COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

KARAN ELIAS,	§	No. 08-15-00057-CR
Appellant,	§	Appeal from
v.	§	County Criminal Court at Law No. 1
THE STATE OF TEXAS,	§	of El Paso County, Texas
Appellee.	§	(TC # 20100C07299)

O P I N I O N

Karam Elias was charged by information with the offense of Deceptive Business Practice, specifically, for intentionally, knowingly, or recklessly selling less than the represented quantity of a property or service, pursuant to TEX.PEN.CODE ANN. § 32.42(b)(2)(West 2011). Appellant's trial began on December 3, 2014, and once the State rested its case-in-chief, Appellant moved for a directed verdict asserting that the State failed to prove beyond a reasonable doubt the requisite intent needed to sustain Appellant's conviction. The trial court denied Appellant's motion for a directed verdict and the jury ultimately convicted him. Appellant was placed on probation and the trial court ordered him to pay restitution in the amount of $140,715.79. Appellant timely filed this appeal. For the reasons that follow, we affirm.

FACTUAL SUMMARY

Chimene and Kevin Mark owned a home in El Paso and decided to undergo a major remodeling project in anticipation of the birth of their third child. The Marks hired Antonio Rodriguez, owner of Sipcon Homes, as their contractor. In July 2008, the Marks entered into a written contract with Rodriguez for the remodeling project with an agreed upon price of $127,315 and a completion date of November 14, 2008. The contract specified that the Marks' payments to Rodriguez would occur in increments and dictated which portions of the project were to be completed, essentially laying out a timeline format.

In September 2008, Appellant arrived at the Marks' home with Rodriguez. Rodriguez introduced Appellant as his new partner and advised the Marks that Appellant would be completing the remodeling project. Appellant reassured the Marks that he was the person for the job and would have their project completed on time and according to their blue print specifications. Appellant repeated that he was taking over the project. Between October 23, 2008 and December 14, 2008, the Marks made payments directly to Appellant in the amounts of $18,300; $7,163; $25,000; and $15,000. The amount of these checks totaled $65,463. During the punishment phase of Appellant's trial, defense counsel elicited from Chimene that Appellant used $40,000 from the money received for expenses for the remodeling project. On November 22, 2008, Chimene requested several change order contracts with Rodriguez because she felt like the project was not going according to their plan and the November 14th completion date in the contract had already passed. According to Chimene, the Marks began to question Appellant and Rodriguez's decisions because they had already written several checks, which Appellant cashed, but had seen no progress with the remodeling project. As a result, the Marks met with Appellant and Rodriguez several times because they became concerned about where their money was

going. Appellant and Rodriguez advised the Marks that it took time to order the materials and that they could not expect them to order the materials one day and have them show up the next day. Chimene testified that Appellant told them that he had to keep the project flowing and continuously order materials. After receiving this reassurance, the Marks continued to pay Appellant because he promised them that everything was being ordered and that they would begin seeing progress shortly. In December 2008, Appellant cashed a check written by the Marks for $15,000 and told them it was for doors and windows despite the fact that Appellant had previously been given a check for the doors and windows in October 2008. Because the project was not progressing according to the Marks' original timeline, the Marks, Appellant, and Rodriguez signed a new tentative project schedule on February 1, 2009. Chimene testified that Appellant told her and her husband that because Rodriguez owed him money, he was not going to use the money that the Marks gave him for the remodeling project, but was going to keep it for himself instead. Later that month, the Marks met with an attorney who sent Rodriguez and Appellant a formal demand letter requesting specific performance on the contract. Several weeks after the Marks sent the demand letter, two unidentified individuals showed up unannounced at the Marks' home and began working on the home without following the appropriate safety protocol. As a result of this incident, the Marks fired Appellant and Rodriguez. The State called Ron Roth, a building inspector for the city, to testify about the inspection he performed on the Marks' home. There were several aspects of the project that were either not completed or not in compliance with city code. Violations included: the improper installation of the structural insulated panels ; the improper anchoring of the tresses ; a failure to install weep screed, which must be installed in homes with a stucco finish to safeguard against leaks in the walls ; the gas lines that were installed failed the pressure test that ensured

gas leaks would not occur ; the vent near the kitchen sink was installed too low, which Roth indicated could give rise to water and sewage backup ; and the res check documentation, which indicates compliance with the energy code of a structure, was not properly documented.

