

No. \_\_\_\_\_

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In the  
**Supreme Court of the United States**  
OCTOBER TERM, 2021

WILLIAM LARRY FOLEY,  
*Petitioner,*

v.

THE STATE OF TEXAS  
*Respondent.*

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PETITION FOR WRIT OF CERTIORARI  
TO THE TEXAS COURT OF CRIMINAL APPEALS

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**PETITION FOR WRIT OF CERTIORARI**

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## **QUESTION PRESENTED FOR REVIEW**

**IS THE EVIDENCE SUFFICIENT TO SUSTAIN THE JURY'S GUILTY  
VERDICT?**

## TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW .....	i
TABLE OF CONTENTS .....	ii
TABLE OF AUTHORITIES .....	iii
REPORTS OF OPINIONS.....	1
JURISDICTION .....	1
BASIS OF FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE.....	2
CONSTITUTIONAL PROVISIONS.....	3
STATEMENT OF THE CASE .....	4
Procedural History .....	4
Statement of Facts .....	5
REASONS WHY CERTIORARI SHOULD BE GRANTED.....	8
CONCLUSION.....	11
RELIEF REQUESTED .....	12
CERTIFICATE OF SERVICE.....	13
APPENDIX.....	14

## TABLE OF AUTHORITIES

### CASES

<u>Clark v. State</u> , 47 S.W.3d 211 (Tex. App.—Beaumont 2001, no pet.) . . . . .	9
<u>Couchman v. State</u> , 3 S.W.3d 155 (Tex. App.—Fort Worth 1999, pet. ref'd) . . . . .	9
<u>Creech v. State</u> , 718 S.W.2d 89 (Tex. App.—El Paso 1986, no pet.) . . . . .	9
<u>Earls v. State</u> , 707 S.W.2d 82 (Tex. Crim. App. 1986) . . . . .	9
<u>Johnson v. State</u> , 673 S.W.2d 190 (Tex. Crim. App. 1984) . . . . .	9
<u>Malik v. State</u> , 953 S.W.2d 234 (Tex. Crim. App. 1997) . . . . .	7
<u>Morgan v. State</u> , 501 S.W.3d 84 (Tex. Crim. App. 2016) . . . . .	6, 7
<u>United States v. Quimby</u> , 636 F.2d 86 (5th Cir. 1981) . . . . .	9
<u>Rice v. State</u> , 801 S.W.2d 16 (Tex. App.—Fort Worth 1990, pet. ref'd) . . . . .	9
<u>Roberson v. State</u> , 16 S.W.3d 156 (Tex. App.—Austin 2000, pet. ref'd) . . . . .	9
<u>Williams v. State</u> , 235 S.W.3d 742 (Tex. Crim. App. 2007) . . . . .	6

### STATUTES

28 U.S.C., § 1257(a) . . . . .	5
TEX. PENAL CODE ANN. § 30.02 . . . . .	7, 8
U.S. CONST. amend. IVX . . . . .	5
U.S. CONST. amend. V . . . . .	5
U.S. CONST. amend. VIII . . . . .	5

## **REPORTS OF OPINIONS**

The decision of the Twelfth Court of Appeals for Texas is reported as *Foley v. State*, No. 12-20-00017-CR (Tex. App.—Tyler, October 20, 2021, pet. ref'd.). It is attached to this Petition in the Appendix. The decision of the Texas Court of Criminal Appeals to deny Mr. Foley's Petition for Discretionary Review, dated January 26, 2022, is also attached to this Petition in the Appendix.

## **JURISDICTION**

The decision by the Court of Criminal Appeals of Texas affirmed the Twelfth Court of Appeals of Texas's judgment of conviction and sentence in the 7th District Court of Smith County, Texas.

Consequently, Mr. Foley files the instant Application for a Writ of Certiorari under the authority of 28 U.S.C., § 1257(a).

## **BASIS OF FEDERAL JURISDICTION**

### **IN THE COURT OF FIRST INSTANCE**

Jurisdiction was proper in Smith County, Texas because Mr. Foley was indicted for violations of state law by a Grand Jury for Smith County, Texas.

## **CONSTITUTIONAL PROVISIONS**

### **U.S. CONST. amend. V**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

### **U.S. CONST. amend. VIII**

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

### **U.S. CONST. amend. IVX**

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## **STATEMENT OF THE CASE**

### **1. Procedural History.**

The Twelfth Court of Appeals affirmed Ms. Foley's appeal in an opinion that was handed down on October 20, 2021. *Foley v. State*, No. 12-20-00017-CR (Tex. App.—Tyler, October 20, 2021, pet. filed). No motion for rehearing was filed. The Court of Criminal Appeals denied Mr. Foley's petition for discretionary review on January 26, 2022.

