Affirmed and Memorandum Opinion filed June 3, 2010.

In The

Fourteenth Court of Appeals

NO. 14-09-00372-CR

ROBYN M. REED, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 338th District Court
Harris County, Texas
Trial Court Cause No. 1164028

M E M O R A N D U M O P I N I O N

Appellant Robyn M. Reed challenges her theft conviction. After a jury trial, the jury found appellant guilty of theft of welfare benefits valued at more than $1,500 but less than $20,000. The trial court assessed punishment at confinement for one year probated for one year of community supervision. Appellant contends the evidence is legally and factually insufficient to support her conviction. We affirm.

Background

Appellant submitted an application for welfare benefits on July 12, 2006, in which

she stated that she was unemployed and had no source of income. Appellant initially indicated on her application that she was employed by Pappadeaux Restaurant, but she marked through this entry and wrote "quit" next to it.

Jose Vazquez, a Texas Department of Health and Human Services ("TDHHS") employee, contacted appellant by telephone on September 5, 2006 regarding her application. Appellant told Vazquez that she currently was unemployed and had no source of income. She informed Vazquez that she formerly was employed by Pappadeaux Restaurant, but had quit her job in March 2006. Appellant's application was approved, and she began receiving food stamp and Medicaid benefits. Appellant filed an application for recertification of her eligibility to receive welfare benefits on December 14, 2006. She stated on her December 14, 2006 application that she was employed by Pappadeaux Restaurant.

In 2007, appellant's case file was "flagged" for investigation by the Texas Workforce Commission ("TWC"); Robert Rodgers, a TDHHS investigator, was assigned to investigate appellant's case file. Rodgers discovered that appellant was employed by Pappadeaux Restaurant from April 28, 2005 to March 9, 2006 and again from June 6, 2006 until July 17, 2007. Rodgers calculated the benefits that appellant would have been entitled to receive from September 2006 through February 2007 had she reported her employment, and determined that appellant had received an over-issuance of $1,806.13 in welfare benefits during that period.

Appellant was indicted for the offense of theft of welfare benefits valued at more than $1,500 but less than $20,000 "pursuant to one scheme and continuing course of conduct." After a jury trial, the jury found appellant guilty as charged in the indictment. The trial court signed its judgment on April 20, 2009, and assessed punishment at confinement for one year probated for one year of community supervision. Appellant appeals from the trial court's judgment.

Analysis

Appellant presents three issues on appeal. First, appellant contends that the evidence is legally insufficient to establish that she received an over-issuance of more than $1,500 in welfare benefits. In her second and third issues, appellant contends that the evidence is legally and factually insufficient to establish that appellant (1) intended to deprive the State of the over-issued welfare benefits; and (2) deceived the State to obtain the over-issued welfare benefits. We first will address appellant's second and third issues.

In reviewing legal sufficiency of the evidence, an appellate court examines all of the evidence in the light most favorable to the verdict to determine whether any rational factfinder could have found proof of the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Rollerson v. State*, 227 S.W.3d 718, 724 (Tex. Crim. App. 2007). The court does not sit as a thirteenth juror and may not re-evaluate the weight and credibility of the record evidence or substitute its judgment for that of the factfinder. *Dewberry v. State*, 4 S.W.3d 735, 740 (Tex. Crim. App. 1999).

Reconciliation of conflicts in the evidence is within the exclusive province of the factfinder. *See Mosley v. State*, 983 S.W.2d 249, 254 (Tex. Crim. App. 1998). The appellate court's duty is not to re-weigh the evidence, but to serve as a final due process safeguard ensuring only the rationality of the factfinder. *See Williams v. State*, 937 S.W.2d 479, 483 (Tex. Crim. App. 1996). An appellate court faced with a record that supports conflicting inferences must presume — even if not obvious from the record — that the factfinder resolved any such conflicts in favor of the verdict and must defer to that resolution. *Jackson*, 443 U.S. at 326; *Evans v. State*, 202 S.W.3d 158, 161 (Tex. Crim. App. 2006).

