AFFIRMED as MODIFIED and Opinion Filed July 23, 2020

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-19-00812-CR

KENNETH LIONELLE WILLIAMSON, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the Criminal District Court No. 1
Dallas County, Texas
Trial Court Cause No. F-1775495-H

MEMORANDUM OPINION

Before Justices Myers, Partida-Kipness, and Reichek
Opinion by Justice Reichek

Kenneth Lionelle Williamson appeals his conviction for kidnapping. In his first issue, appellant contends the evidence was legally insufficient to show the victim was alive when he was abducted. In his second and third issues, appellant contends the evidence was legally and factually insufficient to support the jury's negative finding on his affirmative defense of duress. The State brings a single cross issue contending there are two errors in the judgment that need to be corrected. We conclude the evidence is sufficient to support appellant's conviction. We further conclude the judgment requires reformation to correctly reflect the findings of the

trial court and the degree of the offense of which appellant was convicted. Accordingly, we reform the trial court's judgment as requested by the State and, as modified, we affirm.

Factual Background

In March 2017, appellant was staying in a house in Dallas, Texas, with Christina Cork, Margaret Jenkins, and Margaret's common-law husband, McClemon Grant. Cork's boyfriend, Leon Gulley, was a frequent visitor at the house which was known as a place to do drugs. Close to the house was the apartment of a drug dealer named Don Hardge. Jenkins testified appellant and Hardge were together every day.

On March 28, Jenkins overheard a conversation between appellant and Gulley in which Gulley was trying to convince appellant to help him break into Hardge's car. Later that evening, Grant returned home to find Gulley hiding in the kitchen. When Grant asked Gulley what was going on, Gulley replied he had done something stupid and had broken into someone's car. Grant told Gulley he needed to leave and then went into the bedroom. Instead of leaving, Gulley hid in a room in the house known as the "junk room."

A short time later, appellant entered the house followed soon after by Hardge, who was carrying a gun. Hardge asked Cork where her "punk-ass" boyfriend was and began searching the house. Jenkins was in her bedroom and could hear Hardge going through the rooms. Jenkins testified Hardge came into her room and she told

him Gulley was not in there. Hardge was holding the gun and told her "What goes on in Vegas, stays in Vegas" which Jenkins understood to be a threat. After Hardge walked away, Jenkins saw appellant standing in the dining room laughing.

Hardge then went into the junk room which was next to Jenkins's room. Hardge came back out looking for light and appellant handed Hardge a phone with the flashlight on. When Hardge went back into the room, Jenkins heard him say "There he is. I'm seeing him moving." Jenkins heard Hardge call Gulley "a bunch of names" followed by a gunshot. After the gunshot, Cork heard Hardge tell Gulley to "bring his ass out the room" and Gulley replied "It wasn't me, sir." Cork testified Gulley kept saying he couldn't breathe.[1]

Following the gunshot, Kurt Porter, came into the house. Several witnesses characterized Porter as Hardge's "right-hand-man" who often "worked the door" when Hardge was selling drugs out of his apartment. When Porter came in, Hardge told Porter and appellant to get Gulley out of the house. Grant stated that, after Gulley was pulled from the room, appellant and Porter each took one of Gulley's arms. According to Grant, "he come out and said, 'he's shooting, he's shooting,' but I didn't see no blood nowhere." Grant could tell Gulley was still alive as they were leaving and he thought they were taking Gulley out to beat him up and then let

[1] Cork's testimony regarding when she heard Gulley say "It wasn't me sir" was inconsistent. At some points she testified she heard him make the statement before the gunshot, and at other times she stated she heard it afterward. Cork consistently testified, however, that she heard Gulley say he couldn't breathe after the gunshot.

him go because Hardge had "done people like that before." Grant further stated he did not see any wounds on Gulley's body. Appellant and Porter carried Gulley out and put him in the trunk of a PT Cruiser parked outside. Appellant, Porter, and Hardge then drove off with Gulley in the trunk.

