NO. 12-16-00034-CR

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

DANIEL ULTIMO, APPELLANT	***§***	***APPEAL FROM THE 3RD***
V.	***§***	***JUDICIAL DISTRICT COURT***
THE STATE OF TEXAS, APPELLEE	***§***	***HOUSTON COUNTY, TEXAS***

MEMORANDUM OPINION

Daniel Ultimo appeals his conviction for theft from the elderly. In one issue, he challenges the sufficiency of the evidence to support his conviction. We affirm.

BACKGROUND

Odie Larue, age ninety-five, owns property outside Crockett, Texas. In 2014, he leased a travel trailer on the property to Casey Walker.[1] Appellant was Walker's boyfriend. After Walker complained of a leak in the roof, Larue allowed Walker and Appellant to move into a vacant house behind the travel trailer. There was no written lease agreement. The house had been vacant for three or four years, and contained furniture and other personal property belonging to Larue. Larue did not itemize the house's contents before Appellant and Walker moved in.

After several months, Larue evicted Appellant and Walker. Before vacating the house, Appellant and Walker conducted a garage sale. Larue testified that he did not know about the sale, did not attend the sale, and was not certain as to what was sold at the sale. He denied selling his property or trading any items with Walker. He also testified to telling Walker that she could sell his wife's clothing, but to give half of the proceeds to his sister-in-law, Bobbie Bennett. He explained that Bennett retrieved some of her belongings from the house before the garage sale.

[1] In some parts of the record, Walker is also referred to as "Cathy Walker."

Bennett confirmed that she gathered her belongings from the house either before or after the sale. Deputy Roy May of the Houston County Sheriff's Office testified that Bennett told him she had removed some of the property from the house because she did not know what might happen to it and was afraid that Appellant and Walker might sell the property.

Bennett testified that she first learned of the garage sale when she drove by the house during the sale. She saw her sister's clothes and some other items from inside the house, but no furniture. Nor did she see Larue at the sale. She denied knowledge of any agreement to receive half of the sale proceeds. Larue testified that he did not see any of his belongings, other than his wife's clothes, at the sale. He and Bennett denied receiving any money from the sale.

After Appellant and Walker vacated the house, Larue discovered that some of his belongings were missing from the house. He reported the theft to law enforcement in March 2014, but testified that he thought he noticed items missing in October. Deputy May contacted Appellant and Walker about the missing property. They initially denied either taking or having possession of Larue's missing property. They claimed that Bennett took all the property out of the house. When May advised them that Larue would probably be happy with the return of his furniture, they admitted having possession of some items and promised to return them to Larue. Some of Larue's missing belongings, but not all, subsequently appeared in the garage of the house. Appellant and Walker told May that they had returned some items. Larue denied ever giving Appellant or Walker the right to take any property from the house.

Norman Mead, Larue's former renter, testified that he had moved furniture from the house on two or three occasions for Bennett. He also moved furniture for Larue on numerous occasions. He testified that the garage door of the house remained unlocked, and that Larue had allowed various individuals to enter the house to take some clothes. Additionally, Mead attended the garage sale, and he testified that Appellant, Walker, Larue, and Bennett were all present at the sale. He did not see any furniture, yard equipment, or a microwave at the sale.

The State charged Appellant with theft from the elderly in an amount more than $500 but less than $1,500 to which he pleaded "not guilty." The jury found Appellant guilty. The trial court sentenced Appellant to two years of confinement in a State jail facility, but suspended imposition of sentence and placed Appellant on community supervision for five years. This appeal followed.

