In The
Court of Appeals
Sixth Appellate District of Texas at Texarkana

No. 06-19-00178-CR

RUSSELL DEAN SMITH, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 196th District Court
Hunt County, Texas
Trial Court No. 32691CR

Before Morriss, C.J., Burgess and Stevens, JJ.
Memorandum Opinion by Justice Burgess

MEMORANDUM OPINION

In 2003, Russell Dean Smith was convicted of the aggravated kidnapping and aggravated assault of Sharon Renee (Cole) Goodson. Within one month of his release from prison, Smith twice violated a protective order obtained by Goodson. As a result, Smith was convicted by a Hunt County jury of repeated violations of a protective order[1] and sentenced to life imprisonment.[2] In this appeal, Smith complains that the evidence was legally and factually insufficient to support his conviction. Because we find that the evidence was legally sufficient[3] to support Smith's conviction, we affirm the trial court's judgment.

I. Background

In October 2002, Smith kidnapped and sexually assaulted Goodson, which resulted in his 2003 convictions for aggravated kidnapping and aggravated assault. Smith was sentenced to twenty-five years' imprisonment on each count. In October 2017, Goodson had a conversation with James Howard, Smith's uncle and brother,[4] that caused her to contact the Texas Board of Pardons and Paroles (the Board). As a result of Goodson's communications with the Board, on December 13, 2017, she obtained a lifetime protective order against Smith under Chapter 7A of

[1]*See* TEX. PENAL CODE ANN. § 25.072(a) (Supp.).

[2]Because Smith was a habitual felony offender, he received an enhanced punishment. *See* TEX. PENAL CODE ANN. § 12.42(d).

[3]In his brief, Smith asserts that the evidence was both legally and factually insufficient. In *Brooks v. State*, the Texas Court of Criminal Appeals found "no meaningful distinction between the *Jackson v. Virginia*[, 443 U.S. 307 (1979)], legal-sufficiency standard and the *Clewis* [*v. State*, 922 S.W.2d 126 (Tex. Crim. App. 1996),] factual-sufficiency standard, and these two standards have become indistinguishable." *Brooks v. State*, 323 S.W.3d 893, 902 (Tex. Crim. App. 2010). Accordingly, we no longer perform factual sufficiency reviews. *See Hutchings v. State*, 333 S.W.3d 917, 919 n.2 (Tex. App.—Texarkana 2011, pet. ref'd).

[4]Smith was adopted by his grandmother, who was also Howard's mother.

the Texas Code of Criminal Procedure (the Protective Order). *See* TEX. CODE CRIM. PROC. ANN. arts. 7A.01(a), 7A.07(a-1) (Supp.). The Protective Order precluded Smith, *inter alia*, from going within 200 yards of Goodson or any location that he knew her to be, including her residence and workplace. Smith was released from prison on January 2, 2018, and was served with the Protective Order on January 12, 2018.

When she received notice that Smith was to be released from prison, Goodson talked with her managers at the McDonald's restaurant in Greenville about the Protective Order, and they asked her for a photograph of him so the staff would be able to recognize him. Goodson obtained a recent photograph from the Board, and her General Manager, Shawn Austin, hung it in the office at McDonald's so all of the employees could see it.

Around January 25, Austin and another manager, Brenda Mulcahy, observed Smith enter the restaurant with Howard, who had been a regular customer for several years. They testified that Smith kept looking around and leaned over the counter. When he observed Austin and Mulcahy watching him, Smith went out to his car and returned wearing a pair of reading glasses. Since Goodson was not working that day, Austin telephoned her.[5]

A few days later, on January 29, Smith returned to McDonald's with Howard. At the time, Goodson was working in an area behind the counter that could not be seen by customers. Again, Smith stood at the counter and looked back into the area where the employees work. Mulcahy had one of the employees go back and distract Goodson and keep her where Smith could not see her

[5]None of the McDonald's staff informed Smith that he could not be on the premises.

while Mulcahy called the police and kept an eye on him. Goodson did not see Smith until the police arrived and detained him.

