Affirm and Opinion Filed September 11, 2020

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-19-01011-CR

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GREGG ALAN AVERITT, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the 416th Judicial District Court
Collin County, Texas
Trial Court Cause Nos. 416-83259-2018, 416-81392-2019

MEMORANDUM OPINION

Before Justices Myers, Partida-Kipness, and Reichek
Opinion by Justice Partida-Kipness

Gregg Alan Averitt appeals his convictions for theft. The convictions arose from allegations that Averitt undertook roof repair projects with no intent to complete the projects while deceiving the property owners into turning over insurance proceeds. In two issues, Averitt contends (1) the evidence was insufficient to support the jury's verdict, and (2) the trial court erred in allowing the State to introduce evidence of an extraneous offense. We affirm the trial court's judgments.

BACKGROUND

This appeal concerns convictions in two cases tried together. The first case, case number 416-83259-2018, concerns commercial property in downtown Wylie, Texas, owned by Sharon Pollock. The indictment in that case alleged that "pursuant to one scheme or continuing course of conduct that began on or about the 12th day of April, 2016 and continued to on or about the 1st day of December, 2017," Averitt unlawfully appropriated $30,000 or more but less than $150,000 from Pollock. The second case, case number 416-81392-2019, concerns residential property in McKinney, Texas, owned by Michael Sheehan. The indictment in that case likewise alleged that "pursuant to one scheme or continuing course of conduct that began on or about the 1st day of June, 2016 and continued to on or about the 21st day of February, 2018," Averitt unlawfully appropriated $2,500 of more but less than $30,000 from Sheehan. Both indictments alleged Averitt appropriated the money without consent, "namely by deception," and with intent to deprive the owner of it.

A. Pollock's Property

In April 2016, storms that swept through Wylie produced softball-sized hail that damaged Pollock's commercial property. The hailstones punched holes in the roof and damaged some wooden roof supports. Water leaked into the retail space below. Pollock's commercial tenant recommended Averitt to repair the roof, and Pollock called him a few days later.

According to Pollock, Averitt said he had "done roofs in Oklahoma for hospitals and some other buildings," and Pollock thought he was "really knowledgeable and very trustworthy." Pollock testified that she signed a contract with Averitt in May 2016 to repair the roof. The State offered into evidence a purported copy of the contract with Averitt's company, Timeless Exteriors GC, Inc., dated May 18, 2016. The copy contains Averitt's signature but does not contain Pollock's. Regardless, Pollock testified that the copy was an accurate representation of the contract she entered into with Averitt. Soon after the contract was executed, Pollock received a check for $21,500.67 from her insurance carrier. Pollock endorsed the check and gave it to Averitt, who purportedly put it in escrow on May 26, 2016.

At trial, the State introduced a transcript of text messages between Pollock and Averitt discussing the roofing project. Averitt initially assured Pollock that he was "staying on top of [the] claim" and would "do everything in [his]power to minimize the dollars if any out of pocket [sic]." On July 13, 2016, Averitt informed Pollock that he was working with the City of Wylie "on the structure" because the roof was "soft to walk on." Six days later, Pollock texted Averitt her frustration that Averitt was not able to get in contact with the insurance adjuster. Specifically, Pollock texted,

> When you came to my house and told me everything your company does to try & get as much as possible out of the insurance. That you've done this before. You took my money..Now after 2 months your saying

> you can't get my insurance guy to call you back. It's been 2 or 2 1/2 months..I don't understand.

Averitt responded, asking Pollock to have the insurance adjuster contact him so Averitt could get the adjuster to review the structural concerns.

Pollock received a second insurance check for $4,199.52 in September 2016 to pay for temporary repairs. She informed Averitt by text message that she had received the check for temporary repairs and expressed concern that the repair process "is taking long." Averitt responded that "engineers move at [a] snail pace" and that the insurance carrier "advised [him] to hire a [s]tructural engineer" to ensure the roof is constructed properly for drainage. Pollock endorsed the check and gave it to Averitt, who purportedly used the money to purchase tarps to cover the damaged roof until permanent repairs could be completed.

In October 2016, Pollock sent a text to Averitt notifying him that the insurance adjuster said he had not received Averitt's engineering report and stating, "I just don't understand why we're not keeping up with this." Averitt responded, "Bunch of liers [sic]," "I have heard this . . . 500 times," "Delay mode," "Pure stupid," and claimed the adjuster had the report. Averitt also claimed he had "been waiting all week so I can be sure my schedule is good on the day they want to come and meet."

