COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

RONALD BERGE,	§	No. 08-15-00263-CR
Appellant,	§	Appeal from
v.	§	34th District Court
THE STATE OF TEXAS,	§	of El Paso County, Texas
Appellee.	§	(TC # 20120D03597)

CORRECTED OPINION

A jury convicted Ronald Berge of misapplication of fiduciary property and theft over $200,000, and the trial court sentenced him to fifteen years and a day on both counts, to run concurrently. Appellant contends the evidence is insufficient to support the convictions. For the reasons that follow, we affirm.

FACTUAL SUMMARY

Ralph Kendrick owns Kendrick Electric, a company he founded in 1970. Kendrick's sister had served as the company office manager for over twenty-five years, when she left due to health issues and was replaced by Lauri LaBree, the assistant office manager. LaBree was a trusted employee. Kendrick had known her for many years, as she was the wife of Kendrick's shop foreman, a long-time employee whom Kendrick thought of as a son to him. Like her predecessor, LaBree had unfettered access to the company's checks, and was responsible for

preparing checks to pay company's expenses and entering those checks in the company's check-register system.

From June 2006, shortly after LaBree became office manager, until July 2010, hundreds of checks amounting to $1.8 million were written on the company's account and made payable to Appellant. Kendrick testified he did not know Appellant and that Appellant had never performed any services for the company. At trial, Kendrick identified each check made payable to Appellant and as to each, testified that the signature was not his,[1] that he did not authorize the check, and that each appeared to be endorsed by Appellant. Appellant was not listed as the payee on any of the checks in the company check register.[2] Kendrick identified the corresponding portions of Appellant's bank records that reflected the negotiation of each check through one of Appellant's bank accounts.

In mid-2009, Kendrick began to notice the company records did not balance. At this same time, the company experienced a downhill swing, forcing Kendrick to infuse personal funds into the company to keep it afloat. In reviewing the company credit-card statements, Kendrick found an unauthorized charge for the property taxes on LaBree's home. LaBree ultimately admitted to paying her property taxes with the company credit card, and she was terminated in July 2010. A subsequent investigation found a few checks made payable to Appellant, prompting Kendrick to report the incident to the El Paso Police, who ultimately uncovered the approximately $1.8 million in unauthorized checks made payable to Appellant.

[1] Kendrick was the only person at the company authorized to sign checks.

[2] The check register listed the payees as other businesses and individuals, some of which were known to Kendrick, some of which he no longer did business with, and some of which were unknown to Kendrick, no longer in business, or were listed simply as "missing check."

Kendrick denied that he had any sort of romantic relationship with LaBree or that he had ever told LaBree she would become part owner of the company.

Detective Stanley Hayes investigated Kendrick's complaint regarding the unauthorized checks made payable to Appellant. Appellant voluntarily met with Detective Hayes and informed him that LaBree had told him she owned the company and had given him the checks to cash and then return the proceeds to her, in exchange for a $500 payment for each check cashed.[3] Detective Hayes also interviewed LaBree who confirmed Appellant would cash the checks and give her the proceeds after keeping his $500 share. She would then use her share to buy cocaine from Appellant and return the rest of the proceeds to Kendrick. Appellant called LaBree as a witness. She testified that Kendrick approached her about cashing company checks in order to devalue the company and hide the company's true worth during his pending divorce proceedings. She was uncomfortable doing this herself, so she asked Appellant to cash the checks. LaBree claimed that Kendrick approved of this and instructed her to make the checks payable to Appellant. According to LaBree, Appellant would cash the checks in exchange for ten percent of the amount of the check, which they split, with the remainder going back to Kendrick. LaBree asserted that Kendrick had pressed charges against her in retaliation for ending an ongoing affair between them.