Cork said she did not immediately call 911 because, even though she considered Hardge to be her "best friend," she was afraid of him. Both Cork and Grant testified Hardge had made threats and pulled his gun on others, including appellant, in the past. But Cork believed Gulley was still alive and she went to Hardge's apartment to look for him. When she got to the apartment she found appellant and Porter there "hanging out." Jenkins also went to Hardge's apartment to buy some drugs and saw appellant and Porter. Jenkins stated they were all just hanging out together and it didn't look like anyone was being forced to stay there. When Cork could not find Gulley, she eventually called the police.

Grant consented to a search of the house. No blood was found in the junk room, but one of the detectives found a shell casing and a defect in the wall that appeared to be caused by a bullet ricochet. After following the angle of the ricochet, the detective found a bullet in a pile of junk in the middle of the room. The bullet was later matched to Hardge's gun.

An officer was dispatched to surveil Hardge's PT Cruiser. The car was seen leaving Hardge's apartment complex and was pulled over. Hardge and appellant were found in the car and Hardge was arrested.

The next day, officers interviewed Porter who took them to where Gulley's body had been dumped. Dr. Beth Frost, a medical examiner, performed an autopsy. Frost testified Gulley suffered three gunshot wounds: one to his chest, one to his neck, and one to his shoulder. Although Frost could not determine the order in which Gulley received each wound, the nature of the wounds, including the fact that there was bleeding caused by each one, indicated Gulley was likely alive at the time each wound was inflicted. She further stated that one of the shots could have caused two of the wounds, but there was a minimum of two gunshots. The body also had bruising and abrasions indicating Gulley was alive when he suffered some blunt force trauma. The gunshot to Gulley's chest went in through the chest bone, through the left lung, and out through his back. Frost characterized the track of the bullet through the body as hemorrhagic, meaning it caused bleeding. The autopsy showed nearly a liter of blood collected in Gulley's left pleural cavity. Frost testified the wound to the chest would not have been immediately fatal, but Gulley could have died from it quickly.

Appellant was ultimately arrested and indicted for capital murder. The indictment alleged appellant caused the death of the deceased while in the course of committing the offense of kidnapping. The case was tried to a jury. The court's charge instructed the jury on the law of criminal responsibility for the conduct of another and gave the options of finding appellant guilty of capital murder, guilty of

murder, guilty of kidnapping, or not guilty. After hearing the evidence, the jury found appellant guilty of the offense of kidnapping. This appeal followed.

Analysis

I. Kidnapping

In his first issue, appellant contends the evidence is legally insufficient to support his conviction for kidnapping. Specifically, appellant contends the evidence is insufficient to show Gulley was alive when he was taken from the house. When reviewing a challenge to the legal sufficiency of the evidence supporting a criminal conviction, we view the evidence in the light most favorable to the verdict and determine whether a rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Lucio v. State*, 351 S.W.3d 878, 894 (Tex. Crim. App. 2011). We do not resolve conflicts of fact, weigh evidence, or evaluate the credibility of the witnesses as this is the function of the trier of fact. *See Dewberry v. State*, 4 S.W.3d 735, 740 (Tex. Crim. App. 1999). Instead we determine whether both the explicit and implicit findings of the trier of fact are rational by viewing all the evidence admitted at trial in the light most favorable to the adjudication. *Adelman v. State*, 828 S.W.2d 418, 422 (Tex. Crim. App. 1992). The factfinder may choose to disbelieve all or any part of a witness's testimony. *See Sharp v. State*, 707 S.W.2d 611, 614 (Tex. Crim. App. 1986). Each fact need not point directly and independently to the guilt of the appellant as long as the cumulative force of all the incriminating circumstances is

enough to warrant conviction. *See Kennemur v. State*, 280 S.W.3d 305, 313 (Tex. App.—Amarillo 2008, pet. ref'd). Circumstantial evidence is as probative as direct evidence and can be sufficient alone to establish an accused's guilt. *Guevara v. State*, 152 S.W.3d 45, 49 (Tex. Crim. App. 2004). "A court's role on appeal is restricted to guarding against the rare occurrence when the factfinder does not act rationally." *Nisbett v. State*, 552 S.W.3d 244, 262 (Tex. Crim. App. 2018).

