Opinion issued January 27, 2011

In The

Court of Appeals

For The

First District of Texas

NO. 01-09-00976-CR

MICHAEL STINSON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 263rd District Court
Harris County, Texas
Trial Court Case No. 1170914

MEMORANDUM OPINION

Appellant, Michael Stinson, was charged by indictment with engaging in organized criminal activity to make a false statement to obtain property or credit.[1]

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[1] *See* TEX. PENAL CODE ANN. § 71.02(a)(8) (Vernon Supp. 2010); Act of May 17, 2001, 77th Leg., R.S., ch. 1245, § 3, sec. 32.32, 2001 Tex. Gen. Laws 2934, 2935

Appellant pleaded not guilty. A jury found appellant guilty of the lesser-included offense of making a false statement to obtain property or credit.[2] The trial court sentenced appellant to five years' confinement, suspended the sentence, placed appellant on community supervision for five years, and assessed a $1,000 fine with 300 hours of community service. In two points of error, appellant challenges the sufficiency of the evidence to support a finding by the jury of "any agreement with Appellant or by Appellant to engage in a continuing course of criminal activity."

We affirm.

Background

Michael Macomber was a real estate agent in December 2005. During his time as a real estate agent, he saw other people make significant profits on the sale of high-end homes. After making some inquiries he was eventually introduced to and entered into a deal with Pamela Anderson, Marc Ariza, Freda Ariza, and Arthur Monroe. Under their deal, they would obtain a certain home, located in Spring, Texas, appraised at a high value.[3] Monroe, the owner and builder of the home, would sell the property at the inflated price to Macomber, then Monroe

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(amended 2001) (current version at TEX. PENAL CODE ANN. § 32.32 (Vernon Supp. 2010)).

2 *See* Act of May 17, 2001, 77th Leg., R.S., ch. 1245, § 3, sec. 32.32, 2001 Tex. Gen. Laws 2934, 2935 (amended 2001).

3 Originally the deal involved two properties, not one. For reasons not relevant to this opinion, however, the deal on the second property was never completed.

would distribute a portion of the sales proceeds to Macomber, Anderson, and the Arizas afterwards. This scheme was known as obtaining "untapped equity" from the property.

Macomber was instructed to hire appellant to do the appraisal on the property. Macomber paid appellant $500 to perform the appraisal, a customary price for such appraisals. In January 2006, appellant performed the appraisal and issued an appraisal report, determining the property to be worth $1,050,000.

Subsequently, Macomber purchased the property for $980,000 with two banks loans. After the sale, Monroe gave appellant $171,007.00. Appellant then distributed some of that money to Anderson and the Arizas.

Macomber had not been allowed inside the house prior to the sale. Some time after the sale, Macomber entered the house and discovered that significant portions of the house remained unfinished. The house had an elevator shaft, but no elevator. One room did not have any flooring installed. The rooms that did have completed flooring contained mismatched carpeting. The stairs, which were meant to be carpeted, contained only unfinished wood. The space created for a refrigerator was not large enough to accommodate a standard-sized refrigerator. The microwave was not installed in a safe or proper area. The dishwasher, which had been installed in an island in the kitchen, did not have enough space for the door to open entirely, rendering it unusable. Much of the electrical work remained

unfinished, including missing electrical sockets, phone jacks, ceiling fans, and light fixtures. Additionally, electric permits were never issued for the property.

Outside the house, certain projects that Monroe stated would be completed remained unfinished. What was meant to be a basketball and tennis court was only a slab of concrete. An area in the front of the house had been prepared to hold a water fountain, but the fountain was never installed. The cement for the pool had been poured, but the pool contained no drain, pumps, or any other kind of plumbing.

Macomber also learned after the sale that the property was the subject of a lawsuit in which Monroe was alleged to have stolen the design of the house from another builder. Macomber was brought into that lawsuit.

After realizing the troubled state of the house and after running out of money to pay the mortgage, Macomber elicited the help of a friend to burn the property to the ground. Investigators determined the cause of the fire to be arson. In the course of the investigation, Macomber admitted to the untapped equity deal and the subsequent arson.

In the course of the investigation, it was determined that an appraisal had been performed on the property six months earlier and that the appraisal had determined the property to be worth $755,000. That appraisal also stated that the property was an "over-improvement," meaning that it was significantly larger than

the other properties around it; that the supply outweighed the demand in that subdivision and market area; that the resale market had not been established in the subdivision; and that, due to these other factors, the property was rated "high risk."

At trial, Delores Kraft-Longoria testified. Kraft-Longoria is a director for enforcement with the Texas Appraiser Licensing and Certification Board. She testified that appellant's appraising license only authorized him to perform noncomplex appraisals on property valued at less than $1,000,000. A complex appraisal is an appraisal of property that is fairly large and unique or that would require a number of adjustments to compare to other properties. Appellant appraised the property at over $1,000,000. Additionally, Kraft-Longoria testified that the property in question required a complex appraisal.

