Affirmed and Opinion filed March 1, 2001.

In The

Fourteenth Court of Appeals

NO. 14-00-00401-CR

RALPH HAMELL, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 177th District Court
Harris County, Texas
Trial Court Cause No. 816,309

O P I N I O N

The State charged appellant, Ralph Hamell, with the offense of burglary of a habitation. Over his plea of not guilty, a jury found appellant guilty of the charged offense. In addition, after finding two enhancement paragraphs true, the trial court sentenced appellant to thirty-five years confinement in the Institutional Division of the Texas Department of Criminal Justice.

In four points of error appellant contends there is both legally and factually insufficient evidence to support the conviction, the trial court erred in refusing to grant a mistrial following the State's comment on appellant's failure to testify, and the trial court erred in refusing to charge the jury on the lesser included offense of trespass. We affirm.

FACTUAL BACKGROUND

Barry Baumgarten left his Harris County home early in the day on May 20, 1999. He worked very late and did not return to his home until just after four o'clock in the morning of May 21, 1999. He found the front door ajar, went into his home, and found that a VCR was missing from the living room. In addition, the window in the middle bedroom was forced open and a pane of glass in one of the kitchen windows was broken.

Later that morning, Baumgarten mentioned to his neighbor across the street, Albenio Garcia, that his home was burglarized. Incidently, Baumgarten learned that Garcia set up a security camera to monitor his property after someone broke into his car prior to this incident. When Garcia and Baumgarten viewed the tape, they discovered that the burglary was recorded.

Baumgarten recognized Christopher Smith and Ralph Hamell as the two individuals captured on tape near his home. The State introduced into evidence the videotape of the burglary. Appellant first appears on the tape walking past Baumgarten's home at 11:34 p.m. on May 20, 1999. Appellant next appears on the tape at 1:44 a.m. on May 21, 1999, when he and his companion, Smith, walk past Baumgarten's home and then return and enter his yard. Appellant followed Smith into Baumgarten's back yard. Approximately two and a half minutes later, both men returned from the back of Baumgarten's house. Baumgarten testified, in accordance with the tape, that at approximately 2:34 in the morning appellant and Smith returned once more and walked toward the back door. Later, at about 2:41 a.m., Smith is seen emerging from the front door area carrying a black square object under his arm. Simultaneously, appellant returns from behind the house, both men meet and walk away from the house.

Subsequently, Baumgarten provided the videotape to the Houston Police Department. Thereafter, appellant was charged with burglary of a habitation.

DISCUSSION AND HOLDINGS

I. Sufficiency of the Evidence

In his second and third points of error appellant argues that the evidence at trial was legally and factually insufficient to support his conviction.

When both legal and factual sufficiency points of error are raised, this court must first examine the legal sufficiency of the evidence. *Clewis v. State,* 922 S.W.2d 126, 133 (Tex. Crim. App. 1996). When reviewing the legal sufficiency of the evidence, we must view the evidence in the light most favorable to the prosecution and determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia,* 433 U.S. 307, 319 (1979); *Garrett v. State,* 851 S.W.2d 853, 857 (Tex. Crim. App. 1993). This same standard of review applies to cases involving both direct and circumstantial evidence. *King v. State,* 895 S.W.2d 701, 703 (Tex. Crim. App. 1995). On appeal, we do not reevaluate the weight and credibility of the evidence, but rather, we consider only whether the jury reached a rational decision. *Muniz v. State,* 851 S.W.2d 238, 246 (Tex. Crim. App. 1993).

When conducting a factual sufficiency review, we do not view the evidence in the light most favorable to the verdict, but we set aside the verdict "only if it is so against the great weight of the evidence as to be clearly wrong and unjust." *Clewis,* 922 S.W.2d at 129. To do this, "[t]he court reviews the evidence weighed by the jury that tends to prove the existence of the elemental fact in dispute and compares it with the evidence that tends to disprove that fact." *Johnson v. State,* 23 S.W.3d 1, 7 (Tex. Crim. App. 2000). Since the State bears the burden of proving each element of a criminal offense at trial, an appellant may challenge the sufficiency of the evidence used to establish an element of the offense by claiming that evidence supporting the adverse finding is "so weak as to be factually insufficient." *Id.* at 11. We are mindful, however, that we must give appropriate deference to the fact finder so as not to supplant the fact finder's function as the exclusive judge of the weight and credibility given to witness testimony. *Id.* at 7.

