Affirmed and Opinion filed March 9, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-98-01079-CR

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RICKY JOHNSON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 180th District Court
Harris County, Texas
Trial Court Cause No. 778,369

O P I N I O N

Appellant, Ricky Johnson, was charged with the felony offense of burglary of a habitation. A jury found him guilty and the court sentenced him to forty years' confinement in the Texas Department of Criminal Justice - Institutional Division. On appeal, appellant has raised three issues for our review: whether the evidence is legally and factually sufficient to support the jury's verdict, and whether the trial court erred in denying his request for a jury instruction on a lesser included offense. We affirm.

FACTUAL BACKGROUND

On the date of the offense, David Raetzsch, an apartment complex maintenance man, went to the complainant's apartment to fix the stove. Raetzsch knocked on the apartment door and received no answer. He then obtained a key, knocked on the door again, and let himself in, yelling, "maintenance man" as he entered.

Once inside, Raetzsch noticed the apartment was a mess. While working on the stove in the kitchen, Raetzsch sensed someone standing behind him. Raetzsch turned around and saw appellant, who claimed to be a friend of the complainant. Raetzsch was suspicious, but he pretended to work on the stove for another minute or two. Raetzsch then left the apartment and reported the suspicious person to the apartment manager. The manager then notified the complainant, who checked his apartment and found the apartment had been ransacked and several pieces of jewelry had been stolen.

About an hour later, Raetzsch was on the roof of one of the apartment buildings when he saw appellant coming onto the apartment complex property. Raetzsch asked the manager to call the police. When Raetzsch and the manager confronted appellant, appellant walked quickly away. The police arrived and found appellant hiding under the bathroom sink of a vacant apartment. Appellant had two necklaces and a bracelet in his shirt pocket, which were identified as belonging to the complainant.

FACTUAL SUFFICIENCY OF THE EVIDENCE

In his first issue, appellant complains the evidence offered by the State is factually insufficient to support his conviction for burglary of a habitation because it fails to show: (1) appellant entered the complainant's habitation; (2) the intent to commit theft; and (3) the complainant owned the habitation.

In conducting a factual sufficiency review, we view "all the evidence without the prism of 'in the light most favorable to the prosecution' and set aside the verdict only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust." *Clewis v. State*, 922 S.W.2d 126, 134 (Tex. Crim. App. 1996). The appellate court is authorized to disagree with the jury's determination, even if probative evidence exists which supports the verdict. *See Jones v. State*, 944 S.W.2d 642, 647 (Tex. Crim. App. 1996). However, a factual sufficiency review must be appropriately deferential so as to avoid

substituting our own judgment for that of the fact finder. *See id.* Accordingly, we are only authorized to set aside a jury's finding in instances where it is "manifestly unjust," "shocks the conscience," or "clearly demonstrates bias." *See id.*

Appellant first argues that the State did not prove beyond a reasonable doubt that appellant entered the complainant's habitation. Appellant bases this point on the lack of evidence presented at trial of forced entry, or any evidence that appellant had a key to the apartment. Neither of those two facts must be proven to establish appellant's entry. The statute does not require proof of the manner of entry into the apartment; rather, only that entry was made. The Court of Criminal Appeals has discussed the "entry" requirement stating,

> case law and the definitions of entry show that entry has long meant an intrusion *into* the house or building . . . . There must be a "breaking of the close" to have entry in the sense long established for burglary. The protection is to the interior or enclosed part of the described object, be it a house, a building or a vehicle.

Griffin v. State, 815 S.W.2d 576, 579 (Tex. Crim. App. 1991). Sufficient proof of entry was presented by the testimony of David Raetzsch, the apartment maintenance man, who testified that he saw appellant inside the complainant's apartment. In other words, appellant's mere presence in the apartment is sufficient to show that appellant entered the complainant's habitation.

Appellant contends that, due to his previous criminal convictions, Raetzsch was not a credible witness. He further contends that because Raetzsch had a key to the apartment, he should have been the primary suspect. However, these allegations do not render the evidence factually insufficient. The jury is the sole judge of the credibility of the witnesses and the weight to be given their testimony. *See Clewis*, 922 S.W.2d at 129. Accordingly, they may choose to believe or not to believe any portion of the witnesses' testimony and we will not substitute our judgment for that of the fact finder.

Appellant's second argument is that the evidence was factually insufficient to show that he had the intent to commit theft. It is well settled that intent to commit theft is a fact question for the jury to decide and may be inferred from the surrounding circumstances, as well as from the defendant's conduct. *See*

Lewis v. State, 715 S.W.2d 655, 657 (Tex. Crim. App. 1986). The following evidence was sufficient for the jury to infer appellant's intent to commit theft: (1) appellant was seen in the complainant's apartment; (2) the complainant's apartment was ransacked and his jewelry box was empty; (3) appellant was found hiding from police in a vacant apartment; and (4) appellant was found with the complainant's jewelry on his person. From these circumstances, a rational trier of fact could have found beyond a reasonable doubt that appellant had the intent to commit theft when he entered the complainant's apartment.[1]

Finally, appellant argues that the evidence was insufficient to show that the complainant was the "owner" of the habitation. The penal code defines "owner" as a person who has title to the property, possession of the property, or a greater right to possession of the property than the actor. *See* TEX. PEN. CODE ANN. § 1.07 (a)(35)(a) (Vernon 1994). "Possession" is defined in this same section as "actual care, custody, control, or management." TEX. PEN. CODE ANN. § 1.07 (a)(39) (Vernon 1994). Any person who has a greater right to the actual care, custody, control, or management of the property than the defendant can be alleged as the "owner." *See Alexander v. State*, 753 S.W.2d 390, 392 (Tex. Crim. App. 1988).

