Affirmed and Opinion Filed February 17, 2016

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-15-00333-CR

JEB STEVENS BROWN, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the County Court at Law No. 6
Collin County, Texas
Trial Court Cause No. 006-83651-2013

MEMORANDUM OPINION

Before Justices Francis, Evans, and Stoddart
Opinion by Justice Francis

Jeb Brown appeals his conviction for criminal mischief and sentence of one day in the county jail. In two issues, appellant claims the trial court erred by denying his motion for directed verdict and by excluding certain evidence. We affirm.

In his first issue, appellant claims the trial court erred by denying his motion for directed verdict. He argues the evidence is insufficient to support his conviction because the State failed to establish pecuniary value as defined in the statute.

A complaint about the denial of a motion for directed verdict is treated the same as a challenge to the legal sufficiency of the evidence. *Williams v. State*, 937 S.W.2d 479, 482 (Tex. Crim. App. 1996). Evidence is legally sufficient when, viewed in the light most favorable to the verdict, a rational jury could have found the essential elements of the offense beyond a

reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). The *Jackson* standard is the "only standard that a reviewing court should apply in determining whether the evidence is sufficient to support each element of a criminal offense that the State is required to prove beyond a reasonable doubt." *Brooks v. State*, 323 S.W.3d 893, 912 (Tex. Crim. App. 2010). It accounts for the factfinder's duty to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007).

A person commits criminal mischief if, without the effective consent of the owner, he intentionally or knowingly damages or destroys the owner's tangible property. *See* TEX. PENAL CODE ANN. § 28.03(a)(1) (West Supp. 2015). Under the law in effect at the time, an offense is a class B misdemeanor if the amount of pecuniary loss was $50 or more but less than $500. *See* Act of May 23, 2009, 81st Leg., R.S., ch. 638, § 1, 2009 Tex. Gen. Laws 1433, 1433 (amended 2015) (current version at TEX. PENAL CODE ANN. § 28.03(b)). If the property is destroyed, the pecuniary loss is either "the fair market value of the property at the time and place of the destruction" or, "if the fair market value of the property cannot be ascertained, the cost of replacing the property within a reasonable time after the destruction." TEX. PENAL CODE ANN. § 28.06(a)(1)–(2) (West 2011).

Appellant was charged with intentionally or knowingly damaging and destroying tangible property in the amount of $50 or more but less than $500 by hammering a nail into Manis's car tire.

Cody Manis was dating appellant's ex-wife, Meridith Brown. Manis worked for State Farm Insurance and drove a company car, a Nissan Maxima. Around 1:15 a.m. on the day of the offense, Frisco police officer David Connelly saw an intoxicated appellant walk to the Nissan Maxima car parked in front of Meridith's house, crouch down by the rear passenger side, and

walk away. Connelly suspected appellant had vandalized the car, so he activated his patrol lights. Appellant approached the officer, carrying a wooden-handled hammer. The officer asked him what he was doing, and appellant replied, "Being a dumb ass." After another officer arrived, Connelly inspected the Maxima and discovered a nail in the rear passenger side tire.

Manis looked at the tires and also noticed a "chunk" out of the rear driver's side tire. When the officers asked about the cost to replace a tire, Manis told them he had previously replaced one of the back tires after discovering an Allen wrench sticking out of it. He gave them the January 2013 Goodyear receipt showing he paid $199.16 to replace the damaged tire with a new one.

The day after the incident, Manis called his boss at State Farm Insurance to let her know he would not be in that day. According to Manis, his boss instructed him to "get the tires replaced" so he took the car to a nearby Goodyear Tire store where they replaced both rear tires for $440. Manis testified without objection that because the damage was to the sidewall, the tires could not be fixed or plugged. He stated he knew about tires, having been a State Farm agent handling claims, and no one would plug a tire on the sidewall. "[N]o reputable company would do that because the integrity of the tire, even at low speeds, could be subject to a blowout. I drive myself, my kids, the defendant's kids and my fiancé in that car, and there's no way I'd take that risk." On cross-examination, Manis conceded the fair market value of a used tire is less than that of a new tire but said State Farm would "never put a used tire back on and we've never paid for a plug on a tire. . . used car – tires are, I would say, a hundred percent uncommon for the insurance industry."