STANDARD OF REVIEW

We review sufficiency complaints under the legal sufficiency standard enunciated in *Jackson v. Virginia. See Fernandez v. State,* 479 S.W.3d 835, 837 (Tex.Crim.App. 2016); *Brooks v. State,* 323 S.W.3d 893, 912 (Tex.Crim.App. 2010), *citing Jackson v. Virginia*, 443

[3] Detective Hayes analyzed Appellant's bank records and testified that Appellant was not cashing the checks but rather was depositing the checks into his account and then later withdrawing the funds.

U.S. 307, 318-19, 99 S.Ct. 2781, 61 L.Ed. 2d 560 (1979). The relevant inquiry is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson*, 443 U.S. at 319, 99 S.Ct. at 2789. The jury is the sole judge of credibility and weight to be attached to the testimony of witnesses. *Dobbs v. State*, 434 S.W.3d 166, 170 (Tex.Crim.App. 2014). It is the fact finder's duty "to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *See Clayton v. State*, 235 S.W.3d 772, 778 (Tex.Crim.App. 2007), *quoting Jackson*, 443 U.S. at 319, 99 S.Ct. at 2781. When the record supports conflicting inferences, we presume that the jury resolved the conflicts in favor of the verdict, and we defer to that determination. *Dobbs*, 434 S.W.3d at 170; *see also Jackson*, 443 U.S. at 319, 99 S.Ct. at 2789. If a rational fact finder could have found the defendant guilty, we will not disturb the verdict on appeal. *Fernandez*, 479 S.W.3d at 838; *see also Temple v. State*, 390 S.W.3d 341, 363 (Tex.Crim.App. 2013)(affirming judgment where evidence was legally sufficient to support a conviction).

Circumstantial evidence is as probative as direct evidence in establishing guilt, and circumstantial evidence alone may be sufficient to establish guilt. *Dobbs*, 434 S.W.3d at 170; *Carrizales v. State*, 414 S.W.3d 737, 742 n.20 (Tex.Crim.App. 2013), *citing Hooper v. State*, 214 S.W.3d 9, 13 (Tex.Crim.App. 2007). Each fact need not point directly and independently to the guilt of the appellant, as long as the cumulative force of all the incriminating circumstances is sufficient to support the conviction. *Dobbs*, 434 S.W.3d at 170; *Hooper*, 214 S.W.3d at 13.

DID APPELLANT ACT AS A FIDUCIARY?

In Issue One, Appellant contends the evidence is insufficient to support his conviction for

misappropriation of fiduciary property because there is no evidence that he acted as a fiduciary to Kendrick. Appellant concedes the evidence was sufficient to show that Kendrick did not authorize LaBree to write the checks and that "[c]learly this was a crime." He also concedes that he "clearly acted contrary to the benefit of Mr. Kendrick" and with "dishonesty and deception" in cashing the checks. But Appellant contends there is no evidence he personally acted in a fiduciary capacity and that he cannot be guilty of misapplication of the fiduciary property because he was "not a primary actor in the commission of the offense." We disagree.

Appellant is correct that a person commits the offense of misapplication of fiduciary property only "if he intentionally, knowingly, or recklessly misapplies property he holds as a fiduciary . . . in a manner that involves substantial risk of loss to the owner of the property." TEX.PENAL CODE ANN. § 32.45(b)(West 2016). Appellant is also correct that under the statute, a "fiduciary" includes any person acting in a fiduciary capacity, and that to "misapply" the property, the defendant must "deal with property contrary to an agreement under which the fiduciary holds the property." *Id.* at § 32.45(a)(1)(C), (a)(2)(A). Appellant was indicted for personally misapplying Kendrick's property that he held "as a fiduciary and as a person acting in a fiduciary capacity" for Kendrick Electric. The jury charge mirrored those requirements for the jury to convict Appellant.

But Appellant was not tried as the principal actor in this crime, but rather as a party. The charge informed the jury of the law of parties and, in accordance with the Penal Code, instructed the jury that a person is criminally responsible as a party for an offense committed by the conduct of another, if that person, acting with the intent to promote or assist in the commission of the offense, solicits, encourages, directs, aids, or attempts to aid the other person to commit

the offense. *See* TEX.PENAL CODE ANN. § 7.02(a)(2)(West 2011). Also, the State's theory of prosecution, as reflected in its jury argument, was that Appellant was criminally responsible as a party to LaBree's misapplication of fiduciary property because he assisted and aided her in the commission of that offense.

