Affirmed and Opinion filed September 9, 1999.

In The

Fourteenth Court of Appeals

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NO. 14-98-00302-CR

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MARCUS REE JOHNSON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 176th District Court
Harris County, Texas
Trial Court Cause No. 767,907

O P I N I O N

Appellant was charged with attempted burglary of a habitation. A jury found appellant guilty and assessed punishment at six years confinement in the Texas Department of Criminal Justice—Institutional Division. In three points of error, appellant challenges his conviction. We affirm.

The complainant, Stacy Levy ("Levy"), was at home when appellant allegedly attempted to enter her house. Levy noticed appellant trying to enter through the back door, the kitchen window, and the dining room window. Levy called the police and her father,

Sam Levy. Sam Levy then called a neighbor, Corey Saoyer (Saoyer), to check on his daughter. Saoyer observed appellant walking from around the house and out onto the street; Saoyer then approached appellant. Appellant told Saoyer he was coming home from the store. Officer Pettitt was dispatched to the scene, and upon his arrival he noticed appellant walking down the street. Officer Pettitt apprehended appellant and found him carrying a knife and an empty duffel bag. Again, appellant claimed he was on his way home from the store. At trial, appellant testified he was trying to find the house of his friend, Eric Mendez, and that he rang the front doorbell and then went through a fence to the backdoor. After knocking on the backdoor, appellant walked back through the fence to the street. Appellant then encountered Saoyer and Officer Pettitt, but appellant testified he said he was looking for his friend, Eric Mendez, not that he was returning from the store.

In his first and second points of error, appellant claims that evidence adduced at trial is legally and factually insufficient to sustain a conviction of attempted burglary of a habitation.

When reviewing the legal sufficiency of the evidence, the court will look at the evidence in the light most favorable to the prosecution and determine if a rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *Garrett v. State*, 851 S.W.2d 853, 857 (Tex. Crim. App. 1993). This court will not re-evaluate the weight and credibility of the evidence, but only ensure the jury reached a rational decision. *See Muniz v. State*, 851 S.W.2d 238, 246 (Tex. Crim. App. 1993).

When reviewing the factual sufficiency of the evidence, the court will set aside the verdict only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *See Clewis v. State*, 922 S.W.2d 126, 128-29 (Tex. Crim. App. 1996). This review must be deferential so to avoid an appellate court's substituting its judgment for that of the jury. *See id.*

Criminal attempt occurs when a person acts with specific intent to commit an offense and does an act amounting to more than mere preparation that tends but fails to effect the commission of the offense. *See* TEX. PEN. CODE ANN. § 15.01(a) (Vernon 1989). Attempted burglary is established by proving beyond a reasonable doubt, by either direct or circumstantial evidence, appellant did an act amounting to more than mere preparation to enter the habitation of another. *See Flourney v. State,* 668 S.W.2d 380, 382 (Tex. Crim. App. 1984); *Roane v. State,* 959 S.W.2d 387, 388-89 (Tex. App.—Houston [14th Dist.] 1998, pet. ref'd).

Evidence at trial showed that appellant attempted to enter and burglarize the Levy home. Levy observed appellant trying to open the backdoor, the kitchen window, and then the dining room window. Levy called her father and the police. After Officer Pettitt arriaved on the scene, he identified appellant and arrested him. The officer found a knife and an empty duffel bag stuffed in appellant's pants. At trial, Saoyer and Officer Pettitt testified that appellant said he was returning from the store when he was arrested; however, appellant testified that he said he was looking for a friend, Eric Mendez. Looking at this evidence in the light most favorable to the prosecution, we believe a rational trier of fact could conclude appellant committed an act amounting to more than mere preparation to enter the house in question with the intent to commit a felony or theft. In addition, the jury is given the right to judge witness credibility, and can choose to believe some, all, or none of the testimony presented. *See Chambers v. State,* 805 S.W.2d 459, 461 (Tex. Crim. App. 1991).