A. Legal Sufficiency

In his second point of error,[1] appellant alleges that the evidence at trial was legally insufficient to support the jury's verdict in that the evidence failed to prove that appellant, committed the crime of burglary of a habitation.[2] Specifically, he argues that he cannot be convicted only on a strong suspicion; however, he concedes that he can be convicted on circumstantial evidence. A videotape, which the jury viewed, showed appellant was present in the yard of complainant, Barry Baumgarten. There exists no direct evidence that appellant participated in the burglary. Further, appellant argues, though the video reveals Smith exiting the residence with a VCR in his hands, appellant did not possess or carry any property out of the dwelling. The video merely shows appellant was present at the burglary.

The jury charge in this case included a charge on the law of parties. TEX. PEN. CODE ANN. § 7.02(a)(2) (Vernon 1994).[3] That charge was in both the abstract and the application paragraphs of the charge. Thus, where the application paragraph refers to the law of parties described in the abstract portion of the charge, the jury is authorized to convict upon a parties theory. *Campbell v. State*, 910 S.W.2d 475, 477 (Tex. Crim. App. 1995). Under the theory of parties, a person can be guilty of burglary even though he did not personally enter the burglarized premises if he is acting together with another in the commission of the offense. *Wilkerson v. State*, 874 S.w.2d 127, 129 (Tex. App.—Houston [14th Dist.] 1994,

---

[1] We must review the legal sufficiency issue first because if the evidence is legally insufficient there must be an acquittal, leaving no cause to test the evidence for factual sufficiency, or examine any other error. *See Clewis*, 922 S.w.2d at 149 (Clinton, J. concurring).

[2] A person commits burglary if, without the effective consent of the owner, the person enters a habitation with the intent to commit a felony, theft or assault. TEX. PEN. CODE ANN. § 30.02(a)(1) (Vernon Supp. 2000).

[3] Penal Code section 7.02(a)(2) provides as follows:

> (a) A person is criminally responsible for an offense committed by the conduct of another if: ...(2) acting with intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids or attempts to aid the other person to commit the offense.

pet. ref'd). Thus, as long as appellant was acting together with another in the commission of the burglary, the State did not have to prove that appellant actually entered the burglarized premises. *Id.* Here, the video tape evidence depicts appellant and Smith repeatedly inspecting the complainant's house over a period of time beginning at 11:34 p.m. in the evening and continuing into the early the predawn hours. They go behind the house briefly at 1:44 a.m., but promptly return to the front of the house and depart. Approximately one hour later, appellant and Smith return for the last time, go to the rear of the house and quickly exit with the VCR. Even though appellant did not physically carry the VCR, the circumstantial evidence, upon which the jury may rely, demonstrates appellant was acting together with Smith in the commission of the burglary. Proof by circumstantial evidence is not subject to a more rigorous standard than is proof by direct evidence. *McGee v. State,* 774 S.W.2d 229, 238 (Tex. Crim. App. 1989). For the purposes of proving guilt beyond a reasonable doubt, direct and circumstantial evidence are equally probative. *Id.* We hold the evidence is legally sufficient to support a verdict that appellant was a party to the offense in that he assisted in the commission of the offense.