### **2. Statement of Facts**

This criminal case involves a burglary of a habitation allegedly committed by Mr. Foley. The incident took place around 2 a.m. on April 16, 2019. [12 R.R. 21]. Twilajoy Whitehead lived in an apartment on Kennedy Street in Tyler, Texas with a friend, Lauren Billie Coon, that she met at the Salvation Army Homeless Shelter. Ms. Coon's boyfriend, Benjamin Seastrunk, also lived in the apartment with them because Ms. Coon was pregnant with his child. [12 R.R. 75].

Ms. Whitehead is originally from the town of Buna in the Jasper, Texas area. She was married with four children, but she had separated from her husband and her children were living with her father-in-law in the Southeast Texas area. [12 R.R. 38-41]. Ms. Whitehead has three prior felony convictions, including one for theft. [12 R.R. 37-38] She was trying to make a fresh start in Tyler. She worked long shifts at

a Pizza Hut. Ms. Coon worked at a McDonald's restaurant. Mr. Seastrunk did not work as he apparently qualified as disabled and therefore received disability payments from the government. [12 R.R. 75-76].

After Ms. Whitehead arrived home from work that evening, she was tired. She drank several alcoholic beverages, smoked cigarettes and was generally relaxing in her apartment. [12 R.R. 48]. Ms. Coon went upstairs with Mr. Seastrunk to visit a friend named "Swag" who lived upstairs. [12 R.R. 47] Ms. Whitehead testified that, while they were upstairs, she went to close her door. The door was slightly ajar. Before she could close it, a man opened the door and hit her in the face, bloodying her nose. He choked her and continued to attack her until other people pulled him off of her [12 R.R. 27-30] She said she had never seen her attacker before in her life. [12 R.R. 30] Ms. Whitehead described her attacker as a "black guy, tall and bald". [12 R.R. 30]. She did not identify Mr. Foley as her assailant. No one at trial identified Mr. Foley as the assailant. Officer Darty testified that Mr. Foley was arrested that evening as he walked down a street several blocks away from the Kennedy Street apartments for this crime because he matched the description provided by the witnesses of a bald, hairy black man who was not wearing a shirt and who may or may not have had tattoos. [12 R.R. 69; 122-123]

Mr. Foley was convicted by a jury of burglary of a habitation. Thereafter, the trial court sentenced Mr. Foley to life imprisonment. The notice of appeal was then timely filed.

## **REASONS WHY CERTIORARI SHOULD BE GRANTED**

### **I. THE EVIDENCE IS INSUFFICIENT TO SUSTAIN THE JURY'S GUILTY VERDICT.**

The evidence introduced during the jury trial is legally insufficient to sustain the jury's verdict. Mr. Foley contends that the State failed to introduce sufficient evidence for the jury to find Mr. Foley guilty beyond a reasonable doubt of Burglary of a Habitation, as charged in the Indictment. Therefore, this Court should reverse the conviction and enter a finding of acquittal.

The evidence introduced during the jury trial is legally insufficient to sustain the jury's verdict. The key question is whether "the evidence presented actually supports a conclusion that the defendant committed the crime that was charged." *Williams v. State*, 235 S.W.3d 742, 750 (Tex. Crim. App. 2007); *see Morgan v. State*, 501 S.W.3d 84, 89 (Tex. Crim. App. 2016). Mr. Foley contends that the State failed to introduce sufficient evidence for the jury to find him guilty beyond a reasonable doubt of Burglary of a Habitation, as charged in the Indictment. Therefore, this Court should reverse the conviction and enter a finding of acquittal.

The statutory elements of burglary of a habitation, as alleged in the indictment, are that (I) appellant, (ii) with intent to commit assault, (iii) entered a habitation (iv) without the effective consent of the complainant, the owner. *See Tex. Penal Code*

Ann. § 30.02(a)(1). Section 22.01 defines assault as (1) intentionally, knowingly, or recklessly caus[ing] bodily injury to another, including the person's spouse; (2) intentionally or knowingly threaten[ing] another with imminent bodily injury, including the person's spouse; or (3) intentionally or knowingly caus[ing] physical contact with another person when the person knows or should reasonably believe that the other will regard the contact as offensive or provocative.

The sufficiency of the evidence is measured against the elements of the offense as defined by a hypothetically correct jury charge. *See Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997). Such a charge would include one that "accurately sets out the law, is authorized by the indictment, does not unnecessarily increase the State's burden of proof or unnecessarily restrict the State's theories of liability, and adequately describes the particular offense for which the defendant was tried." *Id.*

As correctly set forth in the charge to the jury, a person commits the offense of burglary of a habitation if, without the effective consent of the owner, he (a) enters a habitation with intent to commit an assault; or (b) enters a habitation and commits or attempts to commit an assault. See TEX. PENAL CODE ANN. § 30.02. A person charged with burglary under § 30.02(a)(1) is guilty of that offense the moment that he crosses the threshold of a habitation without consent and with the intent to commit the underlying felony. *Id.*; *see also Morgan*, 501 S.W.3d at 90.

The evidence is insufficient in this case because the evidence failed to prove, beyond a reasonable doubt, that Mr. Foley committed the offense.