In support of his argument appellant cites *Urtado v. State*, 605 S.W.2d 907 (Tex. Crim. App. 1980). *Urtado,* however, is distinguishable from the facts of the present case. In *Urtado,* appellant was charged with attempted burglary of a habitation for cutting through a window screen. *See id.* at 908. At trial, the appellant and two other witnesses, testified the appellant was not connected to the cutting of the window screen and merely touched the window screen after the offender had cut it. *See id.* at 910-11. The Court of Criminal

Appeals reversed the conviction because mere touching of a window screen is not enough to constitute an attempt to enter the habitation. *See id*. at 910-12. This is not the situation in the present case. Appellant actually performed the attempted entry into the habitation and only stopped because he could not get inside. Therefore, the holding in *Urtado* is inapplicable.

Appellant also cites *Flores v. State*, 902 S.W.2d 618 (Tex. App.—Austin 1995, pet. ref'd) to support his position. The defendant in *Flores*, however, was not even charged with the same crime. The *Flores* case involved burglary under section 30.02(a)(3) of the Texas Penal Code, which requires the actor to unlawfully enter a habitation *then* form the requisite intent to commit a felony or theft. *See id*. at 620; *see also* TEX. PEN. CODE ANN. § 30.02(a)(3) (Vernon 1989). Here, appellant was charged with criminal attempt with the underlying offense being burglary under section 30.02(a)(1), which requires the actor to unlawfully enter a habitation with the requisite intent to commit a felony or theft *already* formed. *See* TEX. PEN. CODE ANN. § 30.02(a)(1) (Vernon 1989). The court in *Flores* recognized the difference between these two offenses and reversed because the State failed to show that the defendant, once inside the building, had acquired the requisite mental state. *See Flores*, 902 S.W.2d at 620. The *Flores* court stated that, "a much closer question would be presented in the present cause had the prosecution been for burglary [under] section 30.02(a)(1); however, appellant was not charged under that part of the statute." *Id*. Therefore, the *Flores*, decision is not applicable.

We have carefully examined all of the authorities appellant has cited, but find the facts in those cases distinguishable from those in this case. For the above reasons, we hold that evidence the State presented in this case is sufficient to establish that appellant attempted to enter the Levy household without consent and with intent to commit a felony or theft therein. Also, a rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. Accordingly, we overrule points of error one and two.

In his third point of error, appellant claims the trial court erred by refusing to charge the jury on the lesser included offense of criminal trespass.

Under article 36.14 of the Texas Code of Criminal Procedure, appellant is required to specifically object to a jury charge. *See* TEX. CODE CRIM. PROC. ANN. art. 36.14 (Vernon 1981). Absent a specific and clear objection nothing is preserved for review. *See Reyes v. State*, 910 S.W.2d 585, 592 (Tex. App.—Amarillo 1995, pet. ref'd); *Rassner v. State*, 705 S.W.2d 798, 800 (Tex. App.—Houston [14th Dist.] 1986, pet. ref'd). In this case, appellant objected to the jury charge by simply stating, "I would like a trespass." This is not specific or clear enough to advise the trial court of the nature of the objeciton because there are multiple types of a criminal trespass. *See Reyes*, 910 S.W.2d at 592. For instance, if appellant asked for criminal trespass of the surrounding property of the Levy home, he would not be entitled to it because that is not a lesser included offense of attempted burglary of a habitation. *See Johnson v. State*, 773 S.W.2d 721, 724-25 (Tex. App.—Houston [1st Dis.t] 1989, pet. ref'd). On the other hand, if appellant asked for criminal trespass of a habitation then he might be entitled to it. In this case, however, appellant's objection was too general and absent a distinctly specific objection as required under article 36.14, appellant's complaint is not preserved for review. *See id.*; *Reyes*, 910 S.W.2d at 592; *Turner v. State*, 726 S.W.2d 140, 142 (Tex. Crim. App. 1987); TEX. CODE CRIM. PROC. ANN. art. 36.14 (Vernon 1981). We overrule point of error three.

We affirm the trial court's judgment.

/s/ Paul C. Murphy
Chief Justice

Judgment rendered and Opinion filed September 9, 1999.

Panel consists of Chief Justice Murphy and Justices Anderson and Hudson.

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