In February 2017, Pollock and Averitt exchanged messages regarding the claim and the need to replace the awnings on the building. Averitt indicated that he had provided information to the city for permits and was ready to bring in a dumpster for the project. He also said the city wanted a copy of an asbestos report. After

asking Pollock to provide the report because he was out of town, Averitt indicated he found the report and would provide it to the city. Averitt then asked Pollock to let him know "when the check gets in" because he had "two crews ready to go." Pollock informed Averitt on February 28, 2017, that she had received the $63,462.08 check. Although this was less than Averitt was expecting, he said it was enough to "get us going full blast."

On March 15, 2017, Pollock asked Averitt, "[W]hen are you guys going to start on my building?" Averitt claimed he was picking up the demolition permit that day and that he would be on-site by 2:00 p.m. He said on March 20, 2017, the roof would be installed by the end of the week if he received the materials in time.

On June 5, 2017, Pollock texted Averitt to report new leaks and ask why no one had contacted her husband about installing the air conditioner. According to Pollock, it had been two weeks since Averitt's employee said he would follow up about the air conditioner. Pollock also said the tenants were losing their patience waiting for the awnings to be replaced. She texted, "[W]e are all losing our patience. It's really starting to hurt financially." Averitt said his crew had finished framing and were ready to install the roof. He claimed the roofers had been backed up due to rain but were being scheduled and asked if Pollock had someone to install the awnings. Pollock reminded Averitt that she had already given him the awning manufacturer's contact information two months prior. She provided the information

again, and Averitt said he would handle it and promised his crew would be on-site the next day.

Pollock testified that Averitt's crew did not show up the next day. Instead, Averitt texted Pollock on June 6, 2017, to say his crew was scheduled to install the roof the next week. Pollock testified that they did not install the roof as promised.

On June 14, 2017, Averitt texted Pollock to say he was waiting on certain specially made roof hardware to arrive before the roof could be installed. Pollock asked Averitt on June 19, 2017, whether the parts had come in and complained that he should have known months prior that the parts would be needed. She expressed her frustration with the lack of progress and asked Averitt for a meeting. Averitt said he was in a seven-day seminar, offered no reason why he did not know about the needed parts earlier, said his employee failed to follow up on the air conditioner because he had back surgery, and offered a meeting time.

Three days later, when Pollock texted to confirm their meeting, Averitt said he could not meet because the seminar ran long and he was out of town again. He also said the city required more roof supports to be added, and that he was procuring those. Pollock pressed him to keep the meeting. Three days later, Averitt said he could not meet because he was finishing a project in Oklahoma. Pollock agreed to a new meeting time, adding, "We believe that you guys have put us at the bottom of your list. It seems you have more work than you can handle."

On October 2, 2017, Pollock texted to tell Averitt about leaks from a recent heavy rain, report that the tarps had been destroyed, and to ask where he was. Averitt did not respond. On October 7, 2017, Pollock texted:

> Greg, have a question. If you had no intent in stealing my insurance money and you could not find roofing contractors that will accept the liability, which I now know is a lie, where is my money that you put in escrow at Chase Bank? You could not have done more than $10,000 worth of work at 114 Ballard if even that. WHERE IS THE MONEY GREG? DID YOU BUY THAT NEW TRUCK WITH MY MONEY????

Averitt responded six days later, asking Pollock to provide "scheduling times to install ur [sic] building in Wylie."

Pollock testified that she sent Averitt a demand letter, but he never returned any of the money. She said that Averitt claimed that he was too far into the project to provide a refund. According to Pollock, the only work Averitt did on the property was basic demolition, which included removal of an old air-conditioner, "a couple of walls," sheetrock, and a kitchenette. She estimated that she lost approximately $99,000, including lost rent, while waiting on Averitt to repair the roof. Pollock hired a new contractor to install the roof.

B. Sheehan's House

Sheehan's house in McKinney, Texas, was also hit with hail in April 2016. Averitt's brother was rebuilding a fence for Sheehan at the time and recommended Averitt to repair Sheehan's roof. Sheehan testified that he met with Averitt, who explained that Sheehan's roof had "plenty of damage" and that Averitt would "fight

for [Sheehan and] get as much money as possible." Sheehan signed a contract with Timeless Exteriors and forwarded to Averitt a $10,581.99 check he received from his insurance carrier. Averitt deposited the check in an escrow account on June 1, 2016. Sheehan testified that Averitt said he would use the money to buy materials for the repair, the repair would start within a couple of weeks, and the materials might be on-site for a few days before the work began. The repairs did not start as Averitt promised.