This court should consider these factors in determining the sufficiency of the evidence:

\* Not a single witness positively identified Mr. Foley as the perpetrator of, participant in, or party to the offense of conviction.

\*The State did not present evidence of Mr. Foley entering the habitation at issue.

\*Neither Ms. Whitehead nor Ms. Coon was able to positively identify Mr. Foley as the person whom they saw in their residence.

\*No physical evidence ties Mr. Foley to the burglary beyond reasonable doubt. No fingerprints or DNA were recovered.

\*Officers with the Tyler Police Department arrested Mr. Foley several blocks from the scene of the burglary as he walked down the street. The officers believed he matched the description provided by Ms. Whitehead. The description of the burglar was that he was a black man who was bald and hairy.

Absent proof that Mr. Foley is the individual who committed the offense, his burglary conviction cannot stand. See TEX. PENAL CODE ANN. § 30.02. The State must prove beyond a reasonable doubt that the accused is the person who committed

the crime charged. *Roberson v. State*, 16 S.W.3d 156, 167 (Tex. App.—Austin 2000, pet. ref'd); *see also Johnson v. State*, 673 S.W.2d 190, 196 (Tex. Crim. App. 1984); *Rice v. State*, 801 S.W.2d 16, 17 (Tex. App.—Fort Worth 1990, pet. ref'd). Identity may be proved by direct or circumstantial evidence. *Robertson*, 16 S.W.3d at 167; *see also Earls v. State*, 707 S.W.2d 82, 85 (Tex. Crim. App. 1986); *Couchman v. State*, 3 S.W.3d 155, 162 (Tex. App.—Fort Worth 1999, pet. ref'd); *Creech v. State*, 718 S.W.2d 89, 90 (Tex. App.—El Paso 1986, no pet.). “In fact, identity may be proven by inferences.” *Robertson*, 16 S.W.3d at 167; *see also United States v. Quimby*, 636 F.2d 86, 90 (5th Cir. 1981); *see Clark v. State*, 47 S.W.3d 211, 214 (Tex. App.—Beaumont 2001, no pet.).

When there is no direct evidence of the perpetrator’s identity elicited from trial witnesses, no formalized procedure is required for the State to prove the identity of the accused. *Id.* The absence of an in court identification does not render the evidence insufficient if there is other evidence sufficient to identify the defendant as the perpetrator. *Couchman*, 3 S.W.3d at 162. In Mr. Foley’s case, there was no in-court identification of him as the perpetrator of the offense. The fatal flaw in this case is that the rest of the evidence is insufficient to identify him as the perpetrator. Mr. Foley was sentenced to a life sentence for an offense for which there was insufficient evidence to convict him.

The evidence, measured against the application paragraph of the jury charge, is legally insufficient to support the jury's verdict of burglary of a habitation with the intent to commit or committed aggravated assault. The State failed to prove that Mr. Foley is the individual who actually entered the residence. The State failed to prove that Mr. Foley is the perpetrator of the burglary. The lack of evidence is fatal to this conviction, and the conviction should be vacated.

In light of the authorities cited above after viewing the evidence, or lack thereof, in the light most favorable to the State, no rational trier of fact could have found the essential elements of the crime charged beyond a reasonable doubt. The evidence is legally insufficient to support Mr. Foley's conviction.

## CONCLUSION

This Petition for Writ of Certiorari should be granted and the decision of the Texas Court of Criminal Appeals and the Twelfth Court of Appeals for Texas should be vacated, and the case should be remanded for proceedings consistent with this Court's opinion.

Respectfully submitted,

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## **RELIEF REQUESTED**

FOR THESE REASONS, the Petitioner moves this Court to grant a Writ of Certiorari in order to review the Judgment of the Court of Criminal Appeals for the State of Texas.

Respectfully submitted,

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## **CERTIFICATE OF SERVICE**

I certify that on the 25th day of April, 2022, I served one (1) copy of the foregoing Petition for Writ of Certiorari on the following individuals by mail (certified mail return receipt requested) by depositing same, enclosed in post paid, properly addressed wrapper, in a Post Office or official depository, under the care and custody of the United States Postal Service, or by other recognized means pursuant to the Rules of the Supreme Court of The United States of America, Rule 29:

Michael West  
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WILLIAM LARRY FOLEY  
TDCJ #02307061  
SID# 05378167  
BETO UNIT  
1391 FM 3328  
TENNESSEE COLONY, TX 75880

/s/ Amy R. Blalock  
**AMY R. BLALOCK**

No. \_\_\_\_\_

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WILLIAM LARRY FOLEY,

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v.

