Affirmed and Opinion filed December 20, 2001.

In The

Fourteenth Court of Appeals

NO. 14-00-01229-CR
NO. 14-00-01231-CR

LESLIE JONES, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 184th District Court
Harris County, Texas
Trial Court Cause Nos. 815,612 and 815,613

O P I N I O N

Appellant, Leslie Jones, challenges the legal and factual sufficiency of the evidence supporting his convictions for burglary of a habitation and aggravated robbery. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

On the night of June 12, 1999, Maggie Clark locked the doors of her apartment and left with her boyfriend, Aaron Odom to get Chinese food. When they returned, the apartment had been ransacked. A noise from the back of the apartment attracted their attention. They went outside and saw an individual, later identified as the appellant, riding away on a bicycle. He was carrying what appeared to be two bags filled with Clark's possessions. Clark began

yelling for appellant to stop. Odom jumped into Clark's car and began to chase appellant. As appellant rode away on the bicycle, he discarded one of the bags. Odom followed in his car until he was able to block appellant from going any further. Odom then jumped out of the car and grabbed appellant. Appellant pulled a crowbar out of the bag and swung it at Odom, who was somewhat successful in blocking the crowbar with his hands.

Appellant began running, jumped over a fence, and disappeared from view. Several neighbors who had observed these events called the police. In the meantime, Odom asked the neighbors to set up a perimeter around the neighborhood until the police arrived. When the officers arrived on the scene, they set up more perimeters. After an intense search, Officers David Neck and Kenneth Fedderson of the Canine Division found appellant hiding in a flowerbed. Odom positively identified appellant as the stranger he had chased from Clark's apartment and the one who had assaulted him with the crowbar. Clark identified the items recovered as her property.

Appellant was charged in separate indictments, in cause number 815613 with the offense of burglary of a habitation and in cause number 815612 with the offense of aggravated robbery, both enhanced with two prior felony convictions. He pleaded not guilty to both offenses. A jury convicted him as charged and assessed punishment, enhanced with the two prior convictions, at 35 years' confinement for the burglary charge and 40 years' confinement for the aggravated robbery charge, with the sentences to run concurrently.

II. STANDARD OF REVIEW

When both the legal and factual sufficiency of the evidence are challenged, we must first determine whether the evidence is legally sufficient to support the verdict. *Clewis v. State*, 922 S.W.2d 126, 133 (Tex. Crim. App. 1996). When reviewing legal sufficiency, we view the evidence in the light most favorable to the verdict and determine whether a rational trier of fact could have found the elements of the offense beyond a reasonable doubt. *Curry v. State*, 30 S.W.3d 394, 406 (Tex. Crim. App. 2000). We consider all the evidence presented, whether properly or improperly admitted. *Green v. State*, 893 S.W.2d 536, 540 (Tex. Crim. App. 1995); *Chambers v. State*, 805 S.W.2d 459, 460 (Tex. Crim. App. 1991).

Moreover, in determining legal sufficiency, we do not examine the fact finder's weighing of the evidence, but merely determine whether there is evidence supporting the verdict. *Clewis*, 922 S.W.2d at 132 n.10. Finally, if a legal sufficiency challenge is sustained, a judgment of acquittal must be rendered. *Id.*

In contrast to legal sufficiency, a factual sufficiency review requires the court to view the evidence in a neutral light. *Johnson v. State*, 23 S.W.3d 1, 7 (Tex. Crim. App. 2000) (citing *Clewis v. State*, 922 S.W.2d 126, 134 (Tex. Crim. App. 1996)). We conduct such a review by examining the evidence that tends to prove the existence of an elemental fact in dispute and compare it with evidence tending to disprove that fact. *Id.* Under a factual sufficiency review, a court will set aside a verdict only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *Id.*

II. BURGLARY OF A HABITATION

To support his contention that the evidence presented at trial is both legally and factually insufficient to support his conviction of burglary of a habitation, appellant argues that the State failed to prove (1) he exercised a distinct and conscious assertion of a right to Clark's property and (2) he possessed the property with knowledge of the property's stolen status. Appellant's arguments lack merit.