Sheehan testified that he called Averitt "every ten days or so" to check on his progress. Sheehan noted that Averitt always seemed to have a good explanation for why the work was not done; he was either too busy or fighting with the insurance company. Averitt had Sheehan obtain a 180-day extension from his insurance carrier. Sheehan started calling Averitt more frequently late in the summer of 2016. According to Sheehan, Averitt explained the delay in starting Sheehan's repair by saying he was on roofing projects in Texas, Florida, and Puerto Rico. Sheehan said Averitt "always had a big job to complete and . . . the jobs got bigger and the locations got more exotic."

In emails admitted into evidence at trial, Averitt told Sheehan on September 23, 2016, that roof shingles will be in on the following Monday." Sheehan testified that the shingles never arrived. In an October 18, 2016 email, Sheehan asked Averitt about calls he received from a Colorado company asking about project completion. Averitt said the company provided administrative functions for him. Averitt

responded by email, stating, "I've got u about 6 roofs away then we will be ready to roll," "Hopefully mid week to latter next." Averitt implied he was over-booked, stating, "We are installing on Sundays too."

Sheehan testified that as of December 2016, Averitt had not repaired the roof. Thus, he researched Averitt and found Internet sources indicating that Averitt's "license was revoked." He also said Averitt's "license was taken away in Oklahoma too . . , or there was a mark against his record in Oklahoma." At this point, Sheehan alleged he "was pretty sure that [Averitt] had swindled me." He said that Averitt stopped returning his calls.

On April 5, 2017, Sheehan emailed Averitt that the 180-extension had been approved and asked whether the repair could be scheduled the week of June 5th. Averitt responded four days later that June 5th was acceptable. Averitt also apologized for the delay in his response, claiming to have been tarping a house in Lewisville. Sheehan testified Averitt came to the house in early May 2017, but he only took photographs of additional damage for a supplemental claim. In a May 1, 2017 email, Averitt explained his delay in taking the photographs, saying, "Been a zoo out here."

Sheehan testified that Averitt never started the roof repair. Thus, Sheehan hired another contractor, who completed the project. On February 7, 2018, Sheehan emailed Averitt requesting a refund of the money he paid in June 2016 and threatening to report Averitt to the Better Business Bureau or file a claim in court.

Averitt responded that he was busy on a project in Florida but would check with the bank and his bookkeeper. In a February 21, 2018 email, Averitt confirmed the insurance check was deposited in his bank, he was still in Florida, his brother had died, his response was delayed because he had been in Puerto Rico assessing hurricane damage, cell phone service was bad in Puerto Rico, he was in a "cash crunch," the insurance carrier owed him more than $100,000, and that he would attempt to refund the money within thirty days. Sheehan testified that Averitt refunded only $1,250 of the money Sheehan had paid and estimated he incurred between $15,000 and $17,000 in expenses to get his roof repaired.

C. Limerick's House

As evidence of an extraneous offense, the State offered testimony of Carrie Limerick regarding Averitt's involvement in the repair of tornado damage to her house in Rowlett, Texas. Averitt objected that the evidence was more prejudicial than probative under rules of evidence 403 and 404, and that the facts of Limerick's case were not sufficiently similar to the complainants' to show Averitt's knowledge or intent under penal code section 31.03(c)(1). The trial court overruled Averitt's objections.

Limerick testified that her house sustained serious tornado damage in December 2015. Limerick's mother-in-law gave her Averitt's phone number. According to Limerick, the daughter of a friend of Limerick's mother-in-law was married to Averitt's son. Limerick said that Averitt came to the house shortly after

the call and discussed various upgrades to the house, including flooring, kitchen, and installing a backyard zipline for Limerick's son.

Limerick signed a contract with Timeless Exteriors in February 2016. In March 2016, Limerick received a $91,686.12 check from her insurance carrier made out to Limerick, her husband, and their mortgagee. She endorsed the check and gave it to Averitt, who was going to send it to the mortgage company.