Appellant contends, in connection with both of his sufficiency arguments, the video evidence reflects that he was merely present at the Baumgarten residence, but not a party to the burglary. This argument appears to implicate the theory that the legal sufficiency of the evidence, in circumstantial evidence cases, requires the use of the "reasonable hypothesis analytical construct" as part of the standard of review under *Jackson v. Virginia*. At one time the Court of Criminal Appeals held the appellate court reviewing the legal sufficiency of the evidence was required to find that every other reasonable hypothesis raised by the evidence was negated, except that establishing the guilt of the accused, if the conviction was to be affirmed on circumstantial evidence. *See Geesa v. State*, 820 S.W.2d 154, 158 (Tex. Crim. App. 1991), *overruled in part by Paulson v. State*, 28 S.W.3d 570, 571 (Tex. Crim. App. 2000) (overruling that portion of *Geesa* requiring an instruction in the jury charge on the definition of "beyond a reasonable doubt"). However, the Court of Criminal Appeals in *Geesa* observed that it abrogated the jury charge on circumstantial evidence in *Hankins*

v. State, 646 S.W.2d 191 (Tex. Crim. App. 1983). Discontinuance of the circumstantial evidence charge did away with the very basis and authorization for the use of the "reasonable hypothesis" construct in reviewing sufficiency of the evidence in circumstantial evidence cases. *Geesa,* 820 S.W.2d at 159. Thus, in the part of *Geesa* unaffected by *Paulson,* the court held that use of the analytical construct, the exclusion of outstanding reasonable hypotheses of innocence, was rejected as a method of appellate review for evidentiary sufficiency. *Id.* at 161. We conclude here, therefore, that in reviewing the sufficiency of the evidence we do not consider whether the circumstantial evidence portrayed by the video tape negates the hypothesis that appellant was merely present at the crime scene. That analysis is no longer an element of the standard of review of the sufficiency of the evidence. Although appellant's contention regarding what the evidence suggests his status was at the crime scene may be accurate, we have held here that the jury acted rationally in finding the essential elements of the crime beyond a reasonable doubt. We need not and cannot go any further. Accordingly, appellant's contention is irrelevant to our analysis of either of his sufficiency challenges to the judgment below.

B. Factual Sufficiency

In his third point of error, appellant claims that the evidence was factually insufficient to support the jury's verdict, in that the evidence does not prove that he committed the crime. Other than presenting this Court with case law supporting the standard of review for factual sufficiency, appellant's brief on this third point duplicates the argument set out in support of his legal insufficiency claim.

Reviewing the evidence with appropriate deference to the jury's verdict, we find that the evidence is not so weak as to be factually insufficient. Appellant did not testify and did not call any witnesses. After a neutral review comparing the evidence that proves appellant's participation as a party to the offense of burglary of a habitation against the presumption of innocence that prevails in all criminal trials, we cannot say the verdict of guilty is so obviously weak as to undermine confidence in the jury's verdict. *Johnson*, 23 S.W.3d at 11. Because appellant did not muster any contrary evidence, we do not reach the

other prong of the Johnson factual sufficiency test; whether the proof of guilt is outweighed by contrary proof. *Id.*

Accordingly, points of error two and three are overruled.

II. Comment on the Appellant's Failure to Testify

In his first point of error, appellant claims the trial court erred in failing to grant a mistrial after the State commented on appellant's right to remain silent during closing argument. See U.S. CONST. amend. V; TEX. CONST. art. I, § 10; *Dickinson v. State*, 685 S.W.2d 320, 323 (Tex. Crim. App. 1984). Appellant complains of the following comment:

> I can't call the defendant to the stand, and the judge told you at the beginning we can't call co-defendants to the stand to cause them to incriminate themselves. I can't do it. Ladies and gentlemen, you and I and everyone in this courtroom knows the only people that know exactly how and when Mr. Baumgarten's house was broken into are those people in that video. They are the only people.
>
> Ladies and gentlemen, the defendant did not testify in this case, and that is his absolute right not to testify, but I ask that you not hold that against me because I did not have an opportunity to bring evidence through him.

Appellant's objection to this last comment was sustained and the jury was instructed to disregard the comment. Appellant's motion for mistrial was denied.

