Opinion issued February 10, 2011

In The

Court of Appeals

For The

First District of Texas

NO. 01-10-00246-CR

ANTHINO BERNARD BALLARD, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 174th District Court
Harris County, Texas
Trial Court Case No. 1240388

MEMORANDUM OPINION

Appellant, Anthino Bernard Ballard, was charged by indictment with theft.[1] Appellant pleaded not guilty. A jury found appellant guilty as charged. Appellant

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[1] *See* TEX. PENAL CODE ANN. § 31.03 (Vernon Supp. 2010).

pleaded true to the allegation in one enhancement paragraph that he had previously been convicted of aggravated robbery, and the jury assessed punishment at 7 years' confinement. In two points of error, appellant challenges the sufficiency of the evidence to establish: (1) that he stole stainless steel of a value of $1,500 to $20,000; (2) his identity as the thief; and (3) that his prior conviction of aggravated robbery was final.

We affirm.

Background

Appellant was an employee of National Oil Varco in July 2008. The location where appellant worked handled repairs for drilling equipment used in the oil and gas industry. The day before any work on a project was to begin, the necessary parts would be placed on pallets in one of the staging areas. Some of the staging areas were inside the main building. Some of the staging areas were outside of the main building. At time of the incident, the outside staging areas were connected to the employee parking lot without any fencing to separate the areas. On July 18, 2009, some parts had been placed on pallets in one of the outside staging areas for a project that appellant and his group were slated to work on the next day.

A little after 5:00 a.m. the next morning, Edwin Carries, another employee of National Oil Varco, was seated on some pallets outside the main building as

men in his group were cleaning out the work area with blowers. Carries was outside to avoid breathing in the dust created by the blowers. As he sat outside in the dark, he saw appellant driving a forklift to one of the pallets in the outside staging area, lift the pallet, and drive to his car in the parking lot. Carries then saw appellant open one of the passenger doors and load the parts on the pallet into his car. Appellant got in his car and drove away. Carries reported what he saw to his supervisor.

Carries testified that, though he did not know appellant by name, he had seen him at work numerous times previously and recognized him when he saw him take the missing parts. When he told his supervisor what he had seen, Carries gave a general physical description of appellant and identified the group with whom appellant worked. Carries was later shown a photo of appellant, and Carries identified appellant as the person he saw take the missing parts.

Video surveillance from that morning was admitted into evidence, comprising eight clips ranging from a few seconds to five minutes in length. The first clips show an SUV driving onto the property and driving to an area outside of the view of the surveillance cameras. Another clip shows a man walking from the area where the SUV had driven. Other clips show the same or a similar man driving a forklift. In one clip, the forklift is not carrying anything. In another clip, the forklift is carrying a pallet, driving in the direction the SUV had driven earlier.

Subsequent clips show the SUV driving away from that area and leaving the property. None of the videos recording the relevant events contain enough detail to identify the person in the video. The time stamp on the video shows the incident began around 5:09 a.m. and ended around 5:30 a.m. Appellant clocked in for work that day at 5:51 a.m.

The parts were discovered to be missing the same day. An inventory showed that 20 parts were missing and that the parts had been purchased for a total of $5,475.16. The evidence at trial established that all of the stolen parts were made of stainless steel and could have been resold for a total of $9,125.26.

At trial, during the punishment phase of the trial, appellant pleaded true to allegations of certain prior convictions, including the offense of aggravated robbery. The jury found this enhancement, among others, to be true and assessed punishment at 7 years' confinement.

Sufficiency of the Evidence

In two points of error, appellant challenges the sufficiency of the evidence to establish: (1) that he stole stainless steel of a value of $1,500 to $20,000; (2) his identity as the thief; and (3) that his prior conviction of aggravated robbery was final.

