Opinion filed November 9, 2017

In The

Eleventh Court of Appeals

No. 11-15-00290-CR

MARTEL SEPHION BEAVER, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 104th District Court
Taylor County, Texas
Trial Court Cause No. 19548B

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

The jury convicted Martel Sephion Beaver of the third-degree felony offense of theft of a Lincoln Navigator.[1] After Appellant pleaded "true" to the enhancement allegation, the jury found that allegation to be "true" and assessed his punishment at

[1]*See* former TEX. PENAL CODE § 31.03(a), (b), (e)(5) (2011).

confinement for ten years. The trial court sentenced Appellant. On appeal, Appellant asserts four issues. We affirm.

I. *The Charged Offense*

The grand jury returned an indictment against Appellant for theft of personal property worth $20,000 or more but less than $100,000 and alleged that he intentionally and knowingly appropriated a Lincoln Navigator without the owner's consent and with the intent to deprive the owner of that property. Section 31.03 of the Texas Penal Code provides that "[a] person commits an offense if he unlawfully appropriates property with intent to deprive the owner of property." PENAL § 31.03(a). Section 31.03(b) provides that appropriation of property is unlawful if "(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.* § 31.03(b). Appellant pleaded not guilty and proceeded to trial.

II. *Evidence at Trial*

At trial, the State adduced evidence that the keys to a maroon Lincoln Navigator went missing from the Lawrence Hall Lincoln Mazda dealership. After a failed two-day search for the keys and after the vehicle itself also went missing, James Kirksy Kennedy, the general manager[2] for the Lawrence Hall dealership, called the Abilene Police Department and reported that someone had stolen the vehicle.

Police searched for and located the vehicle in Abilene. Katie Snell, an officer with the Abilene Police Department, saw the vehicle and noticed that it did not have a license plate. Appellant was driving the vehicle and had possession

[2]Kennedy was the general sales manager at the time the vehicle was stolen.

of the vehicle when it was stopped by Officer Snell.[3] Officer Snell testified that Appellant never told her that the vehicle was his and she stated that he asked her if the vehicle was stolen. After Appellant's arrest, Officer Snell searched Appellant's backpack and found pamphlets for new vehicles. Officer Snell searched the vehicle and found the window sticker in the back of the vehicle.

After police had arrested Appellant and secured the vehicle, Kennedy went to that location and noticed that the "Monroney" sticker, which is the manufacturer's window sticker, was not on the window but was on the back seat. Kennedy confirmed, by the vehicle's VIN number, that the vehicle was the one that was missing from the lot. Kennedy also confirmed that Appellant was not in the process of buying the vehicle and that Appellant did not have the dealer's consent to take the vehicle off the lot. Kennedy testified that the "asking price" or MSRP for that vehicle was $63,000 and that the lowest amount Lawrence Hall could sell it for was $58,000.

III. *Analysis*

Appellant asserts in his first issue on appeal that that the State adduced insufficient evidence. In his second issue, he asserts a variance between the indictment and proof at trial, while in his third issue, he asserts error between the allegations in the indictment and the jury's instructions. In his fourth issue, Appellant asserts that the trial court erred when it found him competent without holding a competency hearing. Because Appellant's first, second, and third issues are related, we address them together, then address his fourth issue.

[3]The State also introduced the COBAN video recording of Officer Snell's traffic stop of Appellant.

A. <u>Issues One, Two, and Three</u>: The State adduced sufficient evidence for the jury to convict Appellant of theft, and there was no variance between the indictment and proof at trial. In addition, the trial court did not err when it instructed the jury.

In his first three issues, Appellant asserts sufficiency-of-the-evidence, material variance, and jury charge complaints. The State responds that it adduced sufficient evidence and that there was no material variance or jury charge error. As we explain below, we agree.

1. The State adduced sufficient evidence for the jury to find Appellant guilty of theft.

Appellant asserts that the State did not present sufficient evidence to prove that the vehicle was owned by Kennedy and that Appellant had "intentionally or knowingly appropriate[ed]" the vehicle. We review the sufficiency of the evidence under the standard of review set forth in *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). *Brooks v. State*, 323 S.W.3d 893, 912 (Tex. Crim. App. 2010); *Polk v. State*, 337 S.W.3d 286, 288–89 (Tex. App.—Eastland 2010, pet. ref'd). Under the *Jackson* standard, we examine all of the evidence in the light most favorable to the verdict and determine whether, based on that evidence and any reasonable inferences from it, any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Jackson*, 443 U.S. at 319; *Isassi v. State*, 330 S.W.3d 633, 638 (Tex. Crim. App. 2010). We measure the sufficiency of the evidence by the elements of the offense as defined in a hypothetically correct jury charge for the case. *Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997). A hypothetically correct jury charge is one that "accurately sets out the law, is authorized by the indictment, does not unnecessarily increase the State's burden of proof or unnecessarily restrict the State's theories of liability, and adequately describes the particular offense for which the defendant was tried." *Id.*

Section 31.03 of the Texas Penal Code provides that "[a] person commits an offense if he unlawfully appropriates property with intent to deprive the owner of property." PENAL § 31.03(a). Appropriation of property is unlawful if "(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.* § 31.03(b). A person who "has title to the property, possession of the property, whether lawful or not, or a greater right to possession of the property than the actor" is an "[o]wner" of the property. *Id.* § 1.07(a)(35).