In reviewing factual sufficiency of the evidence, an appellate court must determine whether (1) the evidence introduced to support the verdict is "so weak" that the factfinder's verdict seems "clearly wrong and manifestly unjust," or (2) the factfinder's

verdict is nevertheless against the great weight and preponderance of the evidence. *Watson v. State*, 204 S.W.3d 404, 414-15 (Tex. Crim. App. 2008). In a factual sufficiency review, the court views all of the evidence in a neutral light. *Johnson v. State*, 23 S.W.3d 1, 11 (Tex. Crim. App. 2000) (en banc). If the court finds the evidence to be factually insufficient, the court must remand the case for a new trial. *Clewis v. State*, 922 S.W.2d 126, 135 (Tex. Crim. App. 1996).

In order to declare that an evidentiary conflict justifies a new trial, an appellate court must rely on some objective basis in the record demonstrating that the great weight and preponderance of the evidence contradicts the jury's verdict. *See Lancon v. State*, 253 S.W.3d 699, 706-07 (Tex. Crim. App. 2008). An appellate court should not intrude upon the factfinder's role as the sole judge of the weight and credibility of witness testimony. *Vasquez v. State*, 67 S.W.3d 229, 236 (Tex. Crim. App. 2002). The factfinder may choose to believe or disbelieve any portion of the testimony presented at trial. *Bargas v. State*, 252 S.W.3d 876, 887 (Tex. App.—Houston [14th Dist.] 2008, no pet.) (citing *Sharp v. State*, 707 S.W.2d 611, 614 (Tex. Crim. App. 1986) (en banc)). Due deference must be given to the factfinder's determinations concerning the weight and credibility of the evidence and reversal of those determinations is appropriate only to prevent the occurrence of a manifest injustice. *Martinez v. State*, 129 S.W.3d 101, 106 (Tex. Crim. App. 2004).

Appellant was charged with an aggregated theft. An individual commits the offense of theft if the individual unlawfully appropriates property with the intent to deprive the owner of that property. Tex. Penal Code Ann. § 31.03(a) (Vernon 2003). "When amounts are obtained in violation of [Texas Penal Code Chapter 31] pursuant to one scheme or continuing course of conduct, whether from the same or several sources, the conduct may be considered as one offense and the amounts aggregated in determining the grade of the offense." Tex. Penal Code Ann. § 31.09 (Vernon 2005). Section 31.09 operates to create one offense. *Kellar v. State*, 108 S.W.3d 311, 312-13 (Tex. Crim. App. 2003) (en banc); *Dickens v. State*, 981 S.W.2d 186, 188 (Tex. Crim. App. 1998) (en

banc). "Aggregated theft is the sum of all of its parts. A part is a completed theft whose elements have all been proven. The amount obtained in each part may be aggregated in determining the grade of the one aggregated offense." *Dickens*, 981 S.W.2d at 188.

An individual acts with intent when it is the individual's conscious objective or desire to engage in the conduct or cause the result. Tex. Penal Code Ann. § 6.03(a) (Vernon 2003). Intent is a question of fact for the jury. *Reed v. State*, 158 S.W.3d 44, 48 (Tex. App.—Houston [14th Dist.] 2005, pet. ref'd). Appropriation of property is unlawful if it is done without the owner's effective consent. Tex. Penal Code Ann. § 31.03(b)(1). Consent is not effective if it is induced by deception or coercion. *Id.* § 31.01(3)(A) (Vernon 2003). "Deception" is defined as "creating or confirming by words or conduct a false impression of law or fact that is likely to affect the judgment of another in the transaction, and that the actor does not believe to be true" or "failing to correct a false impression of law or fact that is likely to affect the judgment of another in the transaction, that the actor previously created or confirmed by words or conduct, and that the actor does not now believe to be true." *Id.* § 31.01(1)(A)-(B). Deception and intent may be inferred from the circumstances. *See Smith v. State*, 965 S.W.2d 509, 518 (Tex. Crim. App. 1998) (en banc); *Christensen v. State*, 240 S.W.3d 25, 32 (Tex. App.—Houston [1st Dist.] 2007, pet. ref'd) (op. on reh'g) ("A jury may infer intent from any facts that tend to prove its existence, such as the acts, words, and conduct of the defendant.").

