Opinion issued March 1, 2012

In The

Court of Appeals

For The

First District of Texas

NO. 01-11-00414-CR

KIMBERLY EVETTE BUTLER, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 230th District Court
Harris County, Texas
Trial Court Case No. 1244182

MEMORANDUM OPINION

Appellant, Kimberly Evette Butler, was charged by indictment with attempted theft of property valued at $200,000 or more.[1] Appellant pleaded not

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[1] *See* TEX. PENAL CODE ANN. § 15.01(a) (Vernon 2011), § 31.03(a) (Vernon Supp. 2011).

guilty. The jury found her guilty and assessed punishment at 80 years' confinement. In two issues, appellant argues (1) the evidence was legally insufficient to support her conviction and (2) the trial court erred in denying her motion for dismissal based on entrapment.

We affirm.

Background

Appellant presented two fraudulent bills of exchange, each with the face value of 5 billion dollars, to a Wells Fargo bank in Dallas, Texas. The documents were transferred to another Wells Fargo bank in Houston, Texas for processing.

The documents were determined to be fraudulent. The coloring differed between the two documents, though they should have been uniform. The documents were guaranteed twice by the United States government, though they should have only been guaranteed once. Certain coding information appeared at the bottom of them that would not appear on a bill of exchange. Only one had an original stamp. The account domain payer was identified as both the U.S. Secretary of Treasury and U.S. Secretary of Transportation, though the Department of Transportation is not involved in bills of exchange.

The payee on the documents was identified as Jonathan Todd Clinard. Documentation provided in support of the bills of exchange identified Clinard as a man with assets in excess of 2.8 trillion dollars. The testimony at trial established

that it should have been easy to find information on a trillionaire with a simple internet search. The passport number given for Clinard was for an individual living in the state of Washington who had been arrested multiple times for driving while intoxicated. Otherwise, no other information could be found for this person.

After the bills of exchange had been transferred to Houston, appellant came to the Houston office with Bernard Mitchell. Appellant indicated that she wanted to set up a new bank account to deposit the money from the bills of exchange. She was not able to set up a new account because she did not pass their risk-screening process. At the time, appellant had another account open with Wells Fargo for a business identified as Asian Horizon General Trading. Appellant was the only signer for that account.

At that meeting, appellant presented a business card identifying herself as the president and CEO of the company. The website listed on the card did not exist. The card listed two phone numbers. One was disconnected. The other was answered by a male who refused to identify himself and then hung up.

When the bills of exchange were determined to be fraudulent, they were turned over to Carlos Zepeda, a fraud investigator for Wells Fargo. Appellant called multiple times to check on the status of the bills of exchange and was referred to Zepeda, posing as a processor for the bills. One telephone conversation began with appellant saying, "This is Ms. Butler and I'm calling about my ten Bs."

Zepeda contacted Special Agent J. Breedlove with the U.S. Secret Service. After investigating the matter, Special Agent Breedlove asked Zepeda to assist in a sting operation for appellant. Under the plan, Zepeda arranged a meeting with appellant and Mitchell on December 10, 2009 at the Houston Wells Fargo office. He asked appellant to come to the office to discuss the transaction.

On that day, Zepeda took appellant and Mitchell into a conference room at the bank. The meeting took about one hour. Zepeda began by asking for information about her company, Asian Horizon General Trading. Even though she was president and CEO of the company, appellant was unable to answer most questions and turned to Mitchell for him to answer. Appellant acted nervous, worried, and scared during the meeting, stuttering frequently when asked questions.

At the end, the conversation turned to depositing the money, and appellant became more confident. She was adamant that the money be made available for withdrawal the next day. Zepeda had appellant endorse the bills of exchange and sign two collection item receipts, which indicated that she could verify the final endorsement on the bills of exchange. Appellant signed and presented the documents to Zepeda.

Once he obtained the signatures, Zepeda left the conference room and Breedlove entered and arrested appellant.

After the sting operation, Special Agent Breedlove obtained an email from appellant's husband to appellant and Mitchell. Appellant's husband stated in the email, "Here are a few points about Asian Horizon General Trading Company that we should know and remember." The points included when Asian Horizon was created, who Clinard was, what the money will be used for, where the corporate headquarters will be located, and the identity of their legal representative—with an instruction to tell Wells Fargo that he had tried to contact them this morning and wants them to call him. While the legal representative was a real person, he denied having any involvement in the purported transaction.

Sufficiency of the Evidence

In her first issue, appellant argues the evidence was legally insufficient to support her conviction.