In this case, the State adduced evidence that Kennedy, the general sales manager for Lawrence Hall at the time, had discovered that a new Lincoln Navigator, worth between $58,000 and $63,000, and its keys had gone missing from a Lawrence Hall dealership. After Kennedy confirmed that the keys and vehicle were not at the dealership and that no customer had taken the vehicle, Kennedy reported to the Abilene police that the vehicle had been stolen. Police located the vehicle in Appellant's possession.

Appellant never told Officer Snell that the vehicle was his, and he inquired of her as to whether the vehicle was stolen. Kennedy confirmed that the vehicle was the one that was missing from the lot. A jury is free to draw reasonable inferences from basic facts to ultimate ones. *Sanders v. State*, 119 S.W.3d 818, 820 (Tex. Crim. App. 2003). Because the State adduced evidence that Appellant had not received consent to remove the vehicle from the dealer's lot and was stopped by the police in possession of the vehicle after Kennedy had reported it stolen, the jury could infer that Appellant took the vehicle with the intent to deprive the dealer of its property. Appellant's argument that Kennedy was not the owner is unpersuasive because Kennedy, the general sales manager, had a greater right to possession of the vehicle

than Appellant. *See* PENAL § 1.07(a)(35). Kennedy testified that the vehicle was offered for sale by the dealership, that it was stolen from the dealer's lot, and that Appellant had not been given consent to remove that vehicle from the lot. The factfinder is the sole judge of the weight and credibility of the evidence; we may not reevaluate the weight and credibility of the evidence and substitute our own judgment for that of the factfinder. *Dewberry v. State*, 4 S.W.3d 735, 740 (Tex. Crim. App. 1999). After a review of the record, we hold that the State adduced sufficient evidence from which a rational jury could have found beyond a reasonable doubt that Appellant had committed the offense of theft. We overrule Appellant's first issue on appeal.

2. There was no variance between the indictment and proof.

Appellant claims that there was a material variance between the indictment and the proof at trial because the jury instructions included Section 31.03(b)(2) of the Penal Code but the indictment did not include an allegation that Appellant appropriated the property knowing it was stolen by another. The State asserts that Section 31.03(b)(1) and (b)(2) are a subset of Section 31.03(a). We agree. *See Berg v. State*, 747 S.W.2d 800, 809 (Tex. Crim. App. 1988). Furthermore, the State is only required to allege that Appellant unlawfully appropriated the personal property with the intent to deprive the owner of that property. *Id.* In this case, the indictment alleged that on or about July 30, 2014, in Taylor County, Texas, Martel Sephion Beaver did then and there intentionally and knowingly appropriate property by acquiring and exercising control over the property, other than real property, to wit: a Lincoln Navigator, of the value of $20,000 or more but less than $100,000 from James Kirksey Kennedy, the owner thereof, without the effective consent of

the owner and with the intent to deprive the owner of the property. The jury instructions provided the following:

> The state accuses the defendant of having committed the offense of Theft. Specifically, the accusation is that the defendant did then and there intentionally and knowingly appropriate property by acquiring and exercising control over property, other than real property, to-wit: Lincoln Navigator, of the value of twenty thousand dollars ($20,000.00) or more but less than one hundred thousand dollars ($100,000.00) from James Kirksey Kennedy, the owner thereof, without the effective consent of the said owner and with the intent to deprive the said owner of the said property.

Because the indictment and the jury instruction match and because the State adduced sufficient evidence that Appellant committed theft, there is no material variance. *See Berg*, 747 S.W.2d at 809. We overrule Appellant's second issue.