THE STATE OF TEXAS,

*Respondent.*

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**APPENDIX**

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**NO. 12-20-00017-CR**

**IN THE COURT OF APPEALS**

**TWELFTH COURT OF APPEALS DISTRICT**

**TYLER, TEXAS**

***WILLIAM LARRY FOLEY,  
APPELLANT***

***§ APPEAL FROM THE 7TH***

***V.***  
***THE STATE OF TEXAS,  
APPELLEE***

***§ JUDICIAL DISTRICT COURT***

***§ SMITH COUNTY, TEXAS***

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***MEMORANDUM OPINION***

The Texas Court of Criminal Appeals remanded this case to us to determine if the “time payment” fee in the judgment should be struck as prematurely assessed in light of *Dulin v. State*, 620 S.W.3d 129, 133 (Tex. Crim. App. 2021).<sup>1</sup> We modify the judgment and affirm as modified.

**BACKGROUND**

Appellant was indicted for burglary of a habitation with the intent to commit assault, a second-degree felony.<sup>2</sup> Appellant entered a plea of “not guilty” and the case proceeded to a jury trial. The jury found Appellant “guilty” as charged in the indictment. Appellant elected to have the trial court assess his punishment. Appellant pleaded “true” to the State’s allegations that he had previously been finally convicted of two sequential felony offenses, elevating his punishment range to imprisonment for twenty-five years to ninety-nine years or life.<sup>3</sup> The trial court sentenced Appellant to life imprisonment. This appeal followed.

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<sup>1</sup> *Foley v. State*, PD-1257-20, 2021 WL 1940243, at \*1 (Tex. Crim. App. May 12, 2021).

<sup>2</sup> TEX. PENAL CODE ANN. § 30.02(c)(2) (West 2019).

<sup>3</sup> *Id.* § 12.42(d) (West 2019).

## SUFFICIENCY OF THE EVIDENCE

In his first issue, Appellant argues that the evidence is insufficient to support his conviction. Specifically, he contends the evidence is insufficient to establish that he is the individual who committed the burglary.

### Standard of Review

In Texas, the *Jackson v. Virginia* legal sufficiency standard is the only standard that a reviewing court should apply in determining whether the evidence is sufficient to support each element of a criminal offense that the State is required to prove beyond a reasonable doubt. *Brooks v. State*, 323 S.W.3d 893, 912 (Tex. Crim. App. 2010). Legal sufficiency is the constitutional minimum required by the Due Process Clause of the Fourteenth Amendment to sustain a criminal conviction. *See Jackson v. Virginia*, 443 U.S. 307, 316–17, 99 S. Ct. 2781, 2786–87, 61 L. Ed. 2d 560 (1979). The standard for reviewing a legal sufficiency challenge is whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *See id.*, 443 U.S. at 319, 99 S. Ct. at 2789. The evidence is examined in the light most favorable to the verdict. *Id.* A successful legal sufficiency challenge will result in rendition of an acquittal by the reviewing court. *See Tibbs v. Florida*, 457 U.S. 31, 41–42, 102 S. Ct. 2211, 2217–18, 72 L. Ed. 2d 652 (1982). This familiar standard gives full play to the responsibility of the trier of fact to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. *See Jackson*, 443 U.S. at 319, 99 S. Ct. at 2789.

Under this standard, we may not sit as a thirteenth juror and substitute our judgment for that of the factfinder by reevaluating the weight and credibility of the evidence. *See Dewberry v. State*, 4 S.W.3d 735, 740 (Tex. Crim. App. 1999); *see also Brooks*, 323 S.W.3d at 899. Instead, we defer to the factfinder’s resolution of conflicting evidence unless the resolution is not rational. *See Brooks*, 323 S.W.3d at 899–900. When the record supports conflicting inferences, we presume that the factfinder resolved the conflicts in favor of the prosecution and therefore defer to that determination. *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007). Direct and circumstantial evidence are treated equally. *Id.* Circumstantial evidence is as probative as direct evidence in establishing the guilt of an actor, and circumstantial evidence alone can be sufficient to establish guilt. *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007). The duty of a reviewing court is to ensure that the evidence presented supports a

conclusion that the defendant committed the crime charged. *See Williams v. State*, 235 S.W.3d 742, 750 (Tex. Crim. App. 2007).

The sufficiency of the evidence is measured against the elements of the offense as defined by a hypothetically correct jury charge. *See Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997). Such a charge would include one that “accurately sets out the law, is authorized by the indictment, does not unnecessarily increase the State’s burden of proof or unnecessarily restrict the State’s theories of liability, and adequately describes the particular offense for which the defendant was tried.” *Id.*

### **Applicable Law**

As pertinent to this case, a person commits the offense of burglary of a habitation if, without the effective consent of the owner, he enters a habitation with the intent to commit assault. TEX. PENAL CODE ANN. § 30.02 (a)(1) (West 2019). One manner in which a person commits assault is if he intentionally, knowingly, or recklessly causes bodily injury to another. *Id.* § 22.01 (a)(1) (West Supp. 2020).