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 Ervin*, 2010 WL 4619329, at *2. 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. Theft of Stainless Steel of a Value of $1,500 to $20,000

In the first part of his first point of error, appellant argues that the evidence was insufficient to establish beyond a reasonable doubt that all of the items stolen were stainless steel and that they have a value between $1,500 and $20,000.[2]

The indictment alleged that appellant,

> on or about July 19, 2008, did then and there unlawfully, appropriate, by acquiring and otherwise exercising control over property, namely STAINLESS STEEL, owned by HARRELL E. WHITNELL, hereafter styled Complainant, of the value of over one thousand five hundred dollars and under twenty thousand dollars, with the intent to deprive the Complainant of the property.

The charge instructed the jury that they could only find appellant guilty if they found

> from the evidence beyond a reasonable doubt that on or about the 19th day of July, 2008, in Harris County, Texas, the defendant, Anthino Bernard Ballard, did then and there unlawfully, appropriate, by acquiring or otherwise exercising control over property, namely, stainless steel, owned by Harrell E. Whitnell, of the value of over one thousand five hundred dollars and under twenty thousand dollars, with the intent to deprive Harrell E. Whitnell of the property.

A person commits the offense of theft if he unlawfully appropriates property with intent to deprive the owner of property. TEX. PENAL CODE ANN. § 31.03(a)

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[2] In one sentence in his brief, appellant also states, "A material variance exists between an allegation in an indictment and the proof at trial." An appellant's brief must "contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record." TEX. R. APP. P. 38.1(i). If an argument is not adequately briefed, there is nothing for the appellate court to review. *Russeau v. State*, 171 S.W.3d 871, 881 (Tex. Crim. App. 2005). To the degree that appellant intended this sentence to create an additional point of error, it has been inadequately brief and, accordingly, waived.

(Vernon Supp. 2010). The theft is a state jail felony if the value of the stolen property is $1,500 or more but less than $20,000. *Id.* § 31.03(e)(4)(A). If personal property is alleged in an indictment, that property must be sufficiently identified. TEX. CODE CRIM. PROC. ANN. art. 21.09 (Vernon 2009). Proof of the identity of the property as required by article 21.09 becomes a part of the State's burden of proof at trial. *Green v. State*, 578 S.W.2d 411, 415 (Tex. Crim. App. 1979). Accordingly, it was a part of the State's burden of proof to establish that the stolen parts were stainless steel and that they had a value between $1,500 and $20,000. *See* TEX. PENAL CODE ANN. § 31.03(e)(4)(A); TEX. CODE CRIM. PROC. ANN. art. 21.09.

1. Stainless steel

Carries, the employee that witnessed the theft, said he could see the parts that were on the pallet due to the bright lights that were on just outside the main building. Carries testified that the parts were stainless steel. Brad Ortego, a fraud examiner working for National Oil Varco, testified that all of the parts that had been identified as stolen had been on one pallet. He also testified that all of the parts on the pallet in question had been stolen. Carries testified that different kinds of materials are not mixed on one pallet.

Appellant argues that two of the witnesses, Randall Strickland and Wesley Germany, testified that the stainless-steel supplies at National Oil Varco were kept

inside the building, while the theft described by Carries occurred outside of the building.

Both Strickland and Germany testified that stainless steel parts were *stored* inside the building. However, the uncontradicted testimony at trial also established that, the day before any work on a project was to begin, the necessary parts would be placed on pallets in one of the staging areas. Some of the staging areas were inside the main building, while some of the staging areas were outside. Germany testified that he did not know where the stolen parts were on the day that they were stolen. Strickland, the general manager for that location of National Oil Varco, was the only one to testify that the stolen parts were inside the building on the day of the theft. The final exchange on this matter occurred as follows:

> Q. Okay. The stainless steel material that was stolen from [National Oil Varco] on July 19th, that was located inside of the facility; is that not correct?
>
> A. Yes.
>
> Q. It wasn't located outside of the facility?
>
> A. No.
>
> Q. You're positive about that?
>
> A. Yes, unless it was moved out. When it was brought out of the work-in-progress inventory, it was staged up in that area. There's [sic] forklifts in and out all the time.

