Affirmed and Memorandum Opinion filed April 20, 2010.

In The

Fourteenth Court of Appeals

NO. 14-09-00261-CR

CURTIS J. HART, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 351st Judicial District Court
Harris County, Texas
Trial Court Cause No. 1142012

MEMORANDUM OPINION

Curtis J. Hart appeals his conviction for theft of property with a value of $20,000 or more but less than $100,000. Tex. Penal Code Ann. § 31.03(a), (e)(5) (Vernon 2003 & Supp. 2009). Appellant contends the evidence is legally and factually insufficient to support his conviction. We affirm.

I. Background

Matthew Dickey, former general sales manager at Allen Samuels Chevrolet in Houston, Texas, testified that the dealership conducted a physical inventory of all new and used cars around the first of October 2007. About ten days later, the dealership determined that a black 2008 Chevrolet Tahoe was missing. Dickey estimated the value of the vehicle at $40,000 to $50,000.

Dickey contacted Mike Ingels, a Houston Police Department sergeant and off-duty security person at the dealership, and Ingels generated a report of a missing vehicle. Ingels spoke with an On Star representative, and the On Star service located the vehicle at a nearby hotel on the Southwest Freeway. Dickey and Ingels went to the hotel to retrieve the vehicle from the parking lot. Dickey drove the vehicle to the dealership using the spare set of keys, and Ingels went inside the hotel to inquire about surveillance video on the parking lot.

On the surveillance video, Ingels observed a person with a dark complexion dressed in a very bright blue outfit, shorts, black combat boots, and white socks exiting the Tahoe the same day Dickey discovered it missing. Dickey also reviewed the hotel's surveillance video and testified that the person was carrying a shoulder bag. Ingels testified that when he later tried to get a copy of the surveillance video, hotel employees advised him that the video had been overwritten and was unavailable.

When Dickey returned to the dealership after watching the video, he saw what appeared to be the bag from the video on the floor of the make-ready department. He also observed appellant wearing an outfit that matched the outfit the person was wearing in the video. Appellant was employed by a company that made after-market additions such as window tinting and pin striping to vehicles at the dealership. Dickey testified that, in his

work capacity, appellant would have access to vehicles and keys with permission to move vehicles around the lot but not to take vehicles off the lot.

Ingels also saw appellant in the service area wearing the clothing Ingels saw on the video. Ingels asked appellant to come with him to the general manager's office and appellant complied. Once there, Ingels checked appellant for weapons. When appellant stood up, Ingels heard a clicking sound. He frisked appellant and found a key on a key chain tied to the drawstring of appellant's shorts. Ingels asked appellant what the key was, and appellant said he did not recall. Ingels asked appellant to remain in the office while Ingels went outside. Ingels pressed the horn button on the key from appellant's shorts, and the recovered vehicle responded. When Ingels returned, appellant was gone from the premises; he was apprehended at a later date.

The State charged appellant with theft of a motor vehicle with a value of over $20,000 and under $100,000. *See* Tex. Penal Code Ann. § 31.03(a), (e)(5). A jury found appellant guilty. After appellant pleaded true to the enhancement paragraph, the trial court assessed punishment at twelve years' confinement in the Texas Department of Criminal Justice, Institutional Division.

II. Standard of Review

In a legal-sufficiency review, we consider all of the evidence in the light most favorable to the jury's verdict and decide whether a rational trier of fact, based on the evidence and reasonable inferences supported by the evidence, could have found the essential elements of the offense beyond a reasonable doubt. *See Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007); *Wesbrook v. State*, 29 S.W.3d 103, 111 (Tex. Crim. App. 2000). Circumstantial evidence is as probative as direct evidence in establishing the guilt of an actor. *Hooper*, 214 S.W.3d at 13. In fact, circumstantial evidence alone can

be sufficient to establish guilt. *Id*. On appeal, the same standard of review is used for both circumstantial and direct evidence cases. *Id*.

The jury, as the trier of fact, is the sole judge of the credibility of the witnesses and of the strength of the evidence. *Fuentes v. State*, 991 S.W.2d 267, 271 (Tex. Crim. App. 1999). We may not substitute our judgment for the jury's, and we do not re-weigh the evidence presented at trial. *King v. State*, 29 S.W.3d 556, 562 (Tex. Crim. App. 2000). If any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, we must affirm. *McDuff v. State*, 939 S.W.2d 607, 614 (Tex. Crim. App. 1997).