To prove the offense of burglary, the State must show that a person, without the effective consent of the owner (1) entered 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; (2) remained concealed, with intent to commit a felony, theft, or an assault, in a building or habitation; *or* (3) entered a building or habitation and committed or attempted to commit a felony, theft, or an assault. TEX. PEN. CODE ANN. § 30.02(a)(1) (Vernon 1994). To "enter" means to intrude with any part of the body *or* any physical object connected with the body. *Id.* The state may prove the burglarious entry by circumstantial evidence. *Gilbertson v. State*, 563 S.W.2d 606, 608 (Tex. Crim. App. [Panel Op.] 1978).

The state is not required to prove that appellant exercised a distinct and conscious assertion of a right to any of Clark's property, as this is not an element of the offense of burglary. Nor is the state required to prove that appellant possessed the property with knowledge that it was stolen. The state need only have proved that appellant entered Clark's home with the intent to commit a theft. *See Matson v. State*, 819 S.W.2d 839, 843 (Tex. Crim. App. 1991); *Lewis v. State*, 715 S.W.2d 655, 657 (Tex. Crim. App. 1986) (holding the offense is complete upon the entry and a completed felony or theft not necessary).

In cases where there is merely circumstantial evidence, a conviction for burglary may rest upon the defendant having been "found in possession of recently stolen property without offering an explanation inconsistent with guilt when first called upon directly or circumstantially to do so." *Chavez v. State*, 843 S.W.2d 586, 587 (Tex. Crim. App. 1992). To draw such an inference, however, the defendant's possession of the stolen property must have been recent and unexplained, with a distinct and conscious assertion of a right to the stolen property by the possessor. *Ellis v. State*, 691 S.W.2d 799, 800 (Tex. App.–Houston [1st Dist.] 1985, no writ). Where the defendant offers a reasonable explanation of his possession and that explanation is not shown to be false, the evidence is insufficient to sustain a conviction for burglary. *Id.* Reliance on this inference, however, is necessary only where there is no direct evidence placing the defendant at the crime scene. *See Chavez*, 843 S.W.2d at 586, 587. Because this case encompasses a copious amount of direct evidence placing the appellant at the crime scene, it is not necessary to show that he was found possessing and consciously asserting a right to stolen property.

The state presented overwhelming evidence of appellant's guilt. Clark and her boyfriend observed appellant behind Clark's ransacked apartment with two bags of what appeared to be Clark's possessions. This evidence alone is sufficient to sustain appellant's conviction for burglary of a habitation. *See e.g., Brown v. State*, 792 S.W.2d 193 (Tex. App.–Houston [1st Dist.] 1990, no pet.) (finding the evidence sufficient when the complainant saw appellant fleeing his house). While chasing appellant through the neighborhood, Odom saw him discard one of the bags he was carrying. Odom fought with

appellant and was able to view him closely. Although appellant managed to escape from Odom's grip, the police apprehended appellant in the vicinity shortly thereafter. The police recovered several of the stolen items, including a stereo and a woman's jewelry box in the same area. Clark identified the property recovered as the same property taken from her home. This evidence is sufficient to support appellant's conviction for burglary. *See Thompson v. State*, 563 S.W.2d 247, 250 (Tex. Crim. App. 1978) (finding evidence sufficient when, during limited time when entry could have been made, defendant was observed walking away from scene carrying a small case, defendant fled from scene, and three items taken in the burglary were found in a field near where defendant was observed hiding); *see also Morgan v. State*, 503 S.W.2d 770, 772 (Tex. Crim. App. 1974) (finding evidence sufficient beyond a reasonable doubt where defendant was seen fleeing from scene four to five minutes after alarm sounded and property taken in the burglary was found along the path of defendant's flight).

Viewing the evidence in the light most favorable to the verdict, any reasonable juror could have found the elements of burglary of a habitation, beyond a reasonable doubt. Moreover, the jury's verdict is not clearly wrong or unjust or against the great weight and preponderance of the evidence. Accordingly, we find the evidence is both legally and factually sufficient to support appellant's burglary conviction, and we overrule both appellant's points of error challenging that conviction.

IV. AGGRAVATED ROBBERY

Appellant also contends the evidence is both legally and factually insufficient to support his conviction for aggravated robbery. He argues that the evidence is insufficient, because the property taken from Clark's home was abandoned, and, therefore, he could not have been intended to obtain or maintain control of another's property. Appellant further argues the evidence is insufficient because the aggravated robbery was a continuation of the burglary and, thus, part of the same criminal transaction. Again, we find appellant's contentions lack merit.