By the time the police arrived, Howard and Smith were seated in Howard's pickup truck in the McDonald's parking lot. After Officer Jackie Maloy of the Greenville Police Department (GPD) identified Smith, he detained him for violation of the Protective Order. When he informed Smith why he was being detained, Smith initially denied that he knew that a protective order had been filed. At some point, Smith changed his story to claim that he did not know that Goodson worked at McDonald's. Another officer who responded to the call obtained a copy of the Protective Order from Goodson and brought it to Maloy. When he read the Protective Order and determined that a violation had occurred, Maloy transported Smith to jail.

Recordings of three telephone conversations between Smith and Howard were also played at trial. In one conversation, Howard told Smith that he had told Smith's parole officer that Goodson came up to him several months prior and said that Smith was getting out of prison. He also said that he had denied to the parole officer[6] that he knew Smith was not supposed to go to McDonald's. In the second conversation, while discussing Howard's conversation with an investigator regarding whether Smith knew the victim worked at McDonald's, Smith said, "Well, I'm sticking with I didn't know." Later, after discussing that the Protective Order did not say where Goodson worked, Smith asked Howard, "Did you happen to let it slip that I knew?" Howard

[6]Smith's parole officer testified that one of the conditions of his parole was that Smith was not intentionally or knowingly to go near Goodson's place of employment.

responded, "No, I didn't tell them two people s—t." In the third conversation, Smith told Howard that if he was called to Smith's revocation hearing, he should not "even show up."

At trial, Howard denied that he knew Goodson worked at McDonald's before the day Smith was arrested. After the telephone conversations between Smith and Howard were played for him, Howard gave a confused answer:

> Q. (By the State) That when your brother asked you if you let it slip that he knew that she worked there, your explanation is that he found out when he got arrested?
>
> A. Exactly. That day. The police were telling me and he was -- that -- that he -- that she -- that she said that -- that they said that she worked there, that I said that she worked there or something.
>
> Q. Okay. So, Mr. Howard, what exactly -- what exactly did you not let slip, then? Can you explain that for us?
>
> A. I guess that right there, that he -- that the officers said, you know, that they said that she worked there.
>
> Q. So what you did not let slip is that the officer told you that she worked there? That's what you didn't let slip to law enforcement?
>
> A. Right.
>
> Q. Who were you going to let that slip to? They already knew that.
>
> A. No, they -- well, they knew that, but they was telling me that I knew, that I had told him. And I didn't. I didn't. I told them, I didn't tell him nothing.
>
> Q. Okay. You didn't tell them anything because you didn't let it slip; is that correct?
>
> A. No. I didn't know.

Howard maintained that he did not know that Goodson worked at McDonald's and that he had not told Smith that she worked there because he did not want Smith to know that.

II. Standard of Review

"In evaluating legal sufficiency, we review all the evidence in the light most favorable to the trial court's judgment to determine whether any rational jury could have found the essential elements of the offense beyond a reasonable doubt." *Williamson v. State*, 589 S.W.3d 292, 297 (Tex. App.—Texarkana 2019, pet. ref'd) (citing *Brooks*, 323 S.W.3d at 912; *Jackson*, 443 U.S. at 319; *Hartsfield v. State*, 305 S.W.3d 859, 863 (Tex. App.—Texarkana 2010, pet. ref'd)). "Our rigorous review focuses on the quality of the evidence presented." *Id.* (citing *Brooks*, 323 S.W.3d at 917–18 (Cochran, J., concurring)). "We examine legal sufficiency under the direction of the *Brooks* opinion, while giving deference to the responsibility of the jury 'to fairly resolve conflicts in testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.'" *Id.* (quoting *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007) (citing *Jackson*, 443 U.S. at 318–19; *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007)).

In drawing reasonable inferences, the jury "may use common sense and apply common knowledge, observation, and experience gained in the ordinary affairs of life." *Duren v. State*, 87 S.W.3d 719, 724 (Tex. App.—Texarkana 2002, pet. struck) (citing *Manrique v. State*, 994 S.W.2d 640, 649 (Tex. Crim. App. 1999) (Meyers, J., concurring)). Further, the jury is the sole judge of the credibility of the witnesses and the weight to be given their testimony and may "believe all of a witnesses' testimony, portions of it, or none of it." *Thomas v. State*, 444 S.W.3d 4, 10 (Tex. Crim. App. 2014). We give "almost complete deference to a jury's decision when that decision is based on an evaluation of credibility." *Lancon v. State*, 253 S.W.3d 699, 705 (Tex. Crim. App. 2008).