Limerick testified that Averitt repaired the roof, installed a new garage door, gutted the house down to the studs, and removed all of the brick façade. According to Limerick, the inside was "essentially unlivable." Thus, Limerick and her family were forced to move in with her mother-in-law. Photographs taken approximately two years after the tornado, and admitted over Averitt's objection, corroborated Limerick's testimony.

The State also offered text messages sent between Limerick and Averitt approximately a year and a half after the tornado. In one exchange, Limerick asked Averitt for receipts showing the expenses Averitt incurred in performing the work on her house. Averitt initially agreed to provide the requested receipts but said his accountant was out of town for a funeral. According to Limerick, Averitt later said he was not legally obligated to produce the receipts. He also claimed in one text that he could not complete the repairs because the insurance carrier was refusing to pay. Specifically, Averitt said, "They always blame the contractor . . . . It's never USAA[']s fault . . . . Heard it a million times." Other text messages show Averitt

explaining delays on being in Odessa for a week, bad cell phone service, attending a friend's funeral in Georgia, and working on hurricane claims in Florida.

On December 19, 2017, Limerick texted Averitt asking when he was coming to the house. Averitt indicated he would be there two or three days later. Limerick testified that he never did show up. She later texted, "Are you seriously going to steal [$100,000] from us?" He did not respond.

Limerick testified that she and her husband had to sell the house as-is because they were on the verge of bankruptcy and could not afford to hire another contractor to repair the house.

D. Police Investigation

Pollock contacted police, alleging she was the victim of fraud by deception. Garland Police detective Carl Carlson worked for the Sachse Police Department at the time and was assigned to investigate Pollock's allegations. Carlson did not handle Sheehan's complaint.

Carlson contacted Pollock's insurance carrier and the bank in which Averitt allegedly deposited the checks Pollock gave him. Carlson served a search warrant on the bank and obtained Averitt's bank records. Records from the accounts, including a business account belonging to Timeless Exteriors, were admitted into evidence. Carlson testified as to certain transactions demonstrating that Averitt deposited at least one insurance check into the business account and made a large number of withdrawals or purchases at several casinos in Oklahoma. The bank

records reflected a pattern in which Averitt's casino transactions increased around the time he received checks from Pollock and Sheehan. The State produced evidence reflecting that between April 2016 and April 2017, Averitt received $99,724.26 from Pollock and Sheehan and spent $63,707.35 from the Timeless Exteriors account at Oklahoma casinos.

E. The Verdict

On Pollock's complaint in case number 416-83259-2018, the jury found Averitt guilty of theft of stolen property, $30,000 or more but less than $150,000. On Sheehan's complaint in case number 416-81392-2019, the jury found Averitt guilty of theft of stolen property, $2,500 or more but less than $30,000. The trial court assessed punishment and sentenced Averitt to ten years in prison on case number 416-83259-2018 and two years in state jail in case number 416-81392-2019. This appeal followed.

ANALYSIS

In two issues, Averitt contends (1) the evidence is insufficient to support the convictions for theft, and (2) the trial court erred in admitting the extraneous evidence regarding Limerick's house.

A. Sufficiency of the Evidence

In his first issue, Averitt contends the State's evidence was insufficient to show that the complaints at issue were anything more than contractual disputes. Although the evidence shows that he did not complete the work in question, Averitt

contends the State did not prove beyond a reasonable doubt that he intentionally failed to complete the work.

A challenge to the sufficiency of the evidence is evaluated under the standards established in *Jackson v. Virginia*, 443 U.S. 307, 316 (1979); *see also Brooks v. State*, 323 S.W.3d 893, 895 (Tex. Crim. App. 2010). We review the evidence in the light most favorable to the verdict and determine whether a rational jury could have found all the elements of the offense beyond a reasonable doubt. *Jackson*, 443 U.S. at 319; *Brooks*, 323 S.W.3d at 894–95. This standard of review for legal sufficiency is the same for both direct and circumstantial evidence. *Wise v. State*, 364 S.W.3d 900, 903 (Tex. Crim. App. 2012); *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007); *Burden v. State*, 55 S.W.3d 608, 613 (Tex. Crim. App. 2001).