It is well established that the indictment need not "include notice that the State will attempt to prove its case under the law of parties." *Demond v. State*, 452 S.W.3d 435, 443 (Tex.App.--Austin 2014, pet. ref'd), *quoting Marable v. State*, 85 S.W.3d 287, 292 (Tex.Crim.App. 2002)(Cochran, J., concurring). Therefore, an accused may be convicted as a party to the offense even if the indictment does not explicitly charge him as a party. *Id.*, *citing Boston v. State*, 373 S.W.3d 832, 837 (Tex.App.--Austin 2012), *aff'd*, 410 S.W.3d 321, 327 (Tex.Crim.App. 2013).

And, contrary to Appellant's argument, there in nothing in the Penal Code that would prevent the law of the parties from being applied to his prosecution for misapplication of fiduciary property or to prevent Appellant from being convicted as a party to LaBree's misapplication of fiduciary property for assisting and aiding her in the scheme to defraud Kendrick Electric. *Demond*, 452 S.W.3d at 444 ("there is nothing in the language of the Penal Code to indicate that party liability is inappropriate with respect to misapplication of fiduciary property"); *Head v. State*, 299 S.W.3d 414, 433 (Tex.App.--Houston [14th Dist.] 2009, pet. ref'd)("appellant is not required to be a fiduciary of the trusts to be convicted under the law of parties"); *Wiggins v. State*, No. 01-07-00672-CR, 2009 WL 2231806, at *4 (Tex.App.--Houston [1st Dist.] July 23, 2009, pet. ref'd)(mem. op on rehearing)("Under the law of parties, a defendant may be convicted of the offense of misapplication of fiduciary property if . . . he

solicits, encourages, directs, aids, or attempts to aid another person committing the offense."). And because Appellant could be prosecuted and convicted under the law of parties, the State was not required to prove that he acted in a fiduciary capacity. *See Kaufman v. State*, No. 13-06-00653-CR, 2008 WL 6515213, at * 8 (Tex.App.--Corpus Christi-Edinburg May 29, 2008, pet. dism'd)(finding it unnecessary to examine whether there was evidence that appellant acted as a fiduciary, because appellant was not convicted as a principal but as a party to the misappropriation of fiduciary property committed by another, which "is permitted under the law of parties").

Appellant misplaces his reliance on *Amaya v. State*, 733 S.W.2d 168 (Tex.Crim.App. 1986), in arguing that he could only be convicted as a primary actor for misappropriation of fiduciary property, which would require proof he was in a fiduciary relationship with Kendrick Electric. The court in *Amaya* did not hold that a defendant can only be convicted of misappropriation of fiduciary property as a primary actor. Rather, the court determined that the State had failed to prove the appellants acted in a fiduciary capacity with the owner of the property, which "dictates that they were not primary actors in the commission of the offense." *Id*. at 173. But the court went on to state that "[t]heir convictions thus rest on the law of parties[.]" *Id*. at 173-74. Thus, the court recognized that the appellants could be convicted for misappropriation under the law of parties, even without evidence of a fiduciary relationship, as long as the evidence supported party liability. The court ultimately reversed the convictions only because it determined the evidence was insufficient to convict appellants under the law of parties as well. *Id*. at 174.

Indeed, there are numerous cases where the defendant's conviction for misappropriation

of fiduciary property has been upheld under party liability when the defendant was not a fiduciary and did not act in a fiduciary capacity, but rather simply assisted or aided another in the commission of the crime. *See, e.g., Demond*, 452 S.W.3d at 445-53; *Head*, 299 S.W.3d at 433-34; *Wiggins*, 2009 WL 2231806, at *5. In sum, Appellant could be convicted of misappropriation of fiduciary property as a party to LaBree's commission of the offense, and the State was not required to produce any evidence that Appellant himself acted in a fiduciary capacity in order to support Appellant's conviction under the law of parties. We overrule Issue One.