In her second and third issues, appellant argues that the evidence is legally and factually insufficient to support a finding that appellant deceived the State and had the intent to deprive the State of welfare benefits "at any point after December 19, 2006." Appellant argues that she cannot be held "criminally liable for any erroneously paid [welfare] benefits she received after December 19, 2006" because she "reported that she was employed on her December 19, 2006 Application." Therefore, according to appellant, the total amount of welfare benefits she allegedly misappropriated was only

$1,241.34.[1] Appellant also argues that the State should have known that her representation that she received no income was inaccurate due to discrepancies in her July 12, 2006 application. Lastly, appellant argues that Vazquez failed to properly verify that he was talking to appellant during the September 5, 2006 telephone interview.

Appellant was employed by Pappadeaux Restaurant from June 6, 2006 until July 17, 2007. Appellant submitted an application for welfare benefits to TDHHS on July 12, 2006. On her application, appellant initially indicated that she was employed by Pappadeaux Restaurant, but she then marked through this entry and wrote "quit" next to it. Appellant's application was reviewed by Vazquez. Vazquez contacted appellant by telephone on September 5, 2006 to interview her regarding her application. Vazquez testified that he verified he was talking to appellant "based on the questions [he] asked her about the children, Social Security, ID, people that she live[s] with, [and] work history." During the interview, Vazquez asked appellant if she received any income. Appellant responded "no." Appellant was approved to receive and actually received welfare benefits for a six-month period beginning in September 2006 and ending in February 2007 based on her representation that she had no income.

Viewing this evidence in the light most favorable to the verdict, the jury could have found beyond a reasonable doubt that appellant intended to deprive the State of the over-issued welfare benefits between September 2006 and February 2007. *See Jackson*, 443 U.S. at 326; *Evans*, 202 S.W.3d at 161. The jury also could have found beyond a reasonable doubt that appellant unlawfully appropriated the over-issued benefits by deceiving the State. *See Jackson*, 443 U.S. at 326; *Evans*, 202 S.W.3d at 161.

Appellant argues that the evidence is factually insufficient because the State (1) should have known that appellant's representations that she received no income were false due to discrepancies in her application; and (2) had actual knowledge of her

[1] Appellant calculated this amount by adding up the over-issued welfare benefits that, according to Rodgers, she received in September, October, November, and December 2006. Rodgers testified that appellant received an over-issuance during this period totaling (1) $1,155 in food stamp benefits; and (2) $86.34 in Medicaid benefits.

employment as of December 19, 2006. Appellant also argues that Vazquez failed to properly verify that he was talking to appellant during the September 5, 2006 telephone interview. In addressing appellant's argument, we assume without deciding that the State's knowledge of appellant's deception could render the evidence insufficient.

Appellant argues that the State should have known that appellant's representations were false because a TWC report showed that appellant earned wages during the second quarter of 2006. Vazquez testified that he printed out a TWC report before interviewing appellant on September 5, 2006. The report showed that appellant had earned $2,049.25 in the first quarter of 2006 and $307.38 in the second quarter of 2006. Vazquez testified that the first quarter included the months of January, February, and March, and the second quarter included the months of April, May, and June. Appellant told Vazquez during the interview that she quit her job at Pappadeaux Restaurant in March 2006. Vazquez testified that the TWC report supported appellant's statement because appellant probably received her last paycheck in April if she quit her job in March. Accordingly, Vazquez testified that there were no discrepancies between appellant's application and the TWC report.

Appellant also argues that the State should have known that appellant's representations were false because appellant's expenses exceeded her household's income. Appellant told Vazquez she did not have any expenses. Appellant stated that she lived with her mother and did not have to pay rent or utility bills. Based on this information, Vazquez testified that there were no discrepancies on appellant's application regarding her expenses and her income because "everything [was] zero."

Appellant argues that Vazquez failed to properly verify that he was talking to appellant during the September 5, 2006 telephone interview. Vazquez testified that he verified he was talking to appellant "based on the questions [he] asked her about the children, Social Security, ID, people that she live[s] with, [and] work history." Appellant offered no evidence contradicting Vazquez's testimony that he verified appellant's identity.