The State must prove beyond a reasonable doubt that the accused is the person who committed the crime charged. *Roberson v. State*, 16 S.W.3d 156, 167 (Tex. App.—Austin 2000, pet. ref’d) (citing *Johnson v. State*, 673 S.W.2d 190, 196 (Tex. Crim. App. 1984); *Rice v. State*, 801 S.W.2d 16, 17 (Tex. App.—Fort Worth 1990, pet. ref’d)). Identity may be proved by direct or circumstantial evidence. *Robertson*, 16 S.W.3d at 167 (citing *Earls v. State*, 707 S.W.2d 82, 85 (Tex. Crim. App. 1986); *Couchman v. State*, 3 S.W.3d 155, 162 (Tex. App.—Fort Worth 1999, pet. ref’d); *Creech v. State*, 718 S.W.2d 89, 90 (Tex. App.—El Paso 1986, no pet.)). “In fact, identity may be proven by inferences.” *Robertson*, 16 S.W.3d at 167 (citing *United States v. Quimby*, 636 F.2d 86, 90 (5th Cir. 1981)); *see Clark v. State*, 47 S.W.3d 211, 214 (Tex. App.—Beaumont 2001, no pet.); *see also Jones v. State*, 900 S.W.2d 392, 399 (Tex. App.—San Antonio 1995, pet. ref’d) (explaining that jury may use common sense and apply common knowledge, observation, and experience gained in ordinary affairs of life when giving effect to inferences that may reasonably be drawn from evidence).

### **The Evidence at Trial Regarding Identity**

Twilajoy Whitehead, the victim of the burglary, testified she was alone in her apartment on South Kennedy Avenue in Tyler, Texas during the early morning hours of April 16, 2019. When she heard loud noises outside, Whitehead went to lock the partially open front door. As

she attempted to lock the door, a man forced his way through the door and into her apartment. Whitehead testified that the man hit her in the face and choked her with her necklace. When her necklace broke, the man began choking her with his hands. Whitehead recalled falling to the ground and the attacker getting on top of her and choking her with his hands. She lost consciousness and when she came to, her roommate's boyfriend, Benjamin Seastrunk, and the apartment maintenance man were pulling the man off her. Whitehead believed she scratched the man while trying to defend herself. She was unable to recall how or when the man left the scene. Whitehead's roommate, Lauren Coon, called law enforcement. Whitehead could not identify Appellant as her attacker, but recalled the attacker was a tall, black, bald male. Whitehead testified she believed the attacker's family lived in the apartment next door, because after the attack she went outside to smoke a cigarette and the residents of the apartment threatened to "beat her up" if "the law got called."

Coon testified she was upstairs at a neighbor's apartment during the burglary. Coon heard loud banging noises and returned to her apartment where she found Whitehead on the ground with a man on top of her and his hands around her throat and his knees on her chest. Coon recognized the man because she had seen him "around the apartments" but she did not know his name. Coon testified the man was a light skinned black male with a bald head, wearing no shirt and a pair of dark shorts. She described the man as between five feet six inches and five feet eight inches tall with a small to medium, but muscular build. Coon testified that Seastrunk recalled observing tattoos on the man. She testified that the man left the apartment on foot and walked to the right of the apartment building. Coon called law enforcement, reported the burglary, and gave the emergency services dispatcher the man's physical description and direction of travel. Coon testified the attacker's family members, who resided next door, refused to tell her the attacker's name.

Tyler Police Department Officer Adam Riggle responded to the scene and spoke with Whitehead, Coon, and Seastrunk. Riggle testified that the three individuals collectively described the attacker as a light skinned black male, bald headed, short in stature, muscular in build, wearing dark shorts but no shirt, with visible tattoos, and a hairy chest. Riggle broadcasted the attacker's description to other officers in the area who were searching for the suspect.

Officers Joshua Darty and Joshua Allen both testified they were en route to the Kennedy Avenue apartment complex when Riggle asked them to search the nearby area for the suspect, who was reported to be on foot. Darty testified they located Appellant shortly after receiving Riggle's description. Appellant was found walking on a sidewalk within a block or two of the Kennedy Avenue apartment complex. Allen and Darty testified that Appellant matched the description of the attacker and was traveling on foot in the direction of travel described by Coon.

Both Darty and Allen wore body cameras that captured video and audio footage of their contact with Appellant. This footage was introduced at trial. The footage confirms that Appellant matched the suspect description given by Whitehead, Coon, and Seastrunk. The footage showed Darty approach Appellant and tell him he matched the description of an assault suspect. Appellant asked Darty if the witnesses said he had tattoos, and Darty responded that the witnesses described the suspect as having tattoos. Appellant denied assaulting anyone and further denied even being at the Kennedy Avenue apartment complex. Darty asked Appellant about a bleeding cut on Appellant's chin, and Appellant told Darty that he "got into it" with his girlfriend "awhile ago." Darty pointed out that the cut was bleeding and fresh, and asked Appellant if he "wanted to change his story." Appellant then told Darty that "she started squabbling with a [expletive]." Darty asked Appellant to clarify who started squabbling with him. Appellant told Darty he was at his niece's home and got into a squabble with a girl that he did not know, the "chick was tripping," and hit him in the eye area, and he grabbed the girl, who slipped and fell. He told Darty the girl was "full of liquor" and stated "[we] can go over there right now." Appellant asked Allen if "she said I hit her." Appellant then told Allen that his niece told him to leave her home because the police were called. Darty transported Appellant to the Kennedy Avenue apartment complex. Darty testified and the footage confirms that Appellant did not dispute the location of the "squabble" but reiterated to Darty that the girl was "drunk."