DID APPELLANT INTEND TO PROMOTE OR ASSIST LABREE?

In Issue Two, Appellant contends the evidence is insufficient to support his conviction for misappropriation of fiduciary property because there is no evidence he intended to promote or assist LaBree in the commission of the offense. He argues that although the evidence establishes that LaBree committed a crime in writing the checks, there is no evidence that he knew she was not authorized to write the checks she provided to him, as shown by his statement to Detective Hayes that LaBree had told him she owned Kendrick Electric Company. We disagree.

To support a conviction as a party to misappropriation of fiduciary property, the State must prove that Appellant knew he was assisting in the commission of an offense. *See Amaya*, 733 S.W.2d at 174 ("we cannot hold [appellants] accountable as parties without some indications that they knew they were assisting in the commission of an *offense*"); TEX.PENAL CODE ANN. § 7.02(a)(2). "We require a higher level of complicity from those we denote parties than those we

denote primary actors, because the former are performing acts that are not illegal in and of themselves[.]" *Id.*

Appellant does not contest that LaBree acted as a fiduciary to Kendrick Electric and misapplied Kendrick's property by writing 253 checks to Appellant over a four-year period. Nor does he contest that he deposited the 253 checks in his account and shared the proceeds with LaBree. Indeed, he concedes in his brief that the evidence was sufficient to show that Kendrick did not authorize LaBree to write the checks and that "[c]learly this was a crime." He also concedes that he "clearly acted contrary to the benefit of Mr. Kendrick" and with "dishonesty and deception" in cashing the checks. Despite these concessions, Appellant suggests that the evidence demonstrates that LaBree deceived him, as shown by his statement to Detective Hayes that LaBree had told him she owned the company, and that there is no other evidence to show he knew he was assisting in the commission of a crime. But when LaBree testified at trial, she expressly denied that she had ever told Appellant that she was an owner of Kendrick Electric. Faced with this conflicting evidence, the jury could have reasonably determined that LaBree had never deceived Appellant into assisting her.

Appellant's claim that LaBree told him she owned the company was not only contradicted by LaBree herself but was also implausible in light of the sheer number of checks (253), the total amount involved ($1.8 million), and the extended time-period in which Appellant participated in the scheme (four years). A jury could reasonably consider Appellant's untruthful and implausible story to explain his actions, as well as the other circumstances of the case as affirmative evidence of Appellant's guilt. *See Padilla v. State*, 326 S.W.3d 195, 201 (Tex.Crim.App. 2010)(rational fact finder can consider a defendant's untruthful statements, in

connection with other circumstances of the case, as affirmative evidence of defendant's guilt), *citing Wright v. West*, 505 U.S. 277, 296, 112 S.Ct. 2482, 2492, 120 L.Ed.2d 225 (1992)(jury could disbelieve defendant's "uncorroborated and confused testimony" and "whatever it concluded to be perjured testimony as affirmative evidence of guilt"); *Guevara v. State*, 152 S.W.3d 45, 50 (Tex.Crim.App. 2004)(implausible explanations are probative of wrongful conduct and are circumstantial evidence of guilt); *Dominguez v. State*, 474 S.W.3d 688, 697 (Tex.App.--Eastland 2013, no pet.)("When a suspect provides an implausible story to explain his actions, that fact can constitute circumstantial evidence of guilt.").