When we review the factual sufficiency of the evidence, by contrast, we consider the evidence in a neutral light. *Watson v. State*, 204 S.W.3d 404, 414 (Tex. Crim. App. 2006). We must set aside the verdict if (1) the proof of guilt is so obviously weak as to render the verdict clearly wrong and manifestly unjust, or (2) the proof of guilt, while legally sufficient, is nevertheless outweighed by the great weight and preponderance of the contrary proof so as to render the verdict clearly wrong and manifestly unjust. *See Roberts v. State*, 220 S.W.3d 521, 524 (Tex. Crim. App. 2007). However, because the jury is best able to evaluate the credibility of witnesses, we must afford appropriate deference to its conclusions. *See Lancon v. State*, 253 S.W.3d 699, 704–05 (Tex. Crim. App. 2008). In conducting a factual-sufficiency review, we discuss the evidence appellant claims is most important in allegedly undermining the jury's verdict. *Sims v. State*, 99 S.W.3d 600, 603 (Tex. Crim. App. 2003).

III. Analysis

In two issues, appellant contends the evidence is legally and factually insufficient to sustain his conviction for theft. Specifically, appellant challenges the sufficiency of the evidence to prove he unlawfully took the motor vehicle.

1. Legal Sufficiency

In his first issue, appellant contends the evidence is legally insufficient to prove he unlawfully took the motor vehicle because (1) no one could identify appellant as the person exiting the vehicle in the hotel's surveillance video; (2) no one could link the bag in the service area to appellant; and (3) no one saw appellant in, near, or driving the vehicle. Appellant argues that, at most, the facts prove he possessed the keys to the missing vehicle.

A person commits the offense of theft if he unlawfully appropriates property with intent to deprive the owner of the property. Tex. Penal Code Ann. § 31.03(a) (Vernon 2003 & Supp. 2009). Appropriation of property, as it applies in this case, is unlawful if it is without the owner's effective consent. *Id*. § 31.03(b)(1). An offense is a felony of the third degree if the value of the property stolen is $20,000 or more but less than $100,000. *Id*. § 31.03(e)(5).

Dickey testified that appellant worked for a company that made after-market additions such as window tinting and pin striping to vehicles at the dealership. He stated that those company employees had access to vehicles and keys, had permission to move vehicles around to do their work, but did not have permission to take vehicles off the lot.

Both Dickey and Ingels acknowledged that they could not see the face of the person exiting the stolen vehicle on the hotel's surveillance video. However, Ingels identified the person on the video by his clothing: a very bright blue outfit, shorts, black combat boots, and white socks. Ingels also testified that he saw a man in the service area who was dressed in identical clothing, and he identified that person in court as the appellant.

While Dickey did not remember the details of what the person on the video was wearing, he remembered the outfit "stuck out." He also recalled the man in the video carrying a shoulder bag. When he returned to the dealership after viewing the video, he

saw what he thought was the bag from the video in the make-ready department, a department that included a service bay for after-market additions on vehicles. Dickey stated he also saw someone at the dealership wearing clothing that matched the clothing of the person in the video, and he identified appellant in court as that person.

Appellant's arguments are focused largely on the lack of direct evidence placing him in or in control of the stolen vehicle. However, a conviction for theft may be sustained even where the accused is not found in physical possession of stolen property. *McNeely v. State*, 34 S.W.2d 873, 873 (Tex. Crim. App. 1930) (on rehearing).

Ingels testified that he asked appellant to accompany him to the general manager's office, and appellant complied. While checking appellant for weapons, Ingels heard a clicking sound. Ingels testified that he found a key on a key chain tied to the drawstring of appellant's shorts. When he asked appellant what the key was, appellant said he did not recall. Attempts to conceal incriminating evidence, inconsistent statements, and implausible explanations to the police are probative of wrongful conduct and are also circumstances of guilt. *Guevara v. State*, 152 S.W.3d 45, 50 (Tex. Crim. App. 2004). Ingels went outside to determine whether the key was to the stolen vehicle, and the recovered Tahoe sounded when Ingels hit the horn button. When Ingels returned to the general manager's office, appellant was gone. Evidence of flight evinces a consciousness of guilt. *Clay v. State*, 240 S.W.3d 895, 905 n.11 (Tex. Crim. App. 2007).

A rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Therefore, the evidence is legally sufficient to support appellant's conviction for the offense of theft of property with a value of $20,000 or more but less than $100,000. Accordingly, we overrule appellant's first issue.