Finally, Michael Martinez, the general contractor who ultimately completed the project for the Marks, testified. He explained that Appellant had only correctly completed 30% of the work as specified in the contract. He also relayed that it took an additional $99,000 to fix the problems and complete the project for the Marks. The State then rested its case-in-chief and Appellant moved for a directed verdict, which the trial court denied. The jury ultimately convicted Appellant and he was placed on probation and ordered to pay restitution, totaling $140,715.79. This appeal follows. In a single issue, Appellant argues that the trial court erred in denying his motion for directed verdict because the evidence was insufficient to establish the statute's mental culpability requirement to sustain his conviction. We disagree.

STANDARD OF REVIEW

Appellate courts treat a point of error complaining about a trial court's failure to grant a motion for directed verdict as a challenge to the legal sufficiency of the evidence. *Williams v. State*, 937 S.W.2d 479, 482 (Tex.Crim.App. 1996); *Cook v. State*, 858 S.W.2d 467, 470 (Tex.Crim.App. 1993). Evidence is legally sufficient when, viewed in the light most favorable to the verdict, a rational jury could have found the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19, 99 S.Ct. 2781, 2788, 61 L.Ed.2d 560 (1979).

In our analysis, we do not reexamine the evidence and impose our own judgment as to whether the evidence establishes guilt beyond a reasonable doubt, but determine only if the findings by the trier of fact are rational. *See Lyon v. State*, 885 S.W.2d 506, 516-17 (Tex.App.--

El Paso 1994, pet. ref'd). The exclusive judge of the credibility of a witness is the fact finder. *Lancon v. State*, 253 S.W.3d 699, 707 (Tex.Crim.App. 2008). The fact finder also determines the weight that is given to each witness and their testimony, and may choose to believe some testimony and disbelieve other testimony. *Id.* Therefore, we do not assign credibility to witnesses or resolve any conflicts of fact. *Lancon*, 253 S.W.3d at 707; *Adelman v. State*, 828 S.W.2d 418, 421 (Tex.Crim.App. 1992); *Matson v. State*, 819 S.W.2d 839, 843 (Tex.Crim.App. 1991); *Belton v. State*, 900 S.W.2d 886, 897 (Tex.App.--El Paso 1995, pet. ref'd). We resolve any inconsistencies in the testimony in favor of the verdict rendered. *Lancon*, 253 S.W.3d at 707.

The standard of review for sufficiency of the evidence applies to both direct and circumstantial evidence cases. *See Powell v. State*, 194 S.W.3d 503, 506 (Tex.Crim.App. 2006); *Garcia v. State*, 871 S.W.2d 279, 280 (Tex.App.--El Paso 1994, no pet.). If we sustain a legal sufficiency challenge, it follows that we must render a judgment of acquittal. *Clewis v. State*, 922 S.W.2d 126, 133 (Tex.Crim.App. 1996).

APPLICABLE LAW

Section 32.42(b)(2) of the Texas Penal Code provides that a person commits the offense of a deceptive business practice if he, in the course of business, intentionally, knowingly, or recklessly sells less than a represented quantity of a property or service. TEX.PEN.CODE ANN. § 32.42(b)(2). Both the requisite criminal mental state and the prohibited act must be proven to convict the accused. *See Blackman v. State*, 349 S.W.3d 10, 16 (Tex.App.--Houston [1st Dist.] 2010, pet. granted)(person commits offense if person "engages in the proscribed conduct with the culpable mental state"). "Sell" and "sale" are defined to include "offer for sale, advertise for sale, expose for sale, keep for the purpose of sale, deliver for or after sale, solicit and offer to

buy, and every disposition for value." TEX.PEN.CODE ANN. § 32.42(a)(9). Appellant does not challenge the sufficiency of the evidence as to whether he sold the Marks less than he promised. His challenge solely addresses whether the evidence shows the necessary mental state at the relevant time.