A. Standard of Review

This Court reviews sufficiency-of-the-evidence challenges applying the same standard of review, regardless of whether an appellant presents the challenge as a legal or a factual sufficiency challenge. *See Ervin v. State*, 331 S.W.3d 49, 53–54 (Tex. App.—Houston [1st Dist.] 2010, pet. ref'd) (construing majority holding of *Brooks v. State*, 323 S.W.3d 893 (Tex. Crim. App. 2010)). This standard of review is the standard enunciated in *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979). *See id*. Pursuant to this standard, evidence is

insufficient to support a conviction if, considering all the record evidence in the light most favorable to the verdict, no rational fact finder could have found that each essential element of the charged offense was proven beyond a reasonable doubt. *See Jackson*, 443 U.S. at 319, 99 S. Ct. at 2789; *In re Winship*, 397 U.S. 358, 361, 90 S. Ct. 1068, 1071 (1970); *Laster v. State*, 275 S.W.3d 512, 517 (Tex. Crim. App. 2009); *Williams v. State*, 235 S.W.3d 742, 750 (Tex. Crim. App. 2007). We can hold evidence to be insufficient under the *Jackson* standard in two circumstances: (1) the record contains no evidence, or merely a "modicum" of evidence, probative of an element of the offense, or (2) the evidence conclusively establishes a reasonable doubt. *See Jackson*, 443 U.S. at 314, 318 n.11, 320, 99 S. Ct. at 2786, 2789 n.11; *see also Laster*, 275 S.W.3d at 518; *Williams*, 235 S.W.3d at 750.

The sufficiency-of-the-evidence standard gives full play to the responsibility of the fact finder 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; *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007). An appellate court presumes that the fact finder resolved any conflicts in the evidence in favor of the verdict and defers to that resolution, provided that the resolution is rational. *See Jackson*, 443 U.S. at 326, 99 S. Ct. at 2793. In viewing the record, direct and circumstantial evidence are treated equally;

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. *Clayton*, 235 S.W.3d at 778. Finally, the "cumulative force" of all the circumstantial evidence can be sufficient for a jury to find the accused guilty beyond a reasonable doubt. *See Powell v. State*, 194 S.W.3d 503, 507 (Tex. Crim. App. 2006).

B. Analysis

Appellant argues that the evidence is legally insufficient to support her conviction because there is no evidence of her intent. Specifically, she argues there is no evidence that she knew the documents were fraudulent.

Section 15.01 of the Texas Penal Code provides, in relevant part, "A person commits an offense if, with specific intent to commit an offense, he does an act amounting to more than mere preparation that tends but fails to effect the commission of the offense intended." TEX. PENAL CODE ANN. § 15.01(a) (Vernon 2011). Section 31.03 provides, in relevant part, "A person commits an offense if he unlawfully appropriates property with intent to deprive the owner of property." *Id.* § 31.03(a) (Vernon Supp. 2011).

"[B]oth intent and knowledge may be inferred from circumstantial evidence and proof of a culpable mental state almost invariably depends on circumstantial evidence." *Tottenham v. State*, 285 S.W.3d 19, 28 (Tex. App.—Houston [1st

Dist.] 2009, no pet.) (citing *Dillon v. State*, 574 S.W.2d 92, 94 (Tex. Crim. App. 1978)). Intent may be inferred from circumstantial evidence such as the acts, words, and conduct of the accused. *Wolfe v. State*, 917 S.W.2d 270, 275 (Tex. Crim. App. 1996).

Five-billion-dollar bills of exchange are not commonly encountered documents. One of the Wells Fargo employees that testified, Ryan Norris, stated that in his over five years at the bank, he had never encountered someone trying to deposit such a large amount of money. It strains credulity to suggest that someone could come in possession of bills of exchange for such a large amount without knowing their origin and having some basis to believe in their authenticity.

In support of that, the record shows that appellant never indicated any uncertainty as to the documents' origins or authenticity. Instead, she demonstrated a firm belief that the money identified in the bills was hers, including calling Wells Fargo and asking about "my ten Bs." The evidence also shows that appellant was working with a group actively involved in attempting to create an elaborate fake back story and fake documentation to support the bills of exchange. Appellant represented herself as president and CEO of a company that she could demonstrate almost no knowledge of. Her business card included a nonexistent website and wrong phone numbers. Her demeanor at the December 10 meeting was nervous, worried, and scared, suggesting that she was aware of the falsity of the scheme.

We hold that there was legally sufficient evidence in the record to support a determination that appellant knew the documents were fraudulent and, accordingly, intended to unlawfully appropriate property with the intent to deprive the owner of the property. *See* TEX. PENAL CODE ANN. § 31.03(a). We overrule appellant's first issue.

Entrapment

In her second issue, appellant argues the trial court erred in denying her motion for dismissal based on entrapment. First, we must review the procedural posture of this issue.