To establish the offense of robbery, the state must prove that appellant, while in the course of committing theft and with the intent to obtain and maintain control of the property, (1) intentionally[1], knowingly[2], or recklessly[3] caused bodily injury[4] to another; or (2) intentionally or knowingly threatened or placed another in fear of imminent bodily injury or death. TEX. PEN. CODE ANN. § 29.02 (Vernon 1994). To elevate this offense to aggravated robbery, the state had to additionally prove that during the course of the robbery appellant either (1) caused serious bodily injury[5] to another; (2) used or exhibited a deadly weapon; *or* (3) caused bodily injury to another person or threatened or placed another person in fear of imminent bodily injury or death, if the other person is over sixty-five years old or disabled. *Id*.§ 29.03.

"In the course of committing theft" means conduct that occurs in an attempt to commit, during the commission of, or in immediate flight after the attempt or commission of theft. TEX. PEN. CODE ANN. § 29.01 (Vernon 1994). "Intent to obtain or maintain control of the property" refers to the robber's state of mind regarding the property involved in the

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[1] Texas Penal Code section 6.03(a) provides that "a person acts intentionally, or with intent, with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result." TEX. PEN. CODE ANN. § 6.03(a) (Vernon 1994).

[2] Texas Penal Code section 6.03(b) provides 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." TEX. PEN. CODE ANN. § 6.03(b) (Vernon 1994).

[3] Texas Penal Code section 6.03(c) provides that "[a] person acts recklessly, or is reckless, with respect to circumstances surrounding his conduct or the result of his conduct when he is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint." TEX. PEN. CODE ANN. § 6.03(c) (Vernon 1994).

[4] Texas Penal Code section 1.07(8) defines "Bodily Injury" as "physical pain, illness, or any impairment of physical condition." TEX. PEN. CODE ANN. § 1.07(8) (Vernon 1994).

[5] Texas Penal Code section 1.07 (46) defines "Serious Bodily Injury" as "bodily injury that creates a substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ." TEX. PEN. CODE ANN. § 1.07(46) (Vernon 1994).

theft or attempted theft, not his state of mind regarding the assault component of aggravated robbery. *Bonner v. State*, 820 S.W.2d 25, 29 (Tex. App.–Houston [14th Dist.] 1991, pet. ref'd). Furthermore, a completed theft is not required in order to constitute a robbery or an aggravated robbery. *See White v. State*, 671 S.W.2d 40, 41 (Tex. Crim. App. 1984); *see also Steele v. State*, 22 S.W.3d 550, 554 (Tex. App.–Fort Worth 2000, pet. ref'd) (stating that the legislature, in defining aggravated robbery intentionally committed in course of committing a theft, meant in the course of an *attempted* theft, not a *completed* theft). The evidence introduced at trial clearly showed appellant, while in the course of committing a theft, and with the intent to maintain or obtain control over Clark's property, intentionally placed Odom in fear of imminent bodily injury or death, by use a deadly weapon,[6] i.e., a crowbar. The fact that appellant had abandoned part of the stolen property at the time he assaulted Odom is irrelevant because the state was not required to prove that appellant possessed any stolen property. Even if possession were required, the record supports it in that appellant was still holding a bag of Clark's possessions during his flight from her home. Moreover, appellant demonstrated his intent to maintain control over the property by assaulting Odom with the crowbar as appellant struggled to keep possession of the stolen items.

Appellant also contends that the evidence is insufficient because the aggravated robbery is a continuation of the burglary arising from the same criminal episode. Under the former rule, known as the "carving doctrine," the prosecution could not prosecute a defendant for more than one offense arising from a single transaction. *See Valadez v. State*, 979 S.W.2d 18, 21 (Tex. App.–Houston [14th Dist.] 1998, pet. ref'd.). In 1982, the Court of Criminal Appeals abandoned this doctrine. *Ex parte McWilliams*, 634 S.W.2d 815, 824 (Tex. Crim. App. 1982). In deciding whether the state can prosecute for more than one offense arising from the same criminal act, we are to apply the *Blockburger* test. *Id.* Under *Blockburger*, where the same criminal transaction constitutes a violation of two distinct