To be guilty of kidnapping, the defendant must abduct a person who is alive at the time of the offense. *Gribble v. State*, 808 S.W.2d 65, 72 n. 16 (Tex. Crim. App. 1990). Appellant contends a "reasonable reading of the record" suggests Gulley suffered the fatal gunshot wound to his chest while he was still in the junk room and that he was dead at the time appellant and Porter removed him from the house and placed him in the trunk of the car. Appellant focuses on the testimony that Gulley stated he could not breathe after the gunshot and that Hardge had appellant and Porter carry Gulley out to the car instead of merely forcing Gulley to walk to the car at gunpoint. In making this argument, appellant ignores extensive evidence in the record showing that Gulley was alive at the time he was abducted.

Multiple witness testified they heard Gulley speaking after Hardge fired the gunshot in the junk room and they all said Gulley appeared to be alive as he was removed from the house. The gunshot to Gulley's chest caused a hemorrhagic wound that went through his chest bone and out his back. Yet, Grant testified Gulley did not appear to be wounded and had no blood on him as he was taken out to the

car. No blood was found in the junk room and the evidence showed the bullet Hardge fired in the house ricocheted off the wall and lodged in a pile of junk. It is undisputed Hardge fired only one shot in the house and the autopsy of Gulley showed he suffered three gunshot wounds caused by a minimum of two bullets. The medical examiner stated that, because all the shots caused bleeding, it was likely Gulley was alive when all the wounds were inflicted. Furthermore, the jury was free to conclude it was unlikely Hardge would continue to shoot Gulley after he was taken from the house if Gulley was already dead. Based on the foregoing, we conclude the evidence is sufficient to support the jury's finding that Gulley was alive at the time appellant took part in his abduction. *See Santellan v. State*, 939 S.W.2d 155, 163 (Tex. Crim. App. 1997) (evidence that victim could have survived for several minutes after gunshot sufficient to support kidnapping finding). We resolve appellant's first issue against him.

II. Duress

In his second and third issues, appellant contends the evidence is legally and factually insufficient to support the jury's rejection of his affirmative defense of duress. Affirmative defenses may be evaluated for both legal and factual sufficiency. *Butcher v. State*, 454 S.W.3d 13, 20 (Tex. Crim. App. 2015). The factfinder's rejection of a defendant's affirmative defense should be overturned for legal insufficiency only if the defendant establishes that the evidence conclusively proves his affirmative defense, and no reasonable factfinder was

free to think otherwise. *Id.* Under a factual sufficiency review, a finding rejecting a defendant's affirmative defense cannot be overruled unless the verdict is so against the great weight of the evidence as to be manifestly unjust, conscience-shocking, or clearly biased. *Matlock v. State*, 392 S.W.3d 662, 671 (Tex. Crim. App. 2013).

Duress is an affirmative defense to prosecution requiring the defendant to prove by a preponderance of the evidence that he committed the offense "because he was compelled to do so by threat of imminent death or serious bodily injury to himself or another." TEX. PENAL CODE ANN. § 8.05(a). To raise the defense, the evidence must show both compulsion and imminency. *Murkledove v. State*, 437 S.W.3d 17, 26 (Tex. App.—Fort Worth 2014, pet. denied). Compulsion is force or threat of force that would render a person of reasonable firmness incapable of resisting the pressure. TEX. PENAL CODE ANN. § 8.05(c). An imminent threat is a present threat of harm. *See Devine v. State*, 786 S.W.2d 268, 270–71 (Tex. Crim. App. 1989). A threat is imminent when: (1) the person making the threat intends and is prepared to carry out the threat immediately, and (2) the threat is predicated on the threatened person's failure to commit the charged offense immediately. *Cormier v. State*, 540 S.W.3d 185, 190 (Tex. App.—Houston [1st Dist.] 2017, pet. ref'd) (citing *Devine*, 786 S.W.2d at 270–71). Threats of future harm are not sufficient to prove duress. *Id.* at 190–91. And a generalized fear of harm is not sufficient to raise the issue of imminent harm. *Brazelton v. State*, 947 S.W.2d