Proof of a culpable mental state generally relies upon circumstantial evidence. *Dillon v. State,* 574 S.W.2d 92, 94 (Tex.Crim.App. 1978); *Knight v. State,* 457 S.W.3d 192, 199 (Tex.App.--El Paso 2015, pet. ref'd). And ordinarily, proof of a culpable mental state must be inferred from the acts, words, and conduct of the accused and the surrounding circumstances. *Ledesma v. State,* 677 S.W.2d 529, 531 (Tex.Crim.App. 1984); *Knight*, 457 S.W.3d at 199. It is well settled that a jury may also rely on circumstantial evidence to prove party status. *Gross v. State*, 380 S.W.3d 181, 186 (Tex.Crim.App. 2012); *Ransom v. State,* 920 S.W.2d 288, 302 (Tex.Crim.App. 1996). Each fact need not point directly to the guilt of the defendant, as long as the cumulative effect of the facts are sufficient to support the conviction under the law of parties. *Gross*, 380 S.W.3d at 186; G*uevara*, 152 S.W.3d at 49.

We conclude that, viewed in the light most favorable to the jury's verdict, a rational juror could have reasonably inferred from the circumstantial evidence and Appellant's implausible story that Appellant knew he was assisting in the commission of the offense of misapplication of fiduciary property. We overrule Issue Two.

DID APPELLANT INTEND TO DEPRIVE KENDRICK OF HIS PROPERTY?

In Issue Three, Appellant contends the evidence is insufficient to support his conviction for theft because there is no evidence that he intended to deprive Kendrick of his property. Appellant argues that the subsection of the theft statute under which he was indicted required that he participated, either personally or as a party, in the initial misappropriation from Kendrick, and that the State failed to prove that he actually wrote the checks himself or performed some act at the time they were written. He relies upon *Casey v. State*, 633 S.W.2d 885 (Tex.Crim.App. 1982), a panel opinion that was subsequently overruled *en banc* in *McClain v. State*, 687 S.W.2d 350 (Tex.Crim.App. 1985).

The theft statute provides in subsection (a) that a person commits theft "if he unlawfully appropriates property with intent to deprive the owner of property." TEX. PENAL CODE ANN. § 31.03(a)(West Supp. 2016). Subsection (b) provides three different ways in which appropriation of property is unlawful, the first two of which are pertinent here:

> (1) it is without the owner's effective consent; [or]
>
> (2) the property is stolen and the actor appropriates the property knowing it was stolen by another[.]

Id. at § 31.03(b)(1, 2).

In *Casey*, the appellant was indicted under subsection (b)(1) for theft without the owner's effective consent. 633 S.W.2d at 886. The panel concluded that theft under subsection (b)(1) requires that the accused participate, either personally or acting as a party, in the initial unlawful appropriation of the property from its owner. *Id.* at 887. But when the accused does not take part in the initial unlawful appropriation but later acquires or exercises control over the stolen property knowing that it was stolen by another, he is guilty only of theft under subsection (b)(2).

Id. The court concluded that when a theft is alleged under subsection (b)(1), the State must establish that the defendant was involved in the initial appropriation from the owner, and if the State proves only the transfer of stolen property, the conviction must be reversed. *Id.* Applying *Casey*, Appellant argues that his theft conviction should likewise be reversed since he was indicted under subsection (b)(1) but there is no evidence he was involved in the initial appropriation from Kendrick.

But in *McClain*, the court, sitting *en banc*, found the rationale of *Casey* "untenable" and overruled it. 687 S.W.2d at 353, 355. The court reasoned that knowing the property possessed "was stolen by another," as set out in subsection (b)(2), is merely a subset of knowing the possession is "without the owner's consent," as set out in subsection (b)(1), and that *Casey* erred in treating these circumstances as mutually exclusive. *Id.* at 354-55. The court concluded that it "follows that these provisions have evidentiary import only in terms of establishing the 'unlawfulness' of the appropriation, and the defendant is not entitled to have them expressed in the State's charging instrument[.]" *Id.* at 355. Thus, the State was not required to prove that Appellant participated in the initial misappropriation from Kendrick to support Appellant's conviction for theft. We overrule Issue Three.

CONCLUSION

We affirm the judgment of the court below.

May 31, 2017

ANN CRAWFORD McCLURE, Chief Justice

Before McClure, C.J., Rodriguez, and Hughes, JJ.
Hughes, J., not participating

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