It is not required that each fact "point directly and independently to the guilt of the appellant, as long as the cumulative force of all the incriminating circumstances is sufficient to support the conviction." *Id*. Circumstantial evidence and direct evidence are equally probative in establishing the guilt of a defendant, and guilt can be established by circumstantial evidence alone. *Ramsey v. State*, 473 S.W.3d 805, 809 (Tex. Crim. App. 2015); *Hooper*, 214 S.W.3d at 13 (citing *Guevara v. State*, 152 S.W.3d 45, 49 (Tex. Crim. App. 2004)).

III. Analysis

"Legal sufficiency of the evidence is measured by the elements of the offense as defined by a hypothetically correct jury charge." *Williamson*, 589 S.W.3d at 298 (quoting *Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997)). "The 'hypothetically correct' jury charge is 'one that accurately sets out the law, is authorized by the indictment, does not unnecessarily increase the State's burden of proof or unnecessarily restrict the State's theories of liability, and adequately describes the particular offense for which the defendant was tried.'" *Id*. (quoting *Malik*, 953 S.W.2d at 240).

Under the indictment and the applicable statutes, the State was required to prove beyond a reasonable doubt that Smith (1) intentionally or knowingly (2) violated the terms of the Protective Order (3) by intentionally or knowingly (4) going to or near Goodson's place of employment (5) multiple times (6) during a continuous period that was twelve months or less in duration. *See* TEX. PENAL CODE ANN. §§ 25.07(a)(3)(A), 25.072(a) (Supp.). Smith only challenges the sufficiency of the evidence showing that he knew that McDonald's was Goodson's place of employment before going there. In this regard, the jury charge instructed the jury that:

> A person acts knowingly, or with knowledge, with respect to the nature of his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or that the circumstances exist. A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result.

See TEX. PENAL CODE ANN. § 6.03(b).

As Smith points out in his brief, the Protective Order did not specify the location of Goodson's place of employment.[7] Although it was not a defense to Smith's prosecution for violating the Protective Order that this information was excluded from the order,[8] its exclusion necessarily required the State to establish he had knowledge of Goodson's place of employment by other evidence.

Viewed in the light most favorable to the jury's verdict, the evidence in this case showed that Smith accompanied his brother, who was a regular customer known to the McDonald's staff, to McDonald's. On both occasions, Smith's actions in leaning over the counter and constantly looking in the area where the employees worked were notable enough to the staff that they telephoned Goodson to let her know he was there, on one occasion, and took steps to keep her out of Smith's sight, on the other. When Smith was confronted by police on the second occasion, he initially denied any knowledge of the Protective Order, even though he had been served with it less than three weeks prior. He then changed his story to a denial that he knew Goodson worked there. In one of his telephone conversations with Howard, Smith stated that he was "sticking with"

[7]*See* TEX. FAM. CODE ANN. § 85.007(a)(2) (providing that upon request, the court may exclude "the address and telephone number of . . . the place of employment or business of a person protected by the order" from a protective order).

[8]*See* TEX. PENAL CODE ANN. § 25.07(f).

this story and wanted to make sure that Howard did not "let it slip that [he] knew." Based on Smith's actions at McDonald's, his statements to the police when confronted, and the context of his statements to Howard in the telephone conversations, the jury could have reasonably inferred that Smith knew that Goodson worked at McDonald's and that he knowingly violated the Protective Order by going there on two occasions. In addition, although Howard denied that he knew Goodson worked at McDonald's and denied that he told Smith she worked there, the jury could have reasonably discounted his denials because of his relationship with Smith and his implausible explanation of what the "did you . . . let it slip that I knew" question meant.

Based on this record, we find that any rational jury could have found beyond a reasonable doubt that Smith knowingly violated the Protective Order by knowingly going to or near Goodson's place of employment. Therefore, we find that legally sufficient evidence supported Smith's conviction. We overrule Smith's sole issue.

IV. Disposition

For the reasons stated, we affirm the trial court's judgment.

Ralph K. Burgess
Justice

Date Submitted: May 26, 2020
Date Decided: June 18, 2020

Do Not Publish