Affirmed and Opinion filed December 9, 1999.

In The

Fourteenth Court of Appeals

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NO. 14-97-00520-CR

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NOE BARAHONA, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 339th District Court
Harris County, Texas
Trial Court Cause No. 738,179

O P I N I O N

After the trial court found appellant guilty of burglary of a building with the intent to commit theft as charged in the indictment, appellant entered a plea of true to the allegations in the enhancement paragraphs. The trial court found the enhancement paragraphs true and assessed punishment at confinement for 25 years. Appellant challenges the denial of the motion to suppress evidence and the sufficiency of the evidence to support his conviction. We affirm.

At approximately 11:30 p.m., Victor Rangle, a security guard for an apartment complex, observed appellant rolling tires and hiding them in the bushes on the complex property. Rangle asked appellant to

identify himself, but appellant refused. When Rangle asked him if he lived in the complex, appellant responded that he was going to leave, but Rangle could stay with the tires. When Rangle told appellant he could not leave, appellant became violent, attacked Rangle, and tried to take his gun. Rangle pushed appellant away, sprayed pepper spray in his face, and then put handcuffs on appellant.

Houston Police Officers Lopez and Cortez were dispatched to the apartment complex. When they arrived, appellant was intoxicated, belligerent, and his clothes were in disarray. Lopez arrested appellant for Class C assault and public intoxication. Appellant was uncooperative when Officer Lopez tried to place him in the patrol car.

Officers Cortez and Lopez saw the tires, which appellant attempted to hide. They had the rims and the hub on them and appeared to be display tires. Officer Cortez went to a tire store located in the vicinity of the apartment complex to see if it had been burglarized. At the tire store, Officer Cortez saw a broken window and saw that tires had been removed from two display mounts inside.

When the manager of the tire store locked the store at approximately 7:30 p.m., there were no broken windows. The manager later identified the tires that appellant hid and testified that appellant did not have permission to be in the store or to take the tires.

Motion to Suppress

Appellant contends there was no testimony that the security guard saw appellant commit a crime or that appellant was about to commit a breach of the peace when confronted by the security guard who was attempting to detain him.

The standard for reviewing a trial court's ruling on a motion to suppress evidence is *de novo*. *Guzman v. State,* 955 S.W.2d 85, 87-89 (Tex. Crim. App. 1997). At a hearing on a motion to suppress, the trial court is the sole trier of fact and judge of the credibility of the witnesses as well as the weight to be given their testimony. *Romero v. State*, 800 S.W.2d 539, 543 (Tex. Crim. App. 1990). On appellate review, the evidence presented at the suppression hearing is viewed in the light most favorable to the trial court's ruling to determine whether the trial court abused its discretion in denying the motion to suppress. *Whitten v. State,* 828 S.W.2d 817, 820 (Tex. App.—Houston [lst Dist.] 1992, pet. ref'd).

The trial court did not abuse its discretion in denying appellant's motion to suppress because there was no evidence obtained in violation of any state or federal law. Appellant abandoned the tires before there was either a detention or arrest. Therefore, any evidence developed regarding the burglary as a result of investigating the tires was not gained as a result of appellant's arrest and was therefore admissible. *Taylor v. State*, 820 S.W.2d 392, 395 (Tex. App.—Houston [14th Dist.] 1991, no pet.).

Moreover, Rangle had probable cause to make a citizen's arrest of appellant for assault. Texas Code of Criminal Procedure article 14.01 provides:

> (a) A peace officer or any other person, may, without a warrant, arrest an offender when the offense is committed in his presence or within his view, if the offense is one classed as a felony or as an offense against the public peace.
>
> (b) A peace officer may arrest an offender without a warrant for any offense committed in his presence or within his view.

Texas Code of Criminal Procedure article 14.04 provides:

> Where it is shown by satisfactory proof to a peace officer, upon the representation of a credible person, that a felony has been committed, and that the offender is about to escape, so that there is no time to procure a warrant, such peace officer may, without warrant, pursue and arrest the accused.

Rangle testified that as soon as he told appellant he could not leave, appellant turned around and became violent, pushing Rangle and reaching for Rangle's gun. Thus, appellant committed the offense of assault, an offense against the public peace, and was subject to arrest by Rangle. *Knot v. State*, 853 S.W.2d 802, 805 (Tex. App.— Amarillo 1993, no pet.). *See also Turner v. State*, 901 S.W.2d 767 (Tex. App.— Houston [14th Dist.] 1995, pet. ref'd.); *McGuire v. State*, 847 S.W.2d 684, 686 (Tex. App.—Houston [1st Dist.] 1993, no pet.).

Officer Lopez also had probable cause to arrest appellant for public intoxication. *Romo v. State*, 577 S.W.2d 251, 253 (Tex. Crim. App. 1979); *Trent v. State*, 925 S.W.2d 130, 134 (Tex. App.—Waco 1996, no pet.). Officer Lopez testified appellant smelled of alcohol and, based on

appellant's behavior, he felt appellant was a danger to himself and others. While in Officer Lopez's custody, probable cause later developed for the arrest of appellant on the basis of the burglary of a building. Once probable cause developed demonstrating appellant had committed the offense of burglary of a building, Officer Lopez legally arrested appellant for that offense as well. *West v. State*, 720 S.W.2d 511, 518 (Tex. Crim. App. 1986); *Christopher v. State*, 639 S.W.2d 932, 935 (Tex. Crim. App. 1982), *overruled on other grounds*, *Preston v. State*, 700 S.W.2d 227, 230 (Tex. Crim. App. 1985).