Riggle testified he arrested Appellant at the scene based on all the evidence and transported Appellant to jail. Riggle's in car camera captured video and audio footage of the transport. During this footage, which was played for the jury, Appellant tells Riggle that his niece lives in the Kennedy Avenue apartment complex. Riggle, Darty, and Allen identified Appellant in open court, in the jury's presence, as the individual they arrested for the burglary.

## **Analysis**

As previously stated, a person commits the offense of burglary of a habitation if, without the effective consent of the owner, he enters a habitation with the intent to commit assault. TEX. PENAL CODE ANN. § 30.02 (a)(1). Appellant does not challenge the State's proof on any element of the offense except identity. Identity may be proved by direct or circumstantial evidence, or by inferences. *Robertson*, 16 S.W.3d at 167. When there is no direct evidence of the perpetrator's identity elicited from trial witnesses, no formalized procedure is required for the State to prove the identity of the accused. *Id.* Furthermore, proof by circumstantial evidence is not subject to a more rigorous standard than proof by direct evidence; direct and circumstantial evidence are equally probative for purposes of proving guilt beyond a reasonable doubt. *Id.* The sufficiency of the evidence is determined from the cumulative effect of all the evidence; each fact in isolation need not establish guilt. *Alexander v. State*, 740 S.W.2d 749, 758 (Tex. Crim. App. 1987). The absence of an in court identification does not render the evidence insufficient if there is other evidence sufficient to identify the defendant as the perpetrator. *Couchman*, 3 S.W.3d at 162.

While no witness at trial identified Appellant as the burglar, the record contains ample circumstantial evidence to establish Appellant's identity as the burglar. Appellant matched the detailed physical description given by Whitehead, Coon, and Seastrunk. Further, Appellant was apprehended on foot near the scene shortly after the burglary. Appellant initially denied assaulting anyone or being at the Kennedy Avenue apartment complex but later admitted to having a physical altercation with a woman at the Kennedy Avenue apartment complex. Appellant also acknowledged that his niece lived at the Kennedy Avenue apartment complex and admitted to leaving the apartment complex because his niece told him the police were called. This is consistent with Whitehead's and Coon's testimony that Appellant's family lived next door and did not want the police called. Moreover, Appellant had a bleeding cut on his chin, consistent with Whitehead's testimony that she scratched the attacker. The cumulative effect of the evidence is sufficient to circumstantially prove that Appellant was the individual who burglarized and assaulted Whitehead. See *Robertson*, 16 S.W.3d at 167; *Alexander*, 740 S.W.2d at 758; *see also McKee v. State*, No. 14-18-00671-CR, 2020 WL 3862328, at \*4 (Tex. App.—Houston [14th Dist.] July 9, 2020, no pet.) (mem. op., not designated for publication) (circumstantial evidence sufficient to prove identity in burglary prosecution despite no in court

identification); *see also Benitez v. State*, No. 03-10-00185-CR, 2010 WL 4909954, at \*2 (Tex. App.—Austin Dec. 1, 2010, no pet.) (mem. op., not designated for publication) (same). Thus, viewing the evidence in the light most favorable to the jury’s verdict, we conclude that the jury was rationally justified in finding, beyond a reasonable doubt, that Appellant committed burglary of a habitation with the intent to commit assault. *See* TEX. PENAL CODE ANN. §§ 22.01(a)(1); 30.02(a)(1); *Jackson*, 443 U.S. at 319, 99 S. Ct. at 2789; *see also Brooks*, 323 S.W.3d at 899. Accordingly, we overrule Appellant’s first issue.

### COURT COSTS

In Appellant’s second issue, he argues that the trial court erred in assessing a “time payment” fee previously authorized by Texas Local Government Code, Section 133.103 in its judgment.<sup>4</sup> On original submission, the State conceded that this fee is facially unconstitutional.