Lastly, appellant argues that the State had actual knowledge of her employment on December 19, 2006, because she stated that she was employed by Pappadeaux Restaurant on her application for recertification. Appellant was certified to receive benefits for a six-month period running from September 2006 through February 2007, based on her July 12, 2006 application. Appellant filed an application for recertification on December 19, 2006, which appellant was required to file to receive benefits after February 2007. On her December 19, 2006 application, appellant stated that she was employed by Pappadeaux Restaurant.

James Dylisaly, a TDHHS supervisor, testified that an individual's application for recertification does not affect the individual's current certification period. Dylisaly testified that the only time a change in an individual's current certification period would occur "is if a change is reported to our office." Appellant received and accepted benefits based on her July 12, 2006 application throughout the duration of this certification period.

Viewing the evidence in a neutral light, a reasonable jury could have found beyond a reasonable doubt that appellant deceived the State and intended to deprive the State of the over-issued welfare benefits for the September 2006 to February 2007 period. *See Johnson*, 23 S.W.3d at 11. The evidence supporting the verdict is not so weak that the verdict is clearly wrong and manifestly unjust. *See Watson*, 204 S.W.3d at 414-15.

We overrule appellant's second and third issues.

In her first issue, appellant argues that the evidence is legally insufficient to establish that she received an over-issuance of more than $1,500 in welfare benefits.

At trial, Rodgers testified that he calculated the welfare benefits appellant would have been entitled to receive each month between September 2006 and February 2007 had she reported that she was employed; he did so by inputting her income into a computer program called the Automated System of the Inspector General. Rodgers compared these calculations to benefits appellant actually received during each month of

that period and determined that appellant had received an over-issuance of $1,806.13 in welfare benefits over the six-month period.[2]

On appeal, appellant first attacks Rodgers's credibility regarding his calculations of the amount of Medicaid benefits appellant received from September 2006 to February 2007. Appellant argues that Rodgers "did not know what the codes referenced on State's Exhibit Two meant nor could he explain what the codes meant to the jury."

Rodgers testified that he asked the agency that administers the benefits to list the Medicaid benefits paid to appellant between September 2006 and February 2007. Rodgers testified he received State's Exhibit 2 in response to his request; this exhibit is a "usage report" and "vendor drug report" from June 30, 2006 to March 1, 2007. State's Exhibit 2 does not reference Medicaid or appellant by name anywhere in the report; rather, it uses various codes. Rodgers testified that State's Exhibit 2 uses codes to identify medical providers who have submitted bills for care provided to appellant. Rodgers testified that he does not know which medical providers are identified by the codes. State's Exhibit 2 also references the same identification number linked to appellant in State's Exhibit 1, which lists the food stamp benefits that appellant received and expressly identifies appellant by name.

We reject appellant's contention that Rodgers's lack of knowledge regarding the codes assigned to medical providers goes to his credibility. The codes at issue related to the identity of the providers — not to appellant's identity. Appellant does not dispute that the unique identification number included in State's Exhibit 1 and State's Exhibit 2 is hers. In any event, the fact finder is the sole judge of the facts, the credibility of the witnesses, and the weight to be given the evidence. *Wyatt v. State*, 23 S.W.3d 18, 30 (Tex. Crim. App. 2000); *Beckham v. State*, 29 S.W.3d 148, 151 (Tex. App.—Houston

[2] Rodgers testified that appellant received an over-issuance of food stamp benefits of $164 in September, $191 in October, $400 in November, $400 in December, $177 in January, and $182 in February. Rodgers also testified that appellant received an over-issuance of Medicaid benefits of $28.78 in September, $39.25 in October, $0 in November, $51.88 in December, $172.22 in January, and $0 in February.

[14th Dist.] 2000, pet. ref'd). The fact finder may believe or disbelieve all or part of any witness's testimony. *Jones v. State*, 984 S.W.2d 254, 258 (Tex. Crim. App. 1998) (en banc). The fact finder is in the best position to evaluate the credibility of witnesses and the evidence, and we must afford due deference to its determination. *Marshall v. State*, 210 S.W.3d 618, 625 (Tex. Crim. App. 2006). To the extent that appellant's complaints could be construed as a challenge to Rodgers's credibility, resolution of such a challenge rests within the fact finder's province.