Kraft-Longoria found a number of faults with appellant's appraisal. Appellant did not identify any of the problems with the construction of the home or of the other improvements on the property, nor did appellant make any adjustments to the value of the home for any of these problems. All of the properties that appellant used as comparison properties were located on a golf course in the subdivision, but the subject property was not on the golf course. Being located next to a golf course typically increases the value of a property, yet appellant did not make any adjustments to reflect this disparity. Because all of the properties on the golf course were smaller than the subject property, appellant adjusted upwards

the value of the comparison properties. This adjustment further inflated the disparity in the value of the properties located on the golf course.

Kraft-Longoria testified that the house on the subject property was "overbuilt" for its neighborhood—that is, it was significantly bigger than the homes around it. She testified that this diminished the overall value of the property and—along with the fact that there were no permits for electricity—rendered the home functionally obsolete. Appellant did not note these things or make any adjustments for them.

Kraft-Longoria testified that, in her opinion, appellant's appraisal was materially false and misleading. She further testified that the value of the property was overinflated by between $200,000 and $400,000.

Sufficiency of the Evidence

In two points of error, appellant argues that the jury's verdict was wrong and unjust because there was insufficient evidence in the record to support a finding of "any agreement with Appellant or by Appellant to engage in a continuing course of criminal activity."

A. Standard of Review

This Court reviews sufficiency-of-the-evidence challenges applying the same standard of review, regardless of whether an appellant presents the challenge as a legal or a factual sufficiency challenge. *See Ervin v. State*, No. 01–10–00054–

CR, 2010 WL 4619329, at *2–4 (Tex. App.—Houston [1st Dist.] Nov. 10, 2010, pet. filed) (construing majority holding of *Brooks v. State*, 323 S.W.3d 893, 912, 924–28 (Tex. Crim. App. 2010)). This standard of review is the standard enunciated in *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979). *See id.* Pursuant to this standard, evidence is insufficient to support a conviction if, considering all the record evidence in the light most favorable to the verdict, no rational fact finder could have found that each essential element of the charged offense was proven beyond a reasonable doubt. *See Jackson*, 443 U.S. at 319, 99 S. Ct. at 2789; *In re Winship*, 397 U.S. 358, 361, 90 S. Ct. 1068, 1071 (1970); *Laster v. State*, 275 S.W.3d 512, 517 (Tex. Crim. App. 2009); *Williams v. State*, 235 S.W.3d 742, 750 (Tex. Crim. App. 2007). We can hold evidence to be insufficient under the *Jackson* standard in two circumstances: (1) the record contains no evidence, or merely a "modicum" of evidence, probative of an element of the offense, or (2) the evidence conclusively establishes a reasonable doubt. *See Jackson*, 443 U .S. at 314, 318 n.11, 320, 99 S. Ct. at 2786, 2789 n.11, 2789; *see also Laster*, 275 S.W.3d at 518; *Williams*, 235 S.W.3d at 750.

The sufficiency-of-the-evidence standard gives full play to the responsibility of the fact finder to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. *See Jackson*, 443 U.S. at 319, 99 S. Ct. at 2789; *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim.

App. 2007). An appellate court presumes that the fact finder resolved any conflicts in the evidence in favor of the verdict and defers to that resolution, provided that the resolution is rational. *See Jackson*, 443 U.S. at 326, 99 S. Ct. at 2793. In viewing the record, direct and circumstantial evidence are treated equally; circumstantial evidence is as probative as direct evidence in establishing the guilt of an actor, and circumstantial evidence alone can be sufficient to establish guilt. *Clayton*, 235 S.W.3d at 778. Finally, the "cumulative force" of all the circumstantial evidence can be sufficient for a jury to find the accused guilty beyond a reasonable doubt. *See Powell v. State*, 194 S.W.3d 503, 507 (Tex. Crim. App. 2006).

B. Analysis

Appellant was charged with engaging in organized criminal activity to make a false statement to obtain property or credit. *See* TEX. PENAL CODE ANN. § 71.02(a)(8) (Vernon Supp. 2010). The jury found appellant guilty of the lesser-included offense of making a false statement to obtain property or credit. *See* Act of May 17, 2001, 77th Leg., R.S., ch. 1246, § 3, sec. 32.32, 2001 Tex. Gen. Laws 2936, 2937 (amended 2001) (current version at TEX. PENAL CODE ANN. § 32.32

(Vernon Supp. 2010)). Section 32.32 of the Texas Penal Code—as that statute applied at the time of the commission of the offense[4]—provides:

> (a) For purposes of this section, "credit" includes:
>
> (1) a loan of money;
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> . . . .
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> (b) A person commits an offense if he intentionally or knowingly makes a materially false or misleading written statement to obtain property or credit for himself or another.

Id.

Appellant's argument that the State failed to prove that there was "any agreement with Appellant or by Appellant to engage in a continuing course of criminal activity" is irrelevant because it is not an element of the offense of which he was found guilty. The State bears the burden of proving each element of an offense beyond a reasonable doubt. TEX. PENAL CODE ANN. § 2.01 (Vernon 2003).