Several courts, including this one, have held subsections (b) and (d) of Section 133.03 unconstitutional. *See, e.g., Irvin v. State*, No. 12-19-00347-CR, 2020 WL 5406276, at \*7 (Tex. App—Tyler Sept. 9, 2020), *vacated*, 2021 WL 1940593 (Tex. Crim. App. May 12, 2021); *Ovalle v. State*, 592 S.W.3d 615, 618 n.1 (Tex. App.—Dallas 2020), *vacated*, 2021 WL 1938672 (Tex. Crim. App. May 12, 2021); *Simmons v. State*, 590 S.W.3d 702, 712 (Tex. App.—Waco 2019), *vacated*, 2021 WL 1938758 (Tex. Crim. App. May 12, 2021); *Johnson v. State*, 573 S.W.3d 328, 340 (Tex. App.—Houston [14th Dist.] 2019), *vacated*, 2021 WL 1939984 (Tex. Crim. App. May 12, 2021). However, the Court of Criminal Appeals has recently held that the pendency of an appeal stops the clock for the purposes of the time payment fee. *Dulin*, 620 S.W.3d at 133.

Fines are punitive and intended to be part of the convicted defendant’s sentence. *See Armstrong v. State*, 340 S.W.3d 759, 767 (Tex. Crim. App. 2011). Court costs, however, are “compensatory in nature” and are “a non-punitive recoupment of the costs of judicial resources

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<sup>4</sup> The Texas Legislature passed legislation, effective January 1, 2020, that transfers Texas Local Government Code, Section 133.103 to Texas Code of Criminal Procedure, Article 102.030 and revises the statute to provide that all of the fees collected under the section are “to be used for the purpose of improving the collection of outstanding court costs, fines, reimbursement fees, or restitution or improving the efficiency of the administration of justice in the county or municipality.” *See* Act of May 23, 2019, 86th Leg., R.S., S.B. 346, § 2.54, 2019 Tex. Sess. Law Serv. Ch. 1352. The changes apply only to a cost, fee, or fine assessed on a conviction for an offense committed on or after the effective date of the Act. *Id.* § 5.01. Because the offense in this case was committed before January 1, 2020, the former law applies. *See Ovalle v. State*, 592 S.W.3d 615, 617 n.1 (Tex. App.—Dallas 2020), *vacated on other grounds*, 2021 WL 1938672 (Tex. Crim. App. May 12, 2021).

expended in connection with the trial of the case.” *Id.*; *Williams v. State*, 495 S.W.3d 583, 590 (Tex. App.—Houston [1st Dist.] 2016), *pet. dism’d, improvidently granted*, 2017 WL 1493488 (Tex. Crim App. 2017).

Here, the judgment of conviction reflects that the trial court assessed \$344.00 in court costs. The judgment includes a document identified as “Order to Withdraw Funds,” which states that Appellant incurred “[c]ourt costs, fees and/or fines and/or restitution” in the amount of \$344.00. The certified bill of costs itemizes the court costs imposed, which total \$344.00 with a \$344.00 balance remaining. The bill of costs includes a \$25.00 time payment fee and includes a paragraph stating that a \$15.00 fee will be assessed if any part of the court costs is paid on or after the 31st day after the date the judgment assessing the court costs is entered.<sup>5</sup> *But see* TEX. LOC. GOV’T CODE ANN. § 133.103(c) *redesignated as* TEX. CODE CRIM. PROC. ANN. art. 102.030 (West Supp. 2020) (treasurer shall deposit ten percent of fees collected under this section in general fund of county or municipality for purpose of improving efficiency of administration of justice in county or municipality).

As previously stated, the Texas Court of Criminal Appeals recently explained that the pendency of an appeal stops the clock for purposes of the time payment fee. *Dulin*, 620 S.W.3d at 133. Consequently, the assessment of the time payment fee in Appellant’s case is premature, and the fee should be struck in its entirety, without prejudice to being assessed later if, more than thirty days after the issuance of the appellate mandate, Appellant has failed to completely pay his court costs. *See id.*

The proper remedy when a trial court erroneously includes amounts as court costs is to modify the judgment to delete erroneous amounts. *See Sturdivant v. State*, 445 S.W.3d 435, 443 (Tex. App.—Houston [1st Dist.] 2014, pet. ref’d). Accordingly, we will modify the trial court’s judgment and attached order to withdraw funds to reflect the appropriate assessment of court costs that do not include the time payment fee. *See Dulin*, 620 S.W.3d at 133. Appellant’s second issue is sustained.

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<sup>5</sup> The bill of costs contains a chart describing each fee and listing the “fee code,” as well as the amount of the fee and the balance due. The bill reflects that the total amount of court costs assessed is \$344.00, which includes the \$25.00 “time payment” fee, but not the \$15.00 “additional time payment fee” referenced in the paragraph below the chart.

**DISPOSITION**

Having sustained Appellant's second issue, we ***modify*** the trial court's judgment and attached order to withdraw funds to reflect that the amount of court costs is \$319, by deleting the time payment fee, without prejudice to it being assessed later, if more than thirty days after the issuance of our mandate, Appellant fails to completely pay his court costs. *See* TEX. R. APP. P. 43.2(b). We further ***modify*** the bill of costs to reflect same. *See id.* In all other respects, we ***affirm*** the trial court's judgment.