At the very least, the State was required to present evidence of circumstances from which a rational jury could infer that Appellant acted recklessly--that is, that Appellant was aware of but consciously disregarded a substantial and justifiable risk that the result (here the sale of less than the represented quantity of property or services) would occur. *See* TEX.PEN.CODE ANN. §§ 6.03(c), 32.42(b)(2). Mental states are almost always inferred from acts and words. *Moore v. State*, 969 S.W.2d 4, 10 (Tex.Crim.App. 1998). "[M]ental culpability is of such a nature that it generally must be inferred from the circumstances under which a prohibited act or omission occurs." *Hernandez v. State*, 819 S.W.2d 806, 810 (Tex.Crim.App. 1991).

To determine whether conduct is reckless, we must look to: (1) whether the act, when viewed objectively at the time of its commission, created a "substantial and unjustifiable" risk of the type of harm that occurred, (2) whether that risk was of such a magnitude that disregard of it constituted a gross deviation from the standard of care that a reasonable person would have exercised in the same situation, (3) whether the defendant was consciously aware of that risk, and (4) whether the defendant consciously disregarded that risk. *Bounds v. State*, 355 S.W.3d 252, 256 (Tex.App.--Houston [1st Dist.] 2011, no pet.). "In other words, the State was required to prove that appellant 'actually fore[saw] the risk and consciously decided to ignore it.'" *Id.*, *citing Williams v. State*, 235 S.W.3d 742, 751-52 (Tex.Crim.App. 2007)(explaining that "it is that 'devil may care' or 'not giving a damn' attitude that raises conduct from criminal negligence to recklessness").

Viewing the evidence in the light most favorable to the jury's verdict, the evidence established that Appellant took over the project in September 2008 and ensured the Marks that the remodeling project would be completed both on time and according to the blue print specifications. The contract price was $127,315 and after Appellant took over the project, the Marks directly paid him a total of $65,463. After the November 14th deadline had passed, the Marks became concerned about where all their money was going and questioned Appellant regarding the progress of the project. Appellant stated that there are "lead times," that it took time to order materials and the Marks could not expect him to order materials one day and have them arrive the next day. The Marks eventually proceeded into the third phase of payments (Draw Number 3) despite the fact that Appellant had not completed the first and second phases of the project. Moving into the third phase, the framing was completed but it was not in compliance with city standards; the roof was not completed; the bathroom was never finished; and the windows were purchased, but not installed. In fact, in December 2008, Appellant requested another $15,000 for doors and windows, despite the fact that the Marks already tendered an $18,000 check for doors and windows in October 2008. Because the doors and windows were supposed to have already been ordered, the Marks, concerned, asked Appellant if they could pay the door and window company directly. Appellant's response was that if the Marks did not pay him directly for the windows, then he would no longer be in control of the project; the windows would not be under a warranty; and he would be unable to "vouch" for the Marks' windows. The $15,000 check was ultimately cashed and never deposited. Further, the evidence established that Appellant failed to timely pay subcontractor Jesus Munoz, of Weather Shield Windows and More, who provided the windows for the project. Munoz approached Chimene at the house with an outstanding balance of $8,257 for the windows. Appellant's

failure to pay ultimately resulted in a lien being filed against the Marks' property. Chimene further testified that in early February 2009, after the parties signed a new project schedule, Appellant informed the Marks that he was going to keep some of the remodeling project money for himself because Rodriguez still owed him some money.

Although some work had been done, like the plumbing and partial electrical work , Martinez testified that only 30% of the work had been correctly completed as specified in the contract. In addition, Roth testified that portions of the completed work were not in compliance with building and city codes, including: the improper installation of the structural insulated paneling; the improper anchoring of the tresses; no installation of weep screed, which must be installed in homes with a stucco finish to prevent leaks in the walls; the installed gas lines failed the pressure test that ensures gas leaks will not occur; the vent by the kitchen sink was installed too low and violated the city code, potentially giving rise to water and sewage backup; and the res check documentation, which indicates compliance with the energy code of a structure, was incorrectly documented. Martinez ultimately completed the remodeling project for the Marks and testified that it took an additional $99,000 to correct the problems and complete the project.

From the foregoing, we find that the jury could have reasonably inferred the requisite culpable mental state of at least recklessness, and therefore hold that the evidence is legally sufficient to support Appellant's conviction. Appellant's sole issue is overruled, and we affirm the judgment of the trial court.

November 2, 2016

ANN CRAWFORD McCLURE, Chief Justice

Before McClure, C.J., Rodriguez, and Hughes, JJ.

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