[6] A deadly weapon is defined as "anything that in the manner of its use or intended use is capable of causing death or serious bodily injury." TEX. PEN. CODE ANN. § 1.07(a)(17)(B) (Vernon 1994). In other words, it is sufficient if the weapon is capable of causing death or serious bodily injury or is displayed in a manner conveying an express or implied threat that serious bodily injury or death will result if the aggressor is not satisfied. *Jones v. State*, 843 S.W.2d 92, 96-97 (Tex. App.–Dallas 1992, pet. ref'd).

statutory provisions, the critical inquiry is whether each offense requires proof of a fact that the other does not. *See id*. (citing *Blockburger v. United States*, 284 U.S. 299 (1932)). We must examine the separate statutory elements of each offense. *Id.*; *see also Ex parte Joseph*, 558 S.W.2d 891, 893 (Tex. Crim. App. 1977). "Separate and distinct offenses complete within themselves, although committed one after the other, do not constitute the same transaction, but separate transactions." *Uribe v. State*, 573 S.W.2d 819, 820-21 (Tex. Crim. App. 1978); *Hawkins v. State*, 535 S.W.2d 359, 360-62 (Tex. Crim. App. 1976). Thus, we must consider whether the offenses at issue here — burglary and aggravated robbery — are separate and distinct offenses, each requiring proof that the other does not.

Burglary is an offense against property; robbery is an offense against the person. *Crank v. State,* 761 S.W.2d 328, 350 (Tex. Crim. App. 1988) overruled on separate grounds by *Alfod v. State*, 866 S.W.2d 619 (Tex. Crim. App. 1993) (finding that "the gravamen of robbery is the assaultive conduct and not the theft"); *see also Rohlfing v. State*, 612 S.W.2d 598, 602 (Tex. Crim. App. 1981) (stating "the current penal code robbery offenses are assaultive in nature and are not aggravated forms of theft"). The burglary of a habitation was committed and completed when appellant, with the intent to commit a felony or theft, entered Clark's apartment without her effective consent. During his flight from the scene, and while trying to maintain control over a portion of the stolen property, appellant assaulted Odom with a crowbar. "When one commits a burglary, and after the felonious entry commits another offense, he may be properly prosecuted for both offenses." *Bingham v. State*, 523 S.W.2d 948, 949 (Tex. Crim. App. 1975) (holding that defendant was properly convicted of both burglary and felony theft, even though evidence established that theft involved property taken in burglary); *see also Pena v. State,* 442 S.W.2d 691 (Tex. Crim. App. 1969) (holding that defendant, previously convicted of burglary of a habitation with intent to commit theft, could also be convicted for theft of property over the value of $50, even though both convictions arose from same transaction).

Although there was only one theft in this transaction that occurred during the burglary of a habitation, this same theft can be used to prove the aggravated robbery. *See Ex Parte*

Hawkins, 6 S.W.3d 554 (Tex. Crim. App. 1999) (holding that the prosecution for two robberies arising from one single theft was permitted). Even though robbery and aggravated robbery are classified as offenses against property, the taking of property is no longer an essential element of the offense. *Earl v. State,* 514 S.W.2d 273, 274 (Tex. Crim. App. 1974). The primary interest protected by the robbery offenses is the security of the person from bodily injury or threat of bodily injury during the commission of a theft. *Id.* Thus, the inquiry focuses not on the number of thefts, but rather on the number of victims involved. *See Hawkins,* 6 S.W.3d at 560. Here, the state alleges in one indictment the burglary of Clark's home and, in another, alleges the aggravated robbery of a separate victim, Odom.

The elements constituting burglary differ from those constituting aggravated robbery; each offense requires proof of facts different from those required by the other. Although stemming from a single theft, each offense was complete within itself and separate from the other, and each required evidence of different facts for conviction. Viewing the evidence in the light most favorable to the verdict, we find the jury could have found the essential elements of aggravated robbery beyond a reasonable doubt. Thus, the evidence is legally sufficient to support appellant's conviction. Additionally, we conclude the jury's determination was not so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. The evidence is therefore factually sufficient to support appellant's conviction. Accordingly, we overrule appellant's points of error challenging the legal and factual sufficiency of his conviction for aggravated robbery.

Having found no merit in appellant's arguments, we affirm the judgments of the trial court in both cases.

/s/ Kem Thompson Frost
Justice

Judgment rendered and Opinion filed December 20, 2001.
Panel consists of Justices Anderson, Hudson, and Frost.
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