A. Procedural Posture

Under Texas law, entrapment is a defense to prosecution. TEX. PENAL CODE ANN. § 8.06(a) (Vernon 2011). At trial, if the defendant presents a prima facie showing of entrapment, the burden shifts to the State to disprove entrapment beyond a reasonable doubt. *Hernandez v. State*, 161 S.W.3d 491, 498 (Tex. Crim. App. 2005). The defendant may also raise the legal issue of entrapment in a pretrial hearing. *Id.*; *see also* TEX. CODE CRIM. PROC. ANN. art. 28.01, § 1(9) (Vernon 2006) (listing entrapment as matter that can be determined at a pretrial hearing). In that circumstance, however, the burden rests on the defendant to establish beyond a reasonable doubt that he was entrapped. *Hernandez*, 161 S.W.3d at 499. Because the procedural posture of the claim of entrapment affects

who had the burden of proof and, in turn, our review on appeal, we must resolve how this matter was presented to the trial court.

Appellant filed a pretrial Motion to Dismiss Based on Entrapment. In the motion, she indicated that she wanted to present the motion at a pretrial hearing. That pretrial hearing never took place, however.

After the State rested on its case in chief, appellant announced an intent to move for directed verdict and the trial court retired the jury. The following exchange then occurred:

> [Appellant's Counsel]: Your Honor, I filed a pretrial motion with a motion for directed verdict.
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> THE COURT: You can orally make your motion. That's fine.

Appellant then argued her motion based on the evidence that had been presented at trial and asserted that once she had presented some evidence, the burden shifted to the State. Both parties and the trial court then discussed whether the motion should be granted based on the evidence presented at trial. Ultimately, the trial court denied the motion.

No pretrial hearing on the motion was ever held. The evidence argued by the parties and considered by the trial court was the evidence presented at trial. We hold that the trial court's ruling on appellant's motion was not a ruling on a pretrial motion but, instead, was a ruling on a motion for directed verdict based on the evidence presented at trial. Accordingly, appellant bore the burden to present a

prima facie showing of entrapment and, if that burden was met, the burden of proof then shifted to the State to disprove entrapment beyond a reasonable doubt. *See id.* at 498.

B. Standard of Review

When conflicting evidence exists on the issue of entrapment, the trial court does not err in overruling a motion to dismiss. *Cook v. State*, 646 S.W.2d 952, 952 (Tex. Crim. App. 1983). The trial court, as the trier of fact, must weigh the evidence and determine whether the defendant was entrapped as a matter of law. *Soto v. State*, 681 S.W.2d 602, 604 (Tex. Crim. App. 1984); *Bush v. State*, 611 S.W.2d 428, 430–31 (Tex. Crim. App. 1980). On review, the issue of entrapment centers on the legal sufficiency of the evidence. *Flores v. State*, 84 S.W.3d 675, 681 (Tex. App.—Houston [1st Dist.] 2002, pet. ref'd). The sufficiency of the evidence turns on whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt and also could have found against the defendant on the issue of a defense beyond a reasonable doubt. *Adelman v. State*, 828 S.W.2d 418, 421 (Tex. Crim. App. 1992) (citing *Saxton v. State*, 804 S.W.2d 910, 914 (Tex. Crim. App. 1991)).

C. Analysis

Section 8.06 of the Texas Penal Code provides, in part:

> It is a defense to prosecution that the actor engaged in the conduct charged because he was induced to do so by a law enforcement agent using persuasion or other means likely to cause persons to commit the offense. Conduct merely affording a person an opportunity to commit an offense does not constitute entrapment.

TEX. PENAL CODE ANN. § 8.06(a). When a defendant raises the defense of entrapment, she must raise prima facie evidence that (1) she engaged in the conduct charged; (2) because she was induced to do so by a law enforcement agent; (3) who used persuasion or other means; and (4) those means were likely to cause persons to commit the offense. *Hernandez*, 161 S.W.3d at 497.

The entrapment defense has both subjective and objective elements. *Id.* at 497 n.11 (citing *England v. State* (*T. England*), 887 S.W.2d 902, 913–14 (Tex. Crim. App. 1994)). "The subjective element requires evidence that 'the accused himself was actually induced to commit the charged offense by the persuasiveness of the police conduct.'" *Id.* (quoting *T. England*, 887 S.W.2d at 913 n.10). Once inducement is shown, the issue becomes an objective test of "whether the persuasion was such as to cause an ordinarily lawabiding person of average resistance nevertheless to commit the offense." *T. England*, 887 S.W.2d at 914.

Appellant argues that "once [the] trier of fact determines that there was inducement to commit [a] criminal act, [the] court must consider only [the] nature of [the] State agent's activity without any reference to [the] previous disposition of [the] particular defendant to commit [the] crime," relying on *England v. State* (*R.*

England), 729 S.W.2d 388, 391 (Tex. App.—Fort Worth 1987, pet. ref'd). Regardless of whether predisposition to commit the crime is relevant *after* police inducement has been found, it is relevant to the determination of police inducement. *See Hernandez*, 161 S.W.3d at 497 n.11 (holding "evidence that a person has committed a crime before is some evidence that a subsequent commission of the crime was not induced by police").

