At trial, the complainants were asked repeatedly why they believed that the person they saw in the apartment complex was the perpetrator of the crime. In response, they referred to statements made by their coworkers.

The first complainant testified without objection that when he ran out onto his balcony and told his coworkers that he had been robbed "we were told he had gone among— into other apartments."

Shortly after, the first complainant was asked how he knew the person leaving in the vehicle was the same person who robbed him. The first complainant responded "[b]ecause my friend—my friend saw when the man was running to the car." The trial court overruled McKee's counsel's hearsay objection.

The second complainant also was asked how he concluded that the man running through the apartment complex was the man who entered his apartment. The second complainant answered "[b]ecause we were told" and "[b]ut that's when they tell me." The trial court sustained McKee's counsel's hearsay objection. McKee's counsel did not request to the court to instruct the jury to disregard this testimony.

On cross-examination, the second complainant was asked about seeing a man outside in the parking lot. The second complainant responded: "Yes. I had to repeat myself because we were told - - ." Before the second complainant testified as to what they were told, McKee made a hearsay objection that the trial court sustained. McKee's counsel asked the trial court to instruct the jury to disregard all testimony regarding anything that the second complainant was told by someone else, but the trial court denied the request.

On further cross-examination, the second complainant was asked:

> Q: So you determined that a random person in the apartment building was nevertheless the man that had been in your apartment.
>
> A: I don't know how else to say it. I have to repeat myself.
>
> Q: Okay. So you don't know who that man was. Isn't that true?
>
> A: I'm going to repeat myself. I'm being -- I'm being told.

McKee's counsel did not object to this testimony or request the court to instruct the jury to disregard the testimony.

Hearsay is a statement other than one made by the declarant while testifying at trial, that is offered to prove the truth of the matter asserted. TEX. R. EVID. 801(d).

Hearsay is inadmissible except as provided by statute, the rules of evidence, or other rules prescribed under statutory authority. *Id.* at 802. However, "[i]nadmissible hearsay admitted without objection may not be denied probative value because it is hearsay." *Id*.

To preserve error in the admission of evidence, a party must make a proper objection and get a ruling on that objection. TEX. R. EVID. 103(a); TEX. R. APP. P. 33.1 (a)(1)-(2). A party must object every time the inadmissible evidence is offered. *Martinez v. State,* 98 S.W.3d 189, 193 (Tex. Crim. App. 2003) (citing *Ethington v. State,* 819 S.W.2d 854, 858 (Tex. Crim. App. 1991)). "[T]he traditional and preferred procedure for a party to voice its complaint has been to seek them in sequence—that is, (1) to object when it is possible, (2) to request an instruction to disregard if the prejudicial event has occurred, and (3) to move for a mistrial if a party thinks an instruction to disregard was not sufficient." *Young v. State*, 137 S.W.3d 65, 69 (Tex. Crim. App. 2004). "However, this sequence is not essential to preserve complaints for appellate review. The essential requirement is a timely, specific request that the trial court refuses." *Id*.

An error in the admission of evidence is harmless when the same evidence comes in elsewhere without objection. *Valle v. State*, 109 S.W.3d 500, 509–10 (Tex. Crim. App. 2003); *Ethington*, 819 S.W.2d at 858. Further, the admission of hearsay testimony is harmless error when the testimony is cumulative of other evidence in the record. *See Marshall v. State*, 210 S.W.3d 618, 631 (Tex. Crim. App. 2006) (explaining that error in admission of evidence is harmless when evidence is cumulative of other evidence admitted without objection); *Anderson v. State*, 717 S.W.2d 622, 627 (Tex. Crim. App. 1986) ("Whether or not the testimony complained of was admissible as an exception to the hearsay rule is irrelevant. If the fact to which the hearsay relates is sufficiently proved by other competent and unobjected to

evidence, as in the instant case, the admission of the hearsay is properly deemed harmless and does not constitute reversible error"). McKee failed to object when the first complainant testified, without objection, that he ran out onto his balcony and told his coworkers that he had been robbed "we were told he had gone among— into other apartments." McKee's counsel also failed to object to the second complainant's testimony that he knew the man running through the complex was the same person who entered his apartment because "I'm being told." Assuming the admission of the complained of hearsay statements was error, the testimony regarding the coworkers' statements is cumulative of the testimony of Diaz and the first complainant (that they saw a man running through the apartment complex and leave in a car so quickly that the tires spun). Therefore, any error in the overruling of the hearsay objection is harmless.

We overrule McKee's second issue.

III. CONCLUSION

We conclude that the evidence is legally sufficient to support McKee's conviction, and that any error in the admission of the testimony regarding the statements of the coworkers was cured. We overrule McKee's two issues and affirm the trial court's judgment.

/s/ Margaret "Meg" Poissant
Justice

Panel consists of Justices Christopher, Spain and Poissant. (Spain, J., concurring as he would reach the issue of error before considering harm, but otherwise joins the opinion)
Do Not Publish — Tex. R. App. P. 47.2(b).