We defer to the trier of fact's resolution of any conflicting inferences that are raised in the evidence and presume that the trier of fact, in this case the jury, resolved such conflicts in favor of the prosecution. *Jackson*, 443 U.S. at 318; *Brooks*, 323 S.W.3d at 894; *Sennett v. State*, 406 S.W.3d 661, 666 (Tex. App.—Eastland 2013, no pet.). We will uphold the verdict unless a rational factfinder must have had reasonable doubt with respect to any essential element of the offense. *Jackson*, 443 U.S. at 319; *Brooks*, 323 S.W.3d at 899. The State need not disprove all reasonable alternative hypotheses that are inconsistent with a defendant's guilt. *Wise*, 364 S.W.3d at 903. Rather, we consider only whether the inferences necessary to establish guilt are reasonable based upon the cumulative force of all the evidence

when considered in the light most favorable to the verdict. *Hooper*, 214 S.W.3d at 13.

Averitt was convicted under penal code section 31.03 for theft. Section 31.03 defines theft as the unlawful appropriation of property with intent to deprive the owner of the property. TEX. PENAL CODE § 31.03(a). "A claim of theft made in connection with a contract, however, requires proof of more than an intent to deprive the owner of property and subsequent appropriation of the property." *Wirth v. State*, 361 S.W.3d 694, 697 (Tex. Crim. App. 2012). The State must prove the appropriation was the result of "a false pretext, or fraud." *Id*. The evidence must show the defendant intended to deprive the owner of the property at the time the property was taken. *Id*. "In reviewing the sufficiency of the evidence, though, we should look at 'events occurring before, during and after the commission of the offense and may rely on actions of the defendant which show an understanding and common design to do the prohibited act.'" *Id*. (quoting *Guevara v. State*, 152 S.W.3d 45, 49 (Tex. Crim. App. 2004)).

Here, the evidence of events occurring before, during, and after the alleged thefts sufficiently demonstrates Averitt's understanding and common design to illegally appropriate the insurance proceeds at issue. Specifically, the evidence shows that Averitt withdrew or spent $63,707.35 from the Timeless Exteriors business account at casinos during the same period in which he received $99,724.26 in insurance proceeds from Pollock and Sheehan. During this same time, Averitt

failed to perform any work on Sheehan's property, and performed only temporary repairs and demolition on Pollock's property. Averitt entered into a contract with Limerick just three months before the Pollock and Sheehan contracts. Averitt performed only partial work on Limerick's house and left Limerick with an uninhabitable house. The record reflects that Averitt engaged in generally the same pattern of behavior in all three instances: early claims of experience and promises of quick resolution followed by missed deadlines and delayed or refused meetings explained away by family matters, overscheduling, travel, and bureaucratic negotiations, ultimately culminating in project abandonment.

Averitt acknowledges that he did not complete the projects at issue. He also admits that his bank records show withdrawals at Oklahoma casinos. Averitt argues, however, that the casino transactions do not support the jury's verdict because the casinos are located between Oklahoma and Texas locations in which he did business, and the State offered no evidence of what he did with the money withdrawn at the casinos. He also notes the bank records reflect gas, toll road, and Home Depot purchases, and payment to the City of Wylie for permits. Thus, according to Averitt, these records show only that he had an active business. However, the State had no burden to disprove Averitt's alternative hypothesis, *see Wise*, 364 S.W.3d at 903, and the jury was free to resolve any conflicting inferences and draw a reasonable inference that the casino transactions were not related to Averitt's roofing business. *See Hooper*, 214 S.W.3d at 13; *see also Martinez v. State*, 527 S.W.3d 310, 322

(Tex. App.—Corpus Christi 2017, pet. ref'd) (evidence defendant continued to draw money out of loan for personal use while fully aware that the project would not be completed was sufficient to support conviction for theft).

As to Pollock's building, Averitt contends that the age of the building and Pollock's cash-value insurance policy complicated the project. He also notes that Pollock admitted Averitt obtained city permits to start work, and she did not know how many times Averitt went to the building. Averitt's partial performance, however, does not invalidate the jury's finding that Averitt intended to wrongfully deprive Pollock of the insurance proceeds. *See Taylor v. State*, 450 S.W.3d 528, 537 (Tex. Crim. App. 2014) ("[T]he fact that partial or even substantial work has been done on a contract will not invariably negate either the intent to deprive or the deception necessary to establish the unlawfulness of the initial appropriation.").

As to Sheehan's complaint, Averitt argues his text messages show he intended to return Sheehan's money when he received payment from another job and had started to pay Sheehan with the $1,250 payment. The jury, however, was free to resolve any conflicting inference raised by the text messages and draw a reasonable inference that Averitt had no intention to repay Sheehan but was, instead, merely attempting to dissuade Sheehan from following through on his threat to report Averitt to the authorities. *See Hooper*, 214 S.W.3d at 13.