To violate appellant's constitutional and statutory rights, the objectionable comment, viewed from the jury's perspective, "must be manifestly intended to be of such a character that the jury would necessarily and naturally take it as a comment on the accused's failure to testify." *Fuentes v. State,* 991 S.W.2d 267, 275 (Tex. Crim. App. 1999) (quoting *Banks v. State*, 643 S.W.2d 129, 134-35 (Tex. Crim. App. 1982)). An indirect or implied allusion to the accused's failure to testify does not violate a defendant's right to remain silent. *Id.* Calling attention to the absence of evidence which only the defendant could produce will result in reversal only if the remark can only be construed to refer to appellant's failure to

testify and not the defense's failure to produce evidence. *Id.*

The complained of comment was a recognition that appellant possessed a right not to testify and the State respected that right; this is distinguishable from cases in which the State comments negatively on the defendant's failure to testify. *Id.* Moreover, to the extent such comment could be construed as an indirect comment on the defendant's failure to testify, it was not so inflammatory that any prejudicial effect could not have been removed by the trial court's instructions to disregard the remark. *Jackson v. State*, 745 S.W.2d 4, 15 (Tex. Crim. App. 1988) (holding trial court's immediate instruction to disregard cured the error, if any, even assuming statements indirectly referred to appellant's failure to testify); *Richards v. State,* 912 S.W.2d 374, 377-78 (Tex. App.—Houston [14th Dist.] 1995, pet. ref'd). Therefore, appellant's first point of error is overruled.

III. Lesser Included Offense

Appellant complains in his fourth point of error that the trial court committed reversible error when it failed to instruct the jury on the lesser included offense of criminal trespass. Specifically, he argues that the State's evidence adduced at trial raises evidence of that lesser included offense.

In determining whether a charge on a lesser included offense is required, a two step analysis is required. *Royster v. State*, 622 S.W.2d 442, 446 (Tex. Crim. App. 1975). "First, the lesser included offense must be included within the proof necessary to establish the offense charged. Secondly, there must be some evidence in the record that if the defendant is guilty, he is guilty of only the lesser offense." *Id*; *Aquilar v. State*, 682 S.W.2d 556, 558 (Tex. Crim. App. 1985).

The first prong of *Royster* is satisfied. Under the facts of this case, the offense of criminal trespass is a lesser included offense of burglary. *See Mitchell v. State,* 807 S.W.2d 740, 742 (Tex. Crim. App. 1991) (citing *Day v. State*, 532 S.W.2d 302 (Tex. Crim. App. 1975)) (analyzing the elements of burglary and criminal trespass). Next, we must determine, under the second prong of *Royster*, whether there was some evidence that, if guilty,

appellant was guilty of only the lesser included offense of criminal trespass.[4] *Skinner v. State,* 956 S.W.2d 532, 543 (Tex. Crim. App. 1997).

It is not enough that the jury may disbelieve crucial evidence pertaining to the greater offense. *Id.* Rather, there must be some evidence directly germane to a lesser included offense for the fact finder to consider before an instruction on it is warranted. *Id.* Evidence may indicate a defendant is guilty of only the lesser offense if: (1) there is evidence which refutes or negates evidence establishing the greater offense; or (2) the evidence presented is subject to different interpretations. *Saunders v. State,* 840 S.W.2d 390, 391-92 (Tex. Crim. App. 1992).

In the instant case, there was no evidence or indication whatsoever that appellant and Smith entered Baumgarten's property for any reason other than to commit theft. Appellant neither testified on his own behalf nor brought forth other witnesses. The only evidence proffered during trial consisted of the State's witnesses and video evidence, showing that appellant either committed the offense of burglary of a habitation or in the alternative was criminally responsible for the same offense committed by Smith. According to the evidence, if appellant was guilty of any offense, it was burglary. Thus, no charge on criminal trespass was required. *Denison v. State*, 651 S.W.2d 754 (Tex. Crim. App. 1983).

Appellant's fourth point of error is overruled.

Accordingly, the judgment of the trial court is affirmed.

/s/ John S. Anderson
Justice

---

[4] A person commits the offense of criminal trespass if he enters or remains on property or in a building of another without the owner's effective consent and he had notice that the entry was forbidden. TEX. CODE CRIM. PROC. ANN. art. 30.05(a)(1) (Vernon Supp. 2000).

Judgment rendered and Opinion filed March 1, 2001.

Panel consists of Justices Anderson, Fowler, and Edelman.

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