Appellant next argues that Rodgers's calculations are inaccurate because appellant is entitled to an "earned income deduction" under title 7 of the Code of Federal Regulations section 273.10(e)(1),[3] and Rodgers did not account for this deduction in his calculations. According to appellant, Rodgers should have subtracted "an amount equal to twenty percent of her earned income" from her total gross monthly earned income when calculating the amount of benefits she would have been entitled to receive had she reported her income. Appellant asserts that the over-issuance of benefits was $1,456.13 after factoring in the 20 percent "earned income deduction."

In determining an individual's eligibility for food stamp benefits, TDHHS follows federal regulations. 1 Tex. Admin. Code § 372.408 (2010). A state agency "do[es] not

[3] Section 273.10(e)(1) states in part as follows:

> To determine a household's net monthly income, the State agency shall:
>
> (A) Add the gross monthly income earned by all household members and the total monthly unearned income of all household members, minus income exclusions, to determine the household's total gross income. Net losses from the self-employment income of a farmer shall be offset in accordance with § 273.11(a)(2)(iii).
>
> (B) Multiply the total gross monthly earned income by 20 percent and subtract that amount from the total gross income; or multiply the total gross monthly earned income by 80 percent and add that to the total monthly unearned income, minus income exclusions. If the State agency has chosen to treat legally obligated child support payments as an income exclusion in accordance with § 273.9(c)(17), multiply the excluded earnings used to pay child support by 20 percent and subtract that amount from the total gross monthly income . . . .

7 C.F.R. § 273.10(e)(1) (2010).

apply the earned income deduction to that part of any earned income that the household failed to report in a timely manner when this act is the basis of the claim." 7 C.F.R. § 273.18(c)(1)(ii)(B) (2010). Appellant argues that she nonetheless is entitled to the earned income deduction, and that section 273.18 does not apply in a criminal proceeding. In support of her argument, appellant cites one California Supreme Court case and two California Court of Appeals cases. *See People v. Crow*, 864 P.2d 80, 87 (Cal. 1993) ("[T]he defrauded agency's 'loss' should be calculated by subtracting the amount the government would have paid had no acts of fraud occurred from the amount the government actually paid. Any money that the government would have been obligated to pay had the fraud not occurred is not attributable to the fraud, and thus is not a 'loss' arising out of the criminal offense."); *People v. Akins*, 27 Cal. Rptr. 3d 815, 820 (Cal. Ct. App. 4th 2005) (applying *Crow* and holding that criminal defendant was entitled to 20 percent earned income deduction for purposes of calculating State's loss); *People v. Hudson*, 7 Cal. Rptr. 3d 114,117 (Cal. Ct. App. 4th 2004) (same).

Texas courts have not addressed this issue, and we do not decide this issue here. Even assuming for argument's sake that appellant was entitled to an offset based on the earned income deduction, appellant bore the burden to produce evidence of her entitlement to and the amount of any such offset. *See* Tex. Penal Code § 31.08(d) (Vernon 2003); *Riley v. State*, No. 01-07-00718-CR, 2009 WL 3050878, at *6 (Tex. App.—Houston [1st Dist.] Sept. 18, 2009, pet. ref'd). The State presented evidence that appellant received an over-issuance of $1,806.13 from September 2006 to February 2007. Appellant did not raise the offset issue in the trial court and did not present any evidence to support her claim of entitlement to an offset based on the earned income deduction. Therefore, even if appellant were entitled to an offset, she failed to meet her burden of proof regarding any offset based on the earned income deduction.

Viewing the evidence in the light most favorable to the verdict, the jury could have found beyond a reasonable doubt that appellant received an over-issuance of more than $1,500 in welfare benefits. *See Jackson*, 443 U.S. at 326; *Evans*, 202 S.W.3d at 161.

We overrule appellant's first issue.

Conclusion

We affirm the trial court's judgment.

/s/ William J. Boyce
Justice

Panel consists of Justices Frost, Boyce, and Sullivan.

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