Affirmed and Opinion filed March 7, 2002.

In The

Fourteenth Court of Appeals

NO. 14-00–01501-CR

BILLY LYNN NEWTON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 262nd District Court
Harris County, Texas
Trial Court Cause No. 855,671

O P I N I O N

A jury found appellant, Billy Lynn Newton, guilty of burglary of a habitation with intent to commit sexual assault. *See* TEX. PEN CODE ANN. § 30.02(a)(1) (Vernon Supp. 2002). The jury assessed punishment at, and the court sentenced appellant to, 30 years confinement. We affirm.

FACTUAL BACKGROUND

The complainant, E.R. was asleep in the downstairs apartment of the duplex in which she lived. She was alone at the time because her roommate was out of town. Between 2:00

and 3:00 a.m., E.R. heard a loud knocking at the door of her apartment. She opened the door a few inches, looked out and saw a man, whom she later identified as appellant, walking downstairs. She went back into her apartment and tried to close the door, but appellant asked to use the phone. When E.R. said, "No," appellant pushed open the door with enough force to push E.R. back from the door and fully open the door.

Appellant then stepped into E.R.'s apartment, closed the door behind him, and threw E.R. against the couch. E.R. tried to kick appellant as appellant was trying to remove E.R.'s boxer shorts. E.R. finally kicked appellant off, but he then put his arms behind E.R.'s head and slammed her head down onto the wood floor. By this time, appellant had practically ripped off E.R.'s shorts. Appellant then unbuttoned his pants, but E.R. was screaming and struggling too much for appellant to hold her down. During the struggle, appellant's finger penetrated E.R. E.R. was bruised during the assault.

E.R. was eventually able to pull away from appellant. She lunged toward an outside door and was able to open it. With the door open, E.R. screamed. Appellant pulled E.R.'s feet from under her and ran out of the apartment.

E.R. called 911, and the police arrived about two minutes later. E.R. gave them appellant's description, and about five minutes later one of the officers apprehended appellant and returned him to the front of E.R.'s apartment, where she identified him as her assailant.

DISCUSSION

In a single issue, appellant argues the evidence was legally insufficient to support his conviction for burglary of a habitation with intent to commit sexual assault. In 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*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979); *Garrett v. State*, 851 S.W.2d 853, 857 (Tex. Crim.

App. 1993). This 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, this court does not reevaluate the weight and credibility of the evidence, but we consider only whether the jury reached a rational decision. *Muniz v. State*, 851 S.W.2d 238, 246 (Tex. Crim. App. 1993).

Texas Penal Code section 30.02(a), Burglary, provides in relevant part: "A person commits an offense if, without the effective consent of the owner, the person . . . enters a habitation, or a building (or any portion of a building) not then open to the public, with intent to commit a felony, theft, or an assault." TEX. PEN CODE ANN. § 30.02(a)(1) (Vernon Supp. 2002). Appellant challenges only the legal sufficiency of the evidence to prove he had the specific intent to commit a sexual assault. He does not challenge the sufficiency of the evidence supporting the other elements of the offense.

A person commits the offense of sexual assault if the person "intentionally or knowingly . . . causes the penetration of the anus or female sexual organ of another person by any means, without that person's consent." TEX. PEN CODE ANN. § 22.011(a)(1)(A) (Vernon Supp. 2002). A sexual assault under subsection (a)(1) is "without consent" of the other person if "the actor compels the other person to submit or participate by the use of physical force or violence." TEX. PEN CODE ANN. § 22.011(b)(1) (Vernon Supp. 2002).

The indictment charged appellant with having entered E.R.'s habitation with intent to commit sexual assault, and the State was therefore required to prove appellant had the intent to commit a sexual assault *when* he entered E.R.'s apartment. *See DeVaughn v. State*, 749 S.W.2d 62, 64-65 (Tex. Crim. App. 1988) (explaining, under former burglary statute, intent to commit felony or theft under subsection (a)(1) must exist at time of entry). In a prosecution for burglary, the specific intent to commit assault may be inferred from the circumstances. *See Wilkerson v. State*, 927 S.W.2d 112, 115 (Tex. App.—Houston [1st Dist.] 1996, no pet.) (stating intent to commit theft under burglary statute may be inferred from circumstances).

Evidence in the present case showed appellant forcibly entered E.R.'s apartment, threw her against a couch, slammed her head down on the floor, ripped her shorts, unbuttoned his pants, and inserted his finger into her vagina. This is substantially more evidence than other courts have concluded was sufficient to establish the requisite intent when the defendant entered the habitation. *See, e.g.*, *Denison v. State*, 651 S.W.2d 754 (Tex. Crim. App. 1983) (holding evidence legally sufficient to prove intent to rape when victim testified she went to bed, locked both her apartment doors, discovered man sitting on her bed at l a.m., removed gun from bedside table, put gun in man's chest, and asked him what he was doing, and man, who was masturbating, said he had been watching her, loved her, knew she was waiting for him, and he wanted to have intercourse with her); *Sendejo v. State*, 26 S.W.3d 676, 677-78 (Tex. App.—Corpus Christi 2000, pet. ref'd) (holding evidence legally and factually sufficient to show intent to commit indecency with a child when there was uncontroverted testimony defendant entered home and touched child on her leg near genital area); *Ramer v. State*, 714 S.W.2d 44, 47 (Tex. App.—Dallas 1986, pet. ref'd) (holding evidence legally sufficient to prove intent to rape when defendant broke into the apartment, jumped on top of victim in bed, had zipper open so his underwear was visible, and threatened to kill victim if she did not stop screaming); *Zapata v. State*, 646 S.W.2d 260, 262 (Tex. App.—Tyler 1982, no pet.) (holding evidence legally sufficient to show intent to rape when victim testified she awoke at approximately 1:00 a.m. to find defendant standing over her bed, he told her to roll over, he "came at [her] with a knife in the stomach," she grabbed the knife to deflect it and cut her hand, she slid out of bed in attempt to get to bathroom to lock herself inside, she engaged in struggle with defendant during which her nightgown was torn and her panties were ripped off, defendant inserted his finger in her rectum, defendant fled when she screamed, and defendant offered no evidence entry was made with any other intent); *see also Sharpe v. State*, 881 S.W.2d 487, 490 (Tex. App.—El Paso 1994, no pet.) (summarizing cases).

Just as the evidence was legally sufficient to establish the requisite intent upon entry of the habitation in the preceding cases, the evidence was legally sufficient here because appellant's conduct post-entry established his intent to commit sexual assault at the time of his entry into the habitation. We overrule appellant's sole issue presented for review.

We affirm the judgment of the trial court.

/s/ John S. Anderson
Justice

Judgment rendered and Opinion filed March 7, 2002.
Panel consists of Chief Justice Brister and Justices Anderson and Frost.
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