3. The trial court did not err when it instructed the jury.

Appellant asserts that the trial court erred when it instructed the jury that he could be found guilty of the offense of theft by unlawfully appropriating the Lincoln Navigator, under Section 31.03(b)(2), by receipt of the vehicle knowing it was stolen because the indictment did not include that allegation. The State asserts that it is only required to allege that Appellant unlawfully appropriated the personal property with the intent to deprive the owner of that property. *See Berg*, 747 S.W.2d at 809. As we previously explained, the offense of theft occurs when one unlawfully appropriates the personal property of another without that person's consent and with the intent to deprive the owner of the property. PENAL § 31.03(a). As outlined in *Berg* and *McLain*, manner and means of the offense of theft is an evidentiary matter—not an element of the offense—and can be proven under either Section 31.03(b)(1) or (b)(2). *Berg*, 747 S.W.2d at 809; *McClain v. State*, 687 S.W.2d 350, 354–55 (Tex. Crim. App. 1985). The trial court correctly instructed the jury on the

offense of theft. *See Berg*, 747 S.W.2d at 809. Moreover, it was not reversible error for the trial court to include the full definition in the abstract instructions. The Court of Criminal Appeals has recently reiterated that "even those portions of the definition that do not apply to the facts proven in a particular case, and are therefore 'superfluous,' 'do[ ] not produce[ ] reversible error . . . because [they have] no effect on the jury's ability fairly and accurately to implement the commands of the application paragraph or paragraphs.'" *Burnett v. State*, No. PD-0576-16, 2017 WL 4158919, at *10 (Tex. Crim. App. Sept. 20, 2017) (alterations in original) (quoting *Plata v. State*, 926 S.W.2d 300, 302–03 (Tex. Crim. App. 1996)). We overrule Appellant's third issue.

B. Issue Four: Although the trial court did not conduct a competency inquiry, it did not err when it found Appellant competent to stand trial.

Appellant asserts in his fourth issue that the trial court erred when it found Appellant competent without holding a competency hearing. Article 46B.003(a) provides that "[a] person is incompetent to stand trial if the person does not have: (1) sufficient present ability to consult with the person's lawyer with a reasonable degree of rational understanding; or (2) a rational as well as factual understanding of the proceedings against the person." TEX. CODE CRIM. PROC. ANN. art. 46B.003(a) (West 2006). "A defendant is presumed competent to stand trial and shall be found competent to stand trial unless proved incompetent by a preponderance of the evidence." *Id.* art. 46B.003(b).

"Whether an issue of incompetency exists at the time of trial is left to the discretion of the trial judge." *Thompson v. State*, 915 S.W.2d 897, 901 (Tex. App.—Houston [1st Dist.] 1996, pet. ref'd). "We review a trial court's decision not to conduct a competency hearing for an abuse of discretion." *Lawrence v. State*, 169

S.W.3d 319, 322 (Tex. App.—Fort Worth 2005, pet. ref'd) (citing *Moore v. State*, 999 S.W.2d 385, 393 (Tex. Crim. App. 1999)). "A trial court abuses its discretion if its decision is arbitrary or unreasonable." *Id.* (citing *Lewis v. State*, 911 S.W.2d 1, 7 (Tex. Crim. App. 1995)).

Article 46B.004 provides in part:

> (b) If evidence suggesting the defendant may be incompetent to stand trial comes to the attention of the court, the court on its own motion shall suggest that the defendant may be incompetent to stand trial.
>
> (c) On suggestion that the defendant may be incompetent to stand trial, the court *shall determine by informal inquiry* whether there is some evidence from any source that would support a finding that the defendant may be incompetent to stand trial.

CRIM. PROC. art. 46B.004 (West Supp. 2016) (emphasis added); *see Lawrence*, 169 S.W.3d at 322. "If, under subsection (b), evidence comes to the trial court's attention suggesting that the defendant may be incompetent to stand trial, then, under subsection (c), the trial court *is required to determine by informal inquiry* whether there is some evidence that would support a finding that the defendant may be incompetent to stand trial." *Lawrence*, 169 S.W.3d at 322 (emphasis added). Only after the court conducts an informal inquiry and determines that evidence exists to support a finding of incompetency, does it order an examination to determine if the defendant is incompetent to stand trial. CRIM. PROC. art. 46B.005(a). And, if the court determines from the examination that evidence exists to support a finding of incompetency, the court shall hold a hearing to determine whether the defendant is incompetent to stand trial. *Id.* arts. 46B.005(b), 46B.051.

In this case, the trial court ordered that Dr. Samuel Brinkman, a clinical neuropsychologist, complete an examination of Appellant. Dr. Brinkman interviewed and assessed Appellant. Dr. Brinkman determined, under the legal

definition of competency, that Appellant was competent to stand trial. The trial court found Appellant competent to stand trial. As a result of this informal inquiry, the trial court was not required to conduct a hearing. *See* CRIM. PROC. arts. 46B.005(b), 46B.051; *see McDaniel v. State*, 98 S.W.3d 704, 711 (Tex. Crim. App. 2003). Therefore, the trial court did not err when it did not conduct a competency hearing. *McDaniel*, 98 S.W.3d at 711. We overrule Appellant's fourth issue on appeal.

IV. *This Court's Ruling*

We affirm the judgment of the trial court.

MIKE WILLSON
JUSTICE

November 9, 2017

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

Panel consists of: Wright, C.J.,
Willson, J., and Bailey, J.