**GREG NEELEY**  
Justice

Opinion delivered October 20, 2021.  
*Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.*

(DO NOT PUBLISH)



## COURT OF APPEALS

### TWELFTH COURT OF APPEALS DISTRICT OF TEXAS

#### JUDGMENT

OCTOBER 20, 2021

NO. 12-20-00017-CR

**WILLIAM LARRY FOLEY,**  
Appellant  
v.  
**THE STATE OF TEXAS,**  
Appellee

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Appeal from the 7th District Court  
of Smith County, Texas (Tr.Ct.No. 007-0984-19)

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THIS CAUSE came to be heard on the appellate record and the briefs filed herein, and the same being considered, because it is the opinion of this court that the judgment of the court below should be modified and as modified, affirmed.

It is therefore ORDERED, ADJUDGED and DECREED that the judgment of the court below be **modified** to withdraw funds to reflect that the amount of court costs is \$319, by deleting the time payment fee, without prejudice to it being assessed later, if more than thirty days after the issuance of our mandate, Appellant fails to completely pay his court costs.; in all other respects the judgment of the trial court is **affirmed**; and that this decision be certified to the court below for observance.

Greg Neeley, Justice.  
*Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.*

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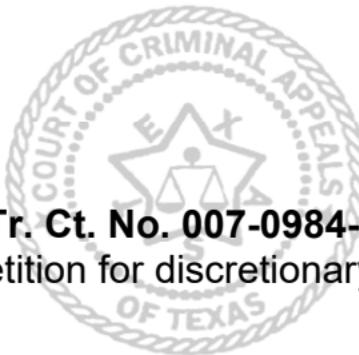
**FOLEY, WILLIAM LARRY** Tr. Ct. No. 007-0984-19

**COA No. 12-20-00017-CR**

**PD-0878-21**

On this day, the Appellant's petition for discretionary review has been refused.

Deana Williamson, Clerk



12TH COURT OF APPEALS CLERK  
KATRINA MCCLENNY  
1517 W. FRONT, ROOM 354  
TYLER, TX 75701  
\* DELIVERED VIA E-MAIL \*

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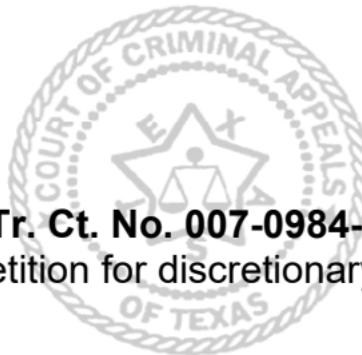
**FOLEY, WILLIAM LARRY** Tr. Ct. No. 007-0984-19

**COA No. 12-20-00017-CR**

**PD-0878-21**

On this day, the Appellant's petition for discretionary review has been refused.

Deana Williamson, Clerk



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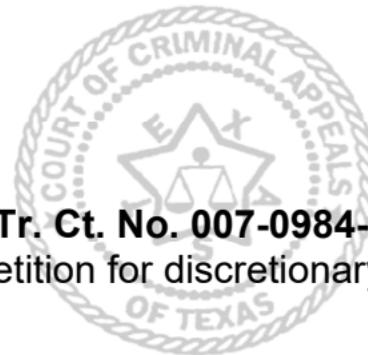
**FOLEY, WILLIAM LARRY** Tr. Ct. No. 007-0984-19

**COA No. 12-20-00017-CR**

**PD-0878-21**

On this day, the Appellant's petition for discretionary review has been refused.

Deana Williamson, Clerk



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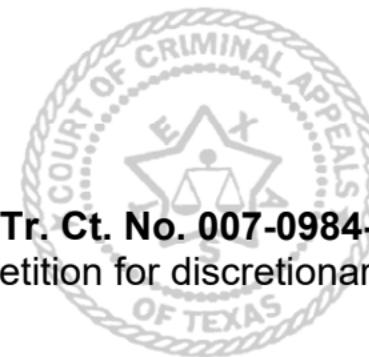
**FOLEY, WILLIAM LARRY** Tr. Ct. No. 007-0984-19

**COA No. 12-20-00017-CR**

**PD-0878-21**

On this day, the Appellant's petition for discretionary review has been refused.

Deana Williamson, Clerk



MICHAEL J. WEST  
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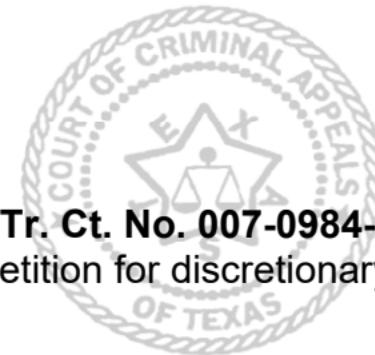
**FOLEY, WILLIAM LARRY** Tr. Ct. No. 007-0984-19

**COA No. 12-20-00017-CR**

**PD-0878-21**

On this day, the Appellant's petition for discretionary review has been refused.

Deana Williamson, Clerk



DISTRICT ATTORNEY SMITH COUNTY  
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