Strickland also testified that he did not do any investigation on his own into the theft. Even if we were to take Strickland's testimony as an unqualified

assertion that the stolen parts were inside the building at the time of the theft, this testimony simply creates a conflict in the testimony. It was within the jury's discretion to believe the testimony that the stolen parts were outside at the time of theft and disbelieve the testimony that the stolen parts were inside. *See Jackson*, 443 U.S. at 319 (holding it is responsibility of jury to fairly resolve conflicts in testimony, to weigh evidence, and to draw reasonable inferences from facts); *Williams*, 235 S.W.3d at 750 (same).

Appellant also argues that "some of the materials described were carbon rather than stainless steel." Appellant cites to Germany's testimony that two parts pictured in an exhibit were carbon, not stainless steel. The relevant exhibit was introduced by appellant and admitted for demonstrative purposes only. The picture showed examples of what some of the stolen items looked like. No one testified that the parts depicted in the exhibit were the actual stolen parts, and no one testified that the parts depicted in the exhibit were of the same material as the stolen parts.[3] The material composition of the parts depicted in appellant's demonstrative example, then, is irrelevant to our analysis of the sufficiency of the evidence to establish that the stolen parts were stainless steel.

[3] Although Germany testified that two of the parts depicted in the demonstrative exhibit were made of carbon, he also testified that National Oil Varco had both carbon and stainless steel versions of those parts.

We hold that there was sufficient evidence in the record to establish that the stolen parts were stainless steel.

2. Value between $1,500 and $20,000

An inventory showed that 20 parts were missing and that the parts had been purchased for a total of $5,475.16. One of the exhibits admitted into evidence showed the name of the parts missing, the number of each part missing, the purchase value, and the resale value. The evidence at trial established that all of the stolen parts were made of stainless steel and could have been resold for a total of $9,125.26.

Appellant argues that there was no testimony as to the value of the pieces which were described as carbon. This argument is a continuation of appellant's argument that Germany testified that some of the parts depicted in appellant's demonstrative exhibit were made of carbon. There was no testimony at trial that any of the stolen parts were made of carbon. Accordingly, all of the evidence regarding the value of the stolen parts related to stainless steel parts.

We hold that there was sufficient evidence in the record to establish that the stolen parts had a value between $1,500 and $20,000.

C. Identity

In the second part of his first point of error, appellant argues that there was insufficient evidence to establish that he was the thief.

A little after 5:00 a.m. on the day of the theft, Carries was seated on some pallets outside the main building as men in his group were cleaning out the work area with blowers. Carries was outside to avoid breathing in the dust created by the blowers. As he sat outside in the dark, he saw appellant driving a forklift to one of the pallets in the outside staging area, lift the pallet, and drive to his car in the parking lot. Carries then saw appellant open one of the passenger doors and load the parts on the pallet into his car. Appellant got in his car and drove away. Carries reported what he saw to his supervisor.

Carries testified that, though he did not know appellant by name, he had seen him at work numerous times and recognized him when he saw him take the missing parts. When he told his supervisor what he had seen, Carries gave a general physical description of appellant and identified the group appellant worked with. Carries was later shown a photo of appellant, and Carries identified appellant as the person he saw take the missing parts.

Video surveillance from that morning was admitted into evidence, comprising eight clips ranging from a few seconds to five minutes in length. The first clips show an SUV driving onto the property and driving to an area outside of the view of the surveillance cameras. Another clip shows a man walking from the area where the SUV had driven. Other clips show the same or a similar man driving a forklift. In one clip the forklift is not carrying anything. In another clip,

the forklift is carrying a pallet, driving in the direction the SUV had driven earlier. Subsequent clips show the SUV driving away from that area and leaving the property. None of the videos recording the relevant events contain enough detail to identify the person in the video. The time stamp on the video shows the incident began around 5:09 a.m. and ended around 5:30 a.m. Appellant clocked in for work that day at 5:51 a.m.