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[4] The offense occurred in January 2006. The statute was amended in 2007, made effective September 1, 2007 and again in 2009, made effective September 1, 2009. Act of May 9, 2007, 80th Leg., R.S., ch. 285, § 5, sec. 32.32, 2007 Tex. Gen. Laws 555, 558; Act of May 21, 2009, 81st Leg., R.S., ch. 709, §§ 4, 5, sec. 32.32, 2009 Tex. Gen. Laws 1779, 1779–80. The State argues that, because the legislature "did not include a bar for offense[s] occurring before the effective date of the legislative change[, this] indicat[es] the Legislature contemplated a retroactive application of the change." This is incorrect. "A statute is presumed to be prospective in its operation unless expressly made retrospective." TEX. GOV'T CODE ANN. § 311.022 (Vernon 2005). This applies to the Texas Penal Code. *See Meadoux v. State*, 307 S.W.3d 401, 417 (Tex. App.—San Antonio 2009), *aff'd on other grounds*, 325 S.W.3d 189 (Tex. Crim. App. 2010) (applying section 311.022 to statute in the Texas Penal Code). Accordingly, we apply the statute as it was in effect on the date of the offense.

In a sufficiency of the evidence review, we determine whether there was sufficient evidence in the record for a rational jury to find each element of the offense beyond a reasonable doubt. *Jackson*, 443 U.S. at 319, 99 S. Ct. at 2789. Because he has not challenged any element of the offense of which he was found guilty, appellant has presented nothing for us to review.

Appellant was charged with engaging in organized criminal activity to make a false statement to obtain property or credit, which required the State to prove beyond a reasonable doubt—as the statute applies to this case—that there was an agreement with one or more persons to engage in conduct that would constitute the offense of making a false statement to obtain property or credit. *See* TEX. PENAL CODE ANN. § 71.02(a)(8) (Vernon Supp. 2010) (including as elements of offense requirement that person commits or conspires to commit one of certain iterated offenses, including making a false statement to obtain property or credit); *see also* TEX. PENAL CODE ANN. § 71.01(b) (Vernon 2003) (providing that "conspires to commit" includes requirement of showing that person agrees with one or more persons that they or one or more of them engage in conduct that would constitute the offense). The jury, however, acquitted appellant of this offense. Because he was acquitted of this offense, jeopardy has attached and appellate review of the offense is not available. *State v. Moreno*, 294 S.W.3d 594, 598 (Tex. Crim. App. 2009).

At any rate, there is sufficient evidence in the record for the jury to have found beyond a reasonable doubt every element of the offense of making a false statement to obtain property or credit. Appellant's appraising license only authorized him to perform noncomplex appraisals on property valued at less than $1,000,000. Appellant appraised the property at over $1,000,000. Kraft-Longoria testified that the property in question required a complex appraisal.

Appellant made adjustments in his appraisal that increased the value of the subject property but did not make any adjustments that decreased the value of the subject property despite the fact that numerous factors were present that required a downward adjustment in the overall value of the property. Appellant did not identify any of the problems with the construction of the home or of the other improvements on the property, nor did appellant make any adjustments to the value of the home for any of these problems. All of the properties appellant used as comparison properties were located on the golf course in the subdivision, but the subject property was not on the golf course. Being located next to a golf course typically raises the value of a property, yet appellant did not make any adjustments to reflect this disparity. Because all of the properties on the golf course were smaller than the subject property, appellant adjusted upwards the value of the comparison properties. This adjustment further inflated the disparity of the value of the properties located on the golf course.

Kraft-Longoria testified that the house on the subject property was "overbuilt" for its neighborhood—that is, it was significantly bigger than the homes around it. She testified that this diminished the overall value of the property and—along with the fact that there were no permits for electricity—rendered the home functionally obsolete. Appellant did not note these things or make any adjustments for them.

In contrast, the appraisal that had been performed six months earlier on the same property did note similar problems with the size of the house as well as with the subdivision in general. That appraisal determined the property to be worth $755,000. That appraisal also stated that the property was an "over-improvement," meaning it was significantly larger than the other properties around it; that the supply outweighed the demand in that subdivision and market area; that the resale market had not been established in the subdivision; and that, due to these other factors, the property was rated high risk.

Kraft-Longoria testified that, in her opinion, appellant's appraisal was materially false and misleading. She further testified that the value of the property was overinflated by between $200,000 and $400,000.

Appellant was paid by Macomber to perform the appraisal. The report reflects that it was prepared for a business called Dana Capital, a loan processing business, and it identifies Macomber's wife as the borrower. We hold there was

sufficient evidence in the record to support a finding by the jury that appellant intentionally or knowingly made a materially false or misleading written statement to obtain property or credit for another. *See* Act of May 17, 2001, 77th Leg., R.S., ch. 1245, § 3, sec. 32.32, 2001 Tex. Gen. Laws 2934, 2935 (amended 2001).

We overrule appellant's two points of error.

Conclusion

We affirm the judgment of the trial court.

Laura Carter Higley
Justice

Panel consists of Justices Jennings, Higley, and Brown.

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