644, 648 (Tex. App.—Fort Worth 1997, no pet.). A duress defense is unavailable if the defendant intentionally, knowingly, or recklessly placed himself in a situation in which it was probable he would be subjected to compulsion. TEX. PENAL CODE ANN. § 8.05(d); *Guia v. State*, 220 S.W.3d 197, 205 (Tex. App.—Dallas 2007, pet ref'd).

Appellant contends the evidence shows he acted under duress because the witnesses testified Hardge was carrying a gun, ordering people around, and making threatening comments at the time of the kidnapping. The witnesses also testified that everyone was generally scared of Hardge and he had threatened others, including appellant, in the past. There was no evidence, however, that Hardge made any threats to appellant on the day of, or in connection with, the kidnapping. Jenkins stated she saw appellant laughing as Hardge was searching the house for Gulley. She further testified appellant hung out with Hardge every day and appellant was in Hardge's apartment immediately after the offense. It did not appear to Jenkins that appellant was being forced to stay with Hardge. Applying the required standard of review, we conclude the evidence is both legally and factually sufficient to support the jury's rejection of appellant's affirmative defense of duress. We resolve appellant's second and third issues against him.

III. Judgment Correction

In a single cross issue, the State contends there are two errors in the judgment that require correction. In an earlier nunc pro tunc order, the trial court corrected its judgment of conviction to reflect that appellant was convicted of kidnapping under

section 20.03 of the Texas Penal Code rather than aggravated kidnapping under section 20.04(A)(1-6). The State now requests we reform the judgment to reflect the correct degree for the offense of kidnapping which is a third-degree felony rather than a first-degree felony. The State further requests that that we correct the judgment to reflect that the trial court found the second enhancement paragraph alleged in appellant's indictment true which raised the punishment range for his offense to that of a second-degree felony.

We agree with the State that the judgment needs to be corrected. We have the power to modify a judgment to speak the truth when we have the necessary information to do so. *See* TEX. R. APP. P. 43.2(b); *Bigley v. State*, 865 S.W.2d 26, 27–28 (Tex. Crim. App. 1993); *Asberry v. State*, 813 S.W.2d 526, 529 (Tex. App.—Dallas 1991, pet. ref'd) (en banc). Accordingly, we reform the trial court's judgment to replace "1ST DEGREE FELONY" under "Degree of Offense" with "3RD DEGREE FELONY." We further reform the judgment to replace "N/A" in the space next to "Finding on 2nd Enhancement Paragraph" with "TRUE." As modified, we affirm the trial court's judgment.

/Amanda L. Reichek/
AMANDA L. REICHEK
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

KENNETH LIONELLE WILLIAMSON, Appellant	On Appeal from the Criminal District Court No. 1, Dallas County, Texas Trial Court Cause No. F-1775495-H.
No. 05-19-00812-CR V.	Opinion delivered by Justice Reichek. Justices Myers and Partida-Kipness participating.
THE STATE OF TEXAS, Appellee	

Based on the Court's opinion of this date, the judgment of the trial court is **MODIFIED** as follows:

> The words "1ST DEGREE FELONY" under "Degree of Offense" are **DELETED** and **REPLACED** with the words "3RD DEGREE FELONY." We further reform the judgment to **DELETE** "N/A" in the space next to "Finding on 2nd Enhancement Paragraph" and **REPLACE** it with the word "TRUE."

As **REFORMED**, the judgment is **AFFIRMED**.

Judgment entered July 23, 2020