2. Factual Sufficiency

In his second issue, appellant contends the evidence is factually insufficient to prove he unlawfully took the motor vehicle. Appellant argues the following evidence tends to disprove that appellant committed theft: (1) Dickey did not know when the vehicle was taken from the dealership; (2) Dickey and Ingels stated that the individual's face could not be seen on the surveillance video, Dickey did not recognize the person in the surveillance video, and neither Dickey nor Ingels saw appellant driving the vehicle; (3) Dickey testified that the individual was carrying a large bag on his shoulder, but no one could link the bag to appellant; (4) Dickey stated that, according to the key track system at the dealership, one set of keys to the vehicle was checked out to Anthony Hancock and was never checked back in, and Ingels did not speak to Hancock about the missing vehicle; and (5) when appellant was questioned about the vehicle's keys found in his possession, he had other keys to other vehicles in his possession.

First, appellant claims Dickey did not know when the vehicle was taken. However, Dickey testified that the vehicle was taken from the dealership sometime between the time the dealership conducted its vehicle inventory, which he stated occurred around the beginning of each month, and October 10, 2007, the date the vehicle was recovered.

Second, appellant argues Dickey and Ingels could not see the face of the person exiting the stolen vehicle on the hotel surveillance video. However, as stated under the legal-sufficiency analysis, both Dickey and Ingels testified that the person in the video was wearing distinctive clothing, they each saw someone at the dealership wearing the same clothing, and both identified appellant in court as the person from the dealership wearing the clothing. The jury is the sole judge of the weight and credibility of witness testimony. *Lancon*, 253 S.W.3d at 707.

Third, appellant contends a bag in the make-ready department could not be linked to him. Dickey testified that the person in the surveillance video had a bag and that he later saw what appeared to be the same bag in the make-ready department. There was, therefore, evidence placing the bag in the department where appellant worked. A rational factfinder certainly could conclude that this evidence, taken with other identification evidence, connected the appellant to the crime. As previously stated, the jury is the sole judge of the weight and credibility of witness testimony. *Lancon*, 253 S.W.3d at 707.

Appellant claims that he has raised the existence of an alternative hypothesis and, therefore, the evidence is factually insufficient. Appellant does not state specifically what that alternative hypothesis is. Appellant does argue, however, that the keys to the stolen vehicle were checked out to Anthony Hancock, a salesman at the dealership, and were never checked back in by him. Dickey testified to this fact, but also stated that there were instances when a salesman might give someone his key track number. Ingels testified that, in his experience, it was common practice for sales people to share their key track passwords.

The existence of alternative reasonable hypotheses may be relevant to, though not necessarily determinative of, a factual-sufficiency review. *See Wilson v. State,* 7 S.W.3d 136, 141 (Tex. Crim. App. 1999). Although we may consider alternative hypotheses raised by the evidence, we may not set aside the jury's verdict simply because we think another result is more reasonable. *Villani v. State*, 116 S.W.3d 297, 304 (Tex. App.—Houston [14th Dist.] 2003, pet. ref'd). The testimony that the keys were checked out to Hancock and never checked back in by him is not enough for this court to conclude that the evidence is factually insufficient to support appellant's conviction. *See Herrero v. State*, 124 S.W.3d 827, 835 (Tex. App.—Houston [14th Dist.] 2003, no pet.). By contrast, the jury heard testimony that it was appellant who had the keys tied to the drawstring of his shorts, and Dickey and Ingels identified appellant as the person they saw in the dealership wearing clothing that matched the clothing worn by the person in the surveillance video.

Appellant also takes issue with the fact that Ingels did not speak to Hancock; however, Ingels testified that he was told by Dickey that Hancock no longer worked at the dealership. Dickey testified that he spoke with Hancock, and Hancock denied having the keys. The State is not otherwise required to disprove a reasonable alternative hypothesis. *Dade v. State*, 848 S.W.2d 830, 832 (Tex. App.—Houston [14th Dist.] 1993, no pet.).

Fifth, appellant contends he had other keys in his possession at the time the keys to the stolen vehicle were found in his possession. However, Ingels testified that the keys to the stolen vehicle were found uniquely tied to the drawstring of appellant's shorts. Ingels testified that appellant carried another set of keys in a small bucket.

Viewing the evidence in a neutral light, the proof of guilt is not so obviously weak as to render the verdict clearly wrong and manifestly unjust, nor is the proof of guilt outweighed by the great weight and preponderance of the contrary proof so as to render the verdict clearly wrong and manifestly unjust. Therefore, we overrule appellant's second issue.

IV. Conclusion

Having overruled all of appellant's issues, we affirm the judgment of the trial court.

/s/ Kent C. Sullivan
Justice

Panel consists of Justices Frost, Boyce, and Sullivan.
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