The trial court did not abuse its discretion in denying appellant's motion to suppress. Because appellant abandoned the tires before there was any detention or arrest, evidence gained as a result of the tires was admissible. Moreover, appellant's arrest by Rangle was justified in that appellant assaulted him, and Officer Lopez had probable cause to arrest appellant for public intoxication, and subsequently for burglary of a building. Thus, evidence gained as a result of the arrest was admissible. Appellant's first point of error is overruled.

Sufficiency of Evidence

Appellant contends the evidence is legally insufficient to support the verdict because he was merely in the vicinity of the burglary.

In analyzing a challenge to the legal sufficiency of evidence, we examine the evidence in the light most favorable to the verdict. *Narvaiz v. State*, 840 S.W.2d 415, 423 (Tex. Crim. App. 1992), *cert. denied*, 507 U.S. 975 (1993). We consider all of the evidence whether properly or improperly admitted. *Chambers v. State*, 805 S.W.2d 459, 460 (Tex. Crim. App. 1991). We then determine whether any rational trier of fact could have found the elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307 (1979); *Turner v. State*, 805 S.W.2d 423, 427 (Tex. Crim. App.), *cert. denied*, 502 U.S. 870 (1991). The trier of fact is the sole judge of the witnesses' credibility and can accept or reject any or all of a witness's testimony. *Bonhom v. State*, 680 S.W.2d 815, 819 (Tex. Crim. App. 1984), *cert. denied*, 474 U.S. 865; *Hemophile v. State*, 505 S.W.2d 560, 562 (Tex. Crim. App. 1974). 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. See *Clewis v. State*, 922 S.W.2d 126, 132 n. 10 (Tex. Crim. App. 1996).

It is the province of the trier of fact to judge the credibility of the witnesses and the weight to be given their testimony and it may resolve or reconcile conflicts in the testimony, accepting or rejecting such portions thereof as it sees fit. *Banks v. State*, 510 S.W.2d 592, 595 (Tex. Crim. App. 1974). The trier of fact is entitled to accept the State's version of the facts and reject appellant's version or reject any of the witness' testimony. *Osborne v. State*, 832 S.W.2d 407, 408 (Tex. App.—Houston [14th Dist.] 1992, no pet.).

Appellant was indicted for the offense of burglary of a building. Appellant concedes the evidence is sufficient to convict him of misdemeanor theft, but not burglary. Burglary is defined in section 30.03(a)(1) of the Texas Penal Code:

> A person commits an offense if, without the effective consent of the owner, he:
>
> (1) enters a habitation, or a building (or any portion of a building) not then open to the public, with intent to commit a felony or theft.

Where there is independent evidence of a burglary, a presumption of burglary sufficient to sustain a conviction may arise from the defendant's unexplained possession of property recently stolen in a burglary. *Johnson v. State*, 856 S.W.2d 849, 850 (Tex. App.—Fort Worth 1993, no pet.); *Jackson v. State*, 782 S.W.2d 264, 266 (Tex. App.—Houston [1st Dist.] 1989, no pet.). To justify the presumption, possession must be personal, recent, unexplained, and involve a distinct and conscious assertion of the right to the property. *Jackson*, 782 S.W.2d at 266.

Appellant's possession of the tires was very recent and unexplained. Appellant offered no explanation for his possession of the tires. Appellant also asserted his right to the tires. Rangle testified that appellant was rolling the tires and hiding them behind the bushes. He also exercised control over the tires by abandoning them in that he told Rangle he was leaving, but Rangle could keep the tires. Moreover,

appellant does not contest that he asserted a right to the tires in that he argues the evidence is sufficient to prove theft.

The burglary of the tire store occurred a short distance from where appellant was discovered with the tires, and Officer Lopez described the route that appellant could have easily taken to get the tires from the store to the apartment complex. The store manager testified that he had locked the store at 7:30 p.m. The manager also testified that the security company that monitors the alarm reported the alarm had gone off.

The tire store window was broken by a rock being thrown through it. Appellant had two fresh cuts on his forearm, which were consistent with coming from broken glass. The tires taken from the tire store were the same tires appellant was attempting to hide. The evidence considered in its entirety supports the verdict that appellant burglarized the tire store, stole the tires, and was discovered as he was rolling them away from the store.

The evidence is sufficient for a rational trier of fact to find beyond a reasonable doubt that appellant committed the offense of burglary of a building. Appellant's second point of error is overruled.

/s/ Cynthia Hollingsworth
Justice

Judgment rendered and Opinion filed December 9, 1999.

Panel consists of Justices Amidei, Lee, and Hollingsworth.[1]

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

[1] Senior Justice Norman Lee and the Honorable Cynthia Hollingsworth, former Justice, Court of Appeals, Fifth District of Texas at Dallas, participating by assignment.