Appellant admitted putting the nail in the tire. He told the jury he was uncomfortable with the pace at which Meridith and Manis's relationship was proceeding and felt he was being pushed out as his children's father. He said that night was not one of his "finest moments."

Although appellant contends the trial court should have granted his motion for directed verdict because the State failed to establish fair market value of the tire or that the fair market value was not obtainable, we disagree. Here, Manis's testimony that Goodyear replaced the two tires for $440 and replaced a back tire in January 2013 for $199 is sufficient to establish the "cost to replace the property in terms of fair market value" was $50 or more but less than $500. *See Campbell v. State*, 426 S.W.3d 780, 785−86 (Tex. Crim. App. 2014) (owner's opinion of fair market value to replace property at time of destruction sufficient if jury believed property was destroyed); *Sullivan v. State*, 701 S.W.2d 905, 909 (Tex. Crim. App. 1986) (owner's testimony estimating value of property is estimating purchase price or cost to replace it even though owner may not use specific terms "market value," "replacement value," or "purchase price"). We overrule appellant's first issue.

In his second issue, appellant claims the trial court erred by excluding the expert testimony of Said Said. We review the trial court's decision to admit or exclude evidence under an abuse of discretion standard. *See Cameron v. State*, 241 S.W.3d 15, 19 (Tex. Crim. App. 2007). A trial court abuses its discretion when it acts outside the zone of reasonable disagreement. *Montgomery v. State*, 810 S.W.2d 372, 391 (Tex. Crim. App. 1991) (op. on reh'g).

Rule 705 provides that, before an expert states an opinion or discloses underlying facts or data, an adverse party (in this case the State) must be permitted to examine the expert about the underlying facts or data outside the jury's presence. TEX. R. EVID. 705(b). If the underlying facts or data do not provide a sufficient basis for the opinion, the expert's opinion is inadmissible. TEX. R. EVID. 705(c). A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if his scientific, technical, or other specialized knowledge will help the trier of fact to understand the

evidence or to determine a fact in issue. TEX. R. EVID. 702. Under this rule, the trial court is responsible for determining whether the evidence is sufficiently reliable and relevant to assist the jury. *See Bekendam v. State*, 441 S.W.3d 295, 300 (Tex. Crim. App. 2014).

The trial court held a hearing outside the jury's presence to determine whether to allow Said to testify. Said, a licensed mechanic since 1996, owned and managed Rick's Auto Repair and Body Shop. Said had attended seminars on auto transmission, engine, tire, and body repair. According to Said, he had experience patching and plugging tires as well as replacing and balancing tires; in addition, he bought and sold tires. Said had not looked at Manis's tire or car personally, but he examined a "picture." Although he conceded he could not measure the tire tread from the photograph, he said he could see wear. He said he would be "guessing as to what the tire tread would be at" the time the photograph was taken and would not be able to give an exact replacement value. Nevertheless, when trial counsel asked if he could tell the value of the tires, Said estimated, without explaining how he arrived at the figure, that the tire in the picture would be worth $25 to $35. Later, he said "bald tires, like the one on the left he showed me the picture of, you pay money to get rid of it." After hearing Said's testimony and considering the arguments of counsel and the law, the trial court found that the underlying data or evidence Said used to base his opinion was insufficient and excluded his testimony.

Although appellant now assigns this ruling as error, we cannot agree. Said testified he had not seen or worked on Manis's car. He admitted he was working from photographs; however, it is not clear whether those photographs are the ones admitted by the State or other photographs used by appellant during the hearing that are not a part of the appellate record. Said admitted he would have to guess what the tire tread on Manis's tires would be like but that he thought they were pretty worn. He claimed the tire was worth $25 to $35 without any explanation as to how he arrived at this estimate, then later claimed one of the tires was

worthless. This testimony, without more, does not provide a sufficient basis for Said's opinion, and the trial court could have determined it would not assist the jury. *See* TEX. R. EVID. 705(c). Under these circumstances, we cannot conclude the trial court abused its discretion in excluding Said's testimony. We overrule appellant's second issue.

We affirm the trial court's judgment.

/Molly Francis/
MOLLY FRANCIS
JUSTICE

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JUDGMENT

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Opinion delivered by Justice Francis,
Justices Evans and Stoddart participating.

Based on the Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

Judgment entered February 17, 2016.