The complainant testified that he had leased the apartment, all of the contract documents were in his name, and that he paid the rent. This uncontroverted evidence is sufficient to show that the complainant had a greater right to possession than appellant. Appellant points to minor inconsistencies in the complainant's testimony as evidence contrary to proof of ownership. However, conflict resolution is within the province of the jury. *See Heiselbetz v. State,* 906 S.W.2d 500, 504 (Tex. Crim. App.1995). We find that the evidence is factually sufficient. Appellant's first issue for review is overruled.

LEGAL SUFFICIENCY OF THE EVIDENCE

[1] Appellant claims the arresting officer's failure to make an in-court identification renders the evidence factually insufficient to show appellant's intent to commit theft. As discussed below under appellant's second issue for review, we find this argument to be without merit.

In his second issue for review, appellant complains the evidence is legally insufficient to support the verdict. Appellant claims there is no evidence to identify him as the person who was found in possession of the complainant's stolen property.[2] Appellant bases this argument on the failure of the arresting officer to formally identify him in court during trial.

In conducting a legal sufficiency review of the evidence, an appellate court must view the evidence adduced at trial in the light most favorable to the verdict and determine if any rational fact finder could have found the crime's essential elements to have been proven beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 319 (1979). The reviewing court will examine the entire body of evidence; if any evidence establishes guilt beyond a reasonable doubt, and the fact finder believes that evidence, the appellate court may not reverse the fact finder's verdict on grounds of legal insufficiency. *See id.*

While it is true that Officer Yeoman never directly identified or described appellant during trial, he referred to "the defendant" as the person he arrested, took into custody, and found in possession of the stolen jewelry. Several courts, including this court, have recognized there is no requirement that witnesses formally identify the defendant in court. *See e.g., Rohlfing v. State*, 612 S.W.2d 598, 600-601 (Tex. Crim. App. 1981); *Hime v. State*, 998 S.W.2d 893, 896 (Tex. App.—Houston [14th Dist.] 1999, no pet.); *Sepulveda v. State*, 729 S.W.2d 954, 957 (Tex. App.—Corpus Christi 1987, pet. ref'd); *Purkey v. State*, 656 S.W.2d 519, 520 (Tex. App.—Beaumont 1983, pet. ref'd). The test is whether "from a *totality of the circumstances* the jury was adequately apprised that the witness [was] referring to appellant." *Purkey*, 656 S.W.2d at 520 (quoting *Rohlfing*, 612 S.W.2d at 601) (emphasis in original). Here, appellant was the only "defendant" on trial and there was no indication the witness was referring to someone other than appellant. In addition, the record reflects that the apartment maintenance

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[2] Appellant's argument is based, in part, on his conclusion that in order to prove he intended to commit theft, the State was required to identify appellant as the person found in possession of the stolen property. Therefore, appellant maintains, the evidence shows that he was guilty, at most, of criminal trespass. As noted above under appellant's first issue for review, intent may be inferred from the surrounding circumstances. There is no requirement that proof of an actual theft is necessary to establish "intent to commit theft." In any event, we address appellant's contention that the officer's in-court identification was insufficient.

man identified appellant as the same person he saw in the custody of the police. Because the uncontroverted in-court identifications were sufficient to show that the witnesses were referring to appellant, we find that a rational trier of fact could conclude the crime's essential elements, including identification, were proven beyond a reasonable doubt. Accordingly, we find no merit in appellant's second issue.

LESSER INCLUDED OFFENSE

Appellant's third issue raises the trial court's denial of his request for a jury instruction on the lesser included offense of criminal trespass. There is a two-pronged test for determining whether a jury must be charged on a lesser included offense. *See Royster v. State*, 622 S.W.2d 442, 446 (Tex. Crim. App. 1981). First, the lesser included offense must be included within the proof necessary to establish the offense charged. *See id*. Second, there must be some evidence in the record that if the defendant is guilty, he is guilty of only the lesser offense. *See id*. Entitlement to a jury instruction on a lesser included offense must be made on a case-by-case basis according to the particular facts. *See Johnson v. State*, 915 S.W.2d 653, 657 (Tex. App.—Houston [14th Dist.] 1996, pet. ref'd). "If the evidence raises the issue of whether the accused is guilty only of the charged offense or not guilty of any offense whatsoever, the charge on the lesser offense is not required." *Williams v. State*, 796 S.W.2d 793, 799 (Tex. App.—San Antonio 1990, no pet.).

It is well established that the offense of criminal trespass[3] is a lesser included offense of burglary. *See Aguilar v. State*, 682 S.W.2d 556, 558 (Tex. Crim. App. 1985); *Day v. State*, 532 S.W.2d 302, 306 (Tex. Crim. App. 1975). Thus, the first prong of *Royster* has been satisfied. However, appellant has not met his burden on the second prong in *Royster*. The evidence offered by the State proved that

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[3] The offense of criminal trespass is defined as follows:

> (a) A person commits an offense if he enters or remains on property or in a building of another without effective consent and he:
> (1) had notice that the entry was forbidden; or
> (2) received notice to depart but failed to do so.

TEX. PEN. CODE ANN. § 30.05 (a) (Vernon 1994).

appellant entered the apartment to commit theft. There was no evidence that appellant was only guilty of criminal trespass. Accordingly, the trial court did not err in refusing appellant's request for a lesser included offense instruction. Appellant's third issue for review is overruled.

The judgment of the trial court is affirmed.

/s/ Leslie Brock Yates
Justice

Judgment rendered and Opinion filed March 9, 2000.

Panel consists of Justices Yates, Frost, and Draughn.[4]

Do Not Publish — TEX. R. APP. P. 47.3(b).

[4] Senior Justice Joe L. Draughn sitting by assignment.