According to Averitt, the evidence shows, at worst, he was merely a bad businessman who needed to repay his customers for uncompleted work. We are not

the fact finder and must defer to the jury's rational findings. *See Jackson*, 443 U.S. at 318–19. The jury inferred from the evidence that Averitt had no intention of completing the projects or returning the money. This determination was not so outrageous that no rational trier of fact could agree. *See Wirth*, 361 S.W.3d at 698. Consequently, we overrule Averitt's first issue.

B. Extraneous Offense

In his second issue, Averitt contends the trial court erred in overruling his objections and admitting evidence regarding Limerick's house. According to Averitt, the facts involved in Limerick's case are substantially different from those at issue in Pollock's and Sheehan's complaints. Thus, evidence regarding Limerick's house was inadmissible as an extraneous offense. Averitt also contends the State failed to prove the extraneous offense beyond a reasonable doubt.

We review a trial court's decision to admit or exclude evidence of extraneous offenses for an abuse of discretion. *Devoe v. State*, 354 S.W.3d 457, 469 (Tex. Crim. App. 2011). The trial court does not abuse its discretion unless its decision to admit or exclude the evidence lies outside the zone of reasonable disagreement. *Martinez v. State*, 327 S.W.3d 727, 736 (Tex. Crim. App. 2010); *De La Paz v. State*, 279 S.W.3d 336, 343–44 (Tex. Crim. App. 2009). We will uphold the trial court's evidentiary ruling if it was correct on any theory of law applicable to the case. *See De La Paz*, 279 S.W.3d at 344.

As previously noted, in a theft case arising from a contract, the State must prove that the defendant intended or knew that he would not perform his obligations at the time money changed hands. *See Taylor*, 450 S.W.3d at 536; *Wirth*, 361 S.W.3d at 697. A contractor may not be convicted of theft on the theory that he acquired a down payment from his customer by deception "if there is no reason to doubt from the evidence that he had every expectation at the time that the money changed hands of fulfilling his contractual obligation." *Taylor*, 450 S.W.3d at 536 (citing *Phillips v. State*, 640 S.W.2d 293, 294 (Tex. Crim. App. 1982)). In other words, "at the time of the down payment, the customer paid voluntarily, and the accused neither intended nor knew he would not perform." *Id*. A contractor may still be found guilty of theft, however, if after contract formation he forms the mens rea to deprive the owner of his property and "appropriates *additional* property by deception; that is, he induces his customer to make further payment on the contract while no longer intending to perform, or at least knowing that he will not." *Id*. at 537 (citing *Ehrhardt v. State*, 334 S.W.3d 849, 856 (Tex. App.—Texarkana 2011, pet. ref'd)). Intent may be inferred from proof that the defendant engaged in other similar, recent transactions. TEX. PENAL CODE § 31.03(c)(1); *see Johnson v. State*, 560 S.W.3d 224, 227 (Tex. Crim. App. 2018).

Averitt argues the facts surrounding his contract to repair Limerick's house are too different from those at issue in Pollock's and Sheehan's complaints to support the jury's finding of intent. Specifically, Averitt notes that Limerick's house

was destroyed by a tornado, while complainants' property was damaged by hail. According to Averitt, the tornado damage to Limerick's house required more extensive repair than complainants' properties. The trial court rejected this argument and so do we. Averitt entered into a contract with all three parties to repair storm damage to their respective properties. The evidence established that he received insurance proceeds to make the repairs to each property but failed to do so. The particular cause of that storm damage, whether wind, hail, or water, is irrelevant to the question of his intent to fulfill his contractual obligations. Regardless, Averitt previously argued that the extent of damage to Pollock's building, combined with the age of the building, militated against the jury's finding on intent. Thus, Averitt's own argument demonstrates that Limerick's house suffered damage similar to that suffered by Pollock's building in that both suffered extensive damage far exceeding roof repair.

Averitt also contends that Limerick's complaint is distinguishable from the complaints of Pollock and Sheehan because he obtained Limerick's business through a family referral and "did not seek out the Limericks to work for them." Averitt offers no argument to explain how the source of the referral affects the extraneous offense analysis. Regardless, the evidence shows that Pollock and Sheehan were also referred to Averitt by others; Pollock, who was referred by her tenant, and Sheehan, who was referred by Averitt's brother.