EVIDENTIARY SUFFICIENCY

In his sole issue, Appellant argues the evidence is legally insufficient to support his conviction for theft from the elderly in an amount over $500. Specifically, he contends that (1) there are discrepancies in the testimony of Larue and Bennett with regard to the contents of the house, when Larue noticed the property was missing, who had access to the house, their removal of property during Appellant's occupancy, and their knowledge of and participation in the garage sale; (2) Mead's testimony conflicted with Larue's and Bennett's testimony; (3) no one testified that he sold any of Larue's property without his consent; (4) the evidence does not show that the value of any property taken is over $500; and (5) at most, he is guilty of theft of the items that he admitted to taking and returning, which are valued less than $500. Appellant argues that the evidence merely established that he lived in Larue's house, he conducted a garage sale before moving out, and Larue is not certain as to when the property was sold or taken or what property was sold or taken. Accordingly, Appellant asserts that no trier of fact could have found all the essential elements of theft beyond a reasonable doubt.

Standard of Review

The ***Jackson v. Virginia*** legal sufficiency standard is the only standard that a reviewing court should apply when determining whether the evidence is sufficient to support each element of a criminal offense that the state must prove beyond a reasonable doubt. ***Brooks v. State***, 323 S.W.3d 893, 895 (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. ***Escobedo v. State***, 6 S.W.3d 1, 6 (Tex. App.—San Antonio 1999, pet. ref'd) (citing ***Jackson v. Virginia***, 443 U.S. 307, 315-16, 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* ***Jackson***, 443 U.S. at 319, 99 S. Ct. at 2789; *see also* ***Johnson v. State***, 871 S.W.2d 183, 186 (Tex. Crim. App. 1993).

When reviewing the legal sufficiency of the evidence, we examine the evidence in the light most favorable to the verdict. *See* ***Jackson***, 443 U.S. at 319, 99 S. Ct. at 2789; ***Johnson***, 871 S.W.2d at 186. We give deference to the jury's responsibility to fairly resolve evidentiary conflicts, weigh the evidence, and draw reasonable inferences from basic facts to ultimate facts. ***Hooper v. State***, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007). We defer to the jury's credibility

and weight determinations, because the jury is the sole judge of the witnesses' credibility and the weight to be given their testimony. *See* ***Brooks***, 323 S.W.3d at 899; ***Jackson***, 443 U.S. at 319, 99 S. Ct. at 2789. Circumstantial evidence is as probative as direct evidence in establishing the accused's guilt. ***Hooper***, 214 S.W.3d at 13.

Applicable Law

A person commits theft if he unlawfully appropriates property with the intent to deprive the owner of the property. TEX. PENAL CODE ANN. § 31.03(a) (West Supp. 2016). Except in certain circumstances, theft is a Class A misdemeanor if the value of the property stolen is $500 or more but less than $1,500. ***Id***. § 31.03(e)(3).[2] The offense is a state jail felony if it is shown at trial that the owner of the stolen property is an elderly individual. ***Id***. § 31.03(f)(3)(A). An elderly individual is a person sixty-five years or older. ***Id***. § 22.04 (c)(2) (West Supp. 2016).

The value of property is (1) the fair market value at the time and place of the offense, or (2) if the fair market value cannot be ascertained, the cost of replacing the property within a reasonable time after the theft. ***Id***. § 31.08(a) (West Supp. 2016). A property owner is competent to testify as to the value of his own property. ***Sullivan v. State***, 701 S.W.2d 905, 908 (Tex. Crim. App. 1986). The owner also may testify as to his opinion or estimate of value in general and commonly understood terms. ***Id.*** at 909. Such testimony constitutes an offer of the witness's best knowledge of the property's value and is sufficient evidence for the trier of fact to make a determination as to the value based on the witness's credibility. ***Id.*** If a defendant wishes to rebut the owner's opinion evidence as to the value of stolen property, he must do more than merely impeach the witness's credibility during cross-examination; he must actually offer controverting evidence as to the value of the stolen item. ***Id.***; ***Smiles v. State***, 298 S.W.3d 716, 719 (Tex. App.—Houston [14th Dist.] 2009, no pet.).