Appellant asserts that Carries testified that he did not know whether the items on the pallet were stainless steel and was not sure what, if anything, was stolen by appellant. The portion of Carries's testimony that appellant cites concerns Carries's knowledge of what specific parts were stolen, not whether appellant stole stainless steel. In the same portion of the record, Carries testified that he clearly saw that the parts taken by appellant were stainless steel and that he saw appellant load these parts into appellant's car.

Appellant also complains of a portion of Carries's testimony where Carries watches the surveillance video and has trouble identifying specifics of what he sees in the video. Carries personally witnessed the offense take place. His testimony concerning his ability to view details on the surveillance video does not conflict with his testimony concerning what he personally saw.

We hold that there was sufficient evidence in the record to establish that appellant was the thief. We overrule appellant's first point of error.

D. Final Conviction of Aggravated Robbery

In his second point of error, appellant argues that there is insufficient evidence in the record to support a finding that he had been convicted of aggravated robbery as alleged in the enhancement paragraph.

At trial, during the punishment phase of the trial, appellant pleaded true to certain convictions, including the offense of aggravated robbery. An exhibit admitted into evidence showed that, in 1996, appellant was placed on deferred adjudication for the offense of aggravated robbery. Another exhibit established that he was found guilty of the offense in 1998. This exhibit identified that appellant appealed the conviction on April 2, 1998 and the appellate court issued a mandate on April 20, 1999. The jury found the allegation in the enhancement paragraph, among others, to be true and assessed punishment at 7 years' confinement.

The general rule is that a plea of true to an enhancement paragraph relieves the State of its burden to prove a prior conviction alleged for enhancement and forfeits the defendant's right to appeal the insufficiency of the evidence to prove the prior conviction. *Ex parte Rich*, 194 S.W.3d 508, 513 (Tex. Crim. App. 2006). There is, however, a narrow exception to this general rule. If the record affirmatively reflects that the enhancement allegation was not true, such as

affirmatively reflecting that the judgment for the enhancement was not final, then a sufficiency of the evidence point can be raised. *Id.*

If the State's proof of a prior conviction shows on its face that the conviction was appealed, then the State must also put on evidence showing that the appellate court's mandate has issued. *Ex parte Chandler*, 182 S.W.3d 350, 358 (Tex. Crim. App. 2005). The State is required to make a prima facie showing of finality. *Jones v. State*, 711 S.W.2d 634, 636 (Tex. Crim. App. 1986).

In this case, the exhibit that reflected that appellant had appealed his conviction for aggravated robbery also reflected that the appellate court issued its mandate. Accordingly, the record does not affirmatively reflect that the enhancement allegation was not proper. *See Ex parte Rich*, 194 S.W.3d at 513.

Appellant argues that, although there is a notation on the judgment for the aggravated robbery that the mandate had issued, the mandate itself was not included in the record. There is no requirement that the mandate itself be introduced to prove finality. In *Johnson*, the Court of Criminal Appeals recognized that introducing a mandate into evidence is not the only way to prove that a mandate was issued. *See Johnson v. State*, 784 S.W.2d 413, 414 (Tex. Crim. App. 1990) (holding State failed to present mandate or any other manner of proof showing disposition of appeal). Additionally, the only proof that appellant appealed his conviction was in a similar notation in the same judgment. To the

degree that a notation in a judgment is sufficient to show that an appeal had been taken, a similar notation in the same judgment is sufficient to show that a mandate has been issued.

We hold that the record does not affirmatively reflect that the allegation in the enhancement paragraph was not true and that, by pleading true to the enhancement allegation, appellant forfeited his right to appeal the sufficiency of the evidence to prove the prior conviction. We overrule appellant's second point 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).