Nevertheless, there is no evidence in the record that appellant had committed or attempted to commit theft before. Accordingly, these cases do not apply to appellant.

More applicable to this case is whether the criminal design originated with appellant. "The issue of entrapment is not raised where the facts only indicate that the criminal design originates in the mind of the accused and the law enforcement official or their agents merely furnish opportunity for or aid the accused in the commission of the crime." *Reese v. State*, 877 S.W.2d 328, 333 (Tex. Crim. App. 1994); *see also Adams v. State*, 270 S.W.3d 657, 662 (Tex. App.—Fort Worth 2008, pet. ref'd).

The fraudulent bills of exchange were created before Wells Fargo or the Secret Service became involved. Appellant possessed them and gave them to Wells Fargo in an attempt to obtain 10 billion dollars from Wells Fargo. Appellant made repeated calls before the sting operation asking about the progress of

obtaining the money, referring to the money as her "ten Bs." Her demeanor at the December 10 meeting suggested she was aware of the fraudulent nature of the documents. There is evidence in the record, then, to show that the criminal design originated with appellant. Because the criminal design originated with appellant, it follows that she was not induced to commit the charged offense by the persuasiveness of the police conduct. *See Hernandez*, 161 S.W.3d at 497 n.11 (holding subjective element requires evidence that accused herself was induced to commit offense by persuasiveness of police conduct); *Reese*, 877 S.W.2d at 333 (holding no inducement when criminal design originates in mind of accused and law enforcement officials merely furnish opportunity for or aid in commission of crime).

Appellant argues that Zepeda's arranging the meeting and giving the documents to her to sign was, at the very least, an implicit representation that the documents were authentic. She argues that this representation was what induced her to commit the crime. In support of this argument, at trial and on appeal, appellant relies on *Gifford v. State*, 740 S.W.2d 76 (Tex. App.—Fort Worth 1988, pet. ref'd).

In *Gifford*, the defendant and his wife wanted to put their child up for adoption. *Id.* at 78. A married couple wanting to adopt learned about Gifford and sought him out. *Id.* After initially declining, Gifford's wife called them six weeks

later asking if they were still interested and if they could help them out financially with about $3,500. *Id.* This amount exceeded the cost of the hospital bills incurred with the birth of the child. *Id.* The Texas Rangers were eventually notified. *Id.*

Gifford indicated, however, that he was not sure of the legality of the exchange and wanted everything to be done legally. *Id.* The adoptive couple assured him that they had an attorney and they would take care of the legal issues. *Id.* The adoptive couple assured Gifford that the process was legal. *Id.* The Fort Worth Court of Appeals held that the false representations of the legality of the process was entrapment because receiving money for putting a child up for adoption is not inherently illegal. *Id.* at 79–80.

Appellant argues that it is not inherently illegal to present a bill of exchange to a bank and that there is no evidence that she knew the bills of exchange were fraudulent.

We have already held that there is evidence to support the determination that appellant knew the bills of exchange were fraudulent. It is inherently illegal to obtain money from a bank with fraudulent bills of exchange. *See* TEX. PENAL CODE ANN. § 31.03(a). Accordingly, *Gifford* is distinguished from this case.

Moreover, there is no evidence to support the objective portion of the test. Once inducement is shown, the issue becomes an objective test of "whether the

persuasion was such as to cause an ordinarily lawabiding person of average resistance nevertheless to commit the offense." *T. England*, 887 S.W.2d at 914. The focus is on the law enforcement conduct regardless of the predisposition of the particular defendant. *Id.* at 908. The question is "whether the persuasion used by the law enforcement agent was such as to cause a hypothetical person—an ordinarily lawabiding person of average resistance—to commit the offense." *Id.*

The only evidence of any purported persuasion is Zepeda's offering the documents to appellant to sign. Appellant argues that this act constituted at least an implicit acknowledgement that the documents were authentic. Even assuming this were true, we hold that an implicit acknowledgment of authenticity does not rise to the level of persuasion that would cause an ordinary law-abiding person to present fraudulent documents in order to obtain money. This amounts to providing the appellant the opportunity to commit the crime, not an inducement to commit it.

The actions of Wells Fargo agents, under the direction of the Secret Service, merely afforded appellant the opportunity to commit an offense, the intent for which originated with appellant. See TEX. PENAL CODE ANN. § 8.06(a) (providing "[c]onduct merely affording a person an opportunity to commit an offense does not constitute entrapment"). We hold there was legally sufficient evidence to support the trial court's denial of appellant's directed verdict.

Conclusion

We affirm the judgment of the trial court.

Laura Carter Higley
Justice

Panel consists of Chief Justice Radack and Justices Higley and Brown.

Do not publish. TEX. R. APP. P. 47.2(b).