Analysis

The jury heard evidence that, at the time Larue allowed Appellant and Walker to move into the house, it contained furniture and personal property owned by Larue. The jury also heard evidence that, before moving out, Appellant and Walker conducted a garage sale. After they vacated the house, Larue discovered that items were missing from the house. The jury heard Deputy May testify that Appellant initially denied having possession of any of Larue's missing

[2] Effective September 1, 2015, the Legislature amended section § 31.03(e)(3) to increase the value for a Class A misdemeanor from $500 to $750. *See* Act of May 31, 2015, 84th Leg., R.S., ch. 1251, § 10, 2015 TEX. GEN. LAWS 4208, 4212. The offense in this case occurred before the amendment's effective date.

property, but subsequently admitted to having some of the missing items. Shortly thereafter, some of those items reappeared in the garage of Larue's house.

Moreover, the State presented a list of the missing items and their value. Larue testified to the following missing items: (1) a chest of drawers valued at $100, (2) a desk valued at $100, (3) a microwave valued at $95, (4) a table valued at $45, (5) two table lamps valued at $30 for the pair, (6) two weed eaters valued at $130, (7) tools valued at $70, (8) a set of utensils valued at $75, (9) two chairs valued at $75, and (10) a hamburger cooker valued at $45. He testified that the amount of the missing items exceeds $500. According to Larue and Bennett, all of these items were in the house when Appellant moved in. Bennett confirmed that the items are no longer in the house. The record contains differing testimony as to which items were returned to Larue.

As sole judge of the weight and credibility of the witness testimony, the jury bore the burden of resolving any conflicts in the witnesses' testimony. *See* ***Brooks***, 323 S.W.3d at 899; *see also* ***Hooper***, 214 S.W.3d at 13. In doing so, the jury could reasonably conclude that (1) the items on Larue's list were in the house when Appellant moved in; (2) the items were missing after Appellant moved out; and (3) Appellant either sold or removed the missing items without Larue's consent before vacating the premises.

The jury could also reasonably conclude, based on Larue's testimony and his list of missing items, that the value of the missing items exceeded $500. As the owner of the property, Larue was competent to testify as to the value of his own property. *See* ***Sullivan***, 701 S.W.2d at 908. The record does not indicate that Appellant provided evidence to controvert Larue's opinion as to value. Merely rebutting Larue's opinion as to value on cross-examination is insufficient. *See* ***id***. Absent controverting evidence, Larue's testimony alone is sufficient to prove value. *See* ***id***. The jury was entitled to believe that Appellant unlawfully appropriated all the items on Larue's list and not just those items that were returned. *See* ***Brooks***, 323 S.W.3d at 899; *see also* ***Hooper***, 214, S.W.3d at 13. Further, a lesser included offense instruction on theft of over $50 and less than $500 was submitted to, but rejected by, the jury.

Viewing the evidence in the light most favorable to the jury's verdict, we conclude that a rational trier of fact could have found, beyond a reasonable doubt, that (1) Appellant unlawfully appropriated Larue's property without his consent and with the intent to deprive him of the property; and (2) the value of the missing property was more than $500 but less than $1,500. *See*

Jackson, 443 U.S. at 319, 99 S. Ct. at 2789; *see also* ***Johnson***, 871 S.W.2d at 186; TEX. PENAL CODE ANN. § 31.03(a), (e)(3), (f)(3)(A). Accordingly, the evidence is legally sufficient to support Appellant's conviction for theft of the elderly. We overrule Appellant's sole issue.

DISPOSITION

Having overruled Appellant's sole issue, we ***affirm*** the trial court's judgment.

GREG NEELEY
Justice

Opinion delivered November 30, 2016.
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

NOVEMBER 30, 2016

NO. 12-16-00034-CR

DANIEL ULTIMO,
Appellant
V.
THE STATE OF TEXAS,
Appellee

Appeal from the 3rd District Court
of Houston County, Texas (Tr.Ct.No. 15CR-026)

THIS CAUSE came to be heard on the appellate record and briefs filed herein, and the same being considered, it is the opinion of this court that there was no error in the judgment.

It is therefore ORDERED, ADJUDGED and DECREED that the judgment of the court below **be in all things 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.