Averitt further argues that "it appears from the testimony that the insurance company was not providing sufficient funds to cover all the work required to rehabilitate [Limerick's] house." However, Averitt does not direct us to where in the record this testimony appears, and we have not located this testimony despite a complete review of the record. Regardless, the record reflects that Averitt allegedly encountered coverage issues with the other properties as well. Specifically, Averitt requested a "senior adjuster" to review his findings regarding the structural issues with Pollock's building and to ensure adequate coverage. The record also reflects that Averitt took pictures of additional damage to Sheehan's house to purportedly file a supplemental claim. Regardless, there is no evidence that Averitt told any of the owners that he could not proceed with the repairs because of insufficient insurance proceeds.

As to the quantum of proof, Averitt contends the State failed to prove beyond a reasonable doubt that he appropriated funds from Limerick by "false pretext, or fraud." *See Wirth*, 361 S.W.3d at 697. "[I]n deciding whether to admit extraneous offense evidence in the guilt/innocence phase of trial, the trial court must . . . make an initial determination at the proffer of the evidence, that a jury could reasonably find beyond a reasonable doubt that the defendant committed the extraneous offense." *Harrell v. State*, 884 S.W.2d 154, 160 (Tex. Crim. App. 1994). However, the trial court's ruling on the State's initial pre-trial proffer is not dispositive of the admissibility issue. *Fischer v. State*, 268 S.W.3d 552, 557 (Tex. Crim. App. 2008).

Even if the State's initial proffer is insufficient for a jury to find the defendant committed the extraneous offense beyond a reasonable doubt, the State may present evidence beyond the initial proffer at trial to meet its burden. *Id*. at 557–58.

Here, the State introduced similar testimonial and documentary evidence in support of all three complaints. We have concluded that the evidence was sufficient to support the jury's verdict on Pollock's and Sheehan's complaints, and we likewise conclude that the evidence was sufficient to prove Limerick's complaint. *See id*.

In sum, the record reflects that Limerick's engagement with Averitt was similar in scope and time to the complainants' engagements with Averitt. The record reflects that Limerick's house was damaged by a tornado in December 2015. She entered into a contract for repairs with Averitt in February 2016. In April 2016, Pollock's and Sheehan's properties were damaged by hail. Each entered into a contract with Averitt for repairs in May 2016. Over the next year-and-a-half, all three property owners signed over insurance checks to Averitt. Averitt completed some repairs and demolition on Pollock's and Limerick's properties. He performed no work on Sheehan's property. In each case, Averitt offered similar excuses for delays and non-performance. Each property owner sought a refund. Only Sheehan received a partial refund. In October 2017, Pollock sent Averitt a demand letter and hired another contractor to repair her building. In December 2017, Limerick sent her last communication to Averitt regarding the incomplete repairs, asking, "Are you seriously going to steal [$100,000] from us?" She later sold her house as-is. Finally,

in February 2018, Sheehan issued a demand to Averitt after hiring another contractor to repair his roof. On the record before us, we conclude the trial court did not abuse its discretion in admitting evidence of Limerick's engagement with Averitt as a similar, recent transaction to prove Averitt's intent. *See* TEX. PENAL CODE § 31.03(c)(1). Consequently, we overrule Averitt's second issue.

CONCLUSION

We conclude that the evidence was sufficient to support the jury's verdict and the trial court did not abuse its discretion in admitting evidence of Limerick's case to show Averitt's intent. Having overruled both of Averitt's issues, we affirm the trial court's judgments.

/Robbie Partida-Kipness/
ROBBIE PARTIDA-KIPNESS
JUSTICE

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TEX. R. APP. P. 47.2(b).
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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

GREGG ALAN AVERITT, Appellant No. 05-19-01011-CR V. THE STATE OF TEXAS, Appellee	On Appeal from the 416th Judicial District Court, Collin County, Texas Trial Court Cause No. 416-83259-2018. Opinion delivered by Justice Partida-Kipness. Justices Myers and Reichek participating.

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

Judgment entered this 11th day of September, 2020.

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

GREGG ALAN AVERITT, Appellant No. 05-19-01012-CR V. THE STATE OF TEXAS, Appellee	On Appeal from the 416th Judicial District Court, Collin County, Texas Trial Court Cause No. 416-81392-2019. Opinion delivered by Justice Partida-Kipness. Justices Myers and Reichek participating.

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

Judgment entered this 11th day of September, 2020.