Opinion issued November 3, 2011.

In The

Court of Appeals

For The

First District of Texas

NO. 01-10-00509-CR

MONTE JUSTUS POUNDS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 339th District Court
Harris County, Texas
Trial Court Case No. 1241976

MEMORANDUM OPINION

A jury found appellant, Monte Justus Pounds, guilty of theft of property having a value between $1,500 and $20,000. *See* TEX. PENAL CODE ANN. § 31.03 (West 2010). After finding an enhancement paragraph true, the jury assessed

punishment at six years' confinement. In two related points of error, appellant contends that (1) the evidence is insufficient to support his conviction, and (2) the jury charge was erroneous. We affirm.

BACKGROUND

On October 16, 2009, David Bullock was arrested for possession of narcotics. In exchange for leniency, Bullock identified his supplier, Donny Pham, to police. Officers used the information provided by Bullock and arrested Pham.

On November 16, 2009, appellant began sending text messages to Bullock. Appellant warned that Bullock's name had come up on some "paperwork" and that associates of Pham had Bullock's home address. In one text message, appellant wrote, "U want my help pulling these niggas off of u . . . . That aint gonna be cheap!" Another message suggested that Bullock and his parents might be harmed if Bullock did not provide the appellant money.

Bullock consulted law enforcement officials. Acting on these officials' advice, Bullock arranged a meeting with appellant. Bullock and Kirk Bonsal, an investigator from the district attorney's office, planned to deliver $1,700 of the district attorney's money to appellant. Appellant indicated that this delivery should take place at a local restaurant and that the money should be given to a female bartender known as "Duck."

Bullock and Bonsal went to the restaurant. Despite initial difficulties in locating Angelica "Duck" Grijalva, Bonsal eventually gave Grijalva an envelope containing the $1,700. Appellant and his girlfriend, Diane Harbin, arrived at the restaurant shortly thereafter. Harbin went inside to retrieve the money from Grijalva, while appellant waited in the parking lot. Inside, Grijalva handed Harbin the envelope containing the $1,700. Appellant fled when approached by police in the parking lot. A short time later, appellant returned to the restaurant and was arrested.

SUFFICIENCY OF THE EVIDENCE

In his first point of error, appellant contends that the evidence is insufficient to support his conviction.

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*, 331 S.W.3d 49, 52–55 (Tex. App.—Houston [1st Dist.] 2010, pet. ref'd) (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.

Applicable Law

A person commits theft if he unlawfully appropriates property with intent to deprive the owner of property. TEX. PENAL CODE ANN. § 31.03 (West 2010). "Appropriate" means to acquire or otherwise exercise control over property other than real property. *Id.* "Exercising control" encompasses conduct that does not involve possession. *Gorman v. State*, 634 S.W.2d 681, 683 (Tex. Crim. App. 1982). "[T]he 'manner of acquisition' is inconsequential to the evil of a theft . . . ." *McClain v. State*, 687 S.W.2d 350, 353 (Tex. Crim. App. 1985). "[T]he crucial element of theft is the deprivation of property from the rightful owner, without the

owner's consent, regardless of whether the defendant at that moment has taken possession of the property." *Stewart v. State*, 44 S.W.3d 582, 588 (Tex. Crim. App. 2001).

Discussion

At trial, the jury was instructed on the law of the parties; that instruction did not name Grijalva or Harbin. The jury charge instructed a finding of guilt if appellant unlawfully appropriated the $1,700 himself, or if Donny Pham, Asian Rick, and/or an unknown person or persons unlawfully appropriated the $1,700 and appellant solicited, encouraged, directed, aided or attempted to aid them in committing the offense.

Appellant argues that because sufficiency is measured against a hypothetically correct charge, *see Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997), and the charge did not name Grijalva and Harbin, the evidence can be sufficient only if (1) appellant appropriated the money himself, (2) appellant solicited, encouraged, directed, aided or attempted to aid Donny Pham, and Pham committed the theft, (3) appellant solicited, encouraged, directed, aided or attempted to aid "Asian Rick," and "Asian Rick" committed the theft, or (4) appellant solicited, encouraged, directed, aided or attempted to aid an unknown person who committed the theft. Appellant argues that because "the Appellant never received the money himself . . . the State had to rely on the law of parties,"

and its evidence was insufficient under the charge submitted because there was no evidence that Donny Pham or "Asian Rick" committed the offense, and Grijalva and Harbin were not "unknown persons."

The State responds that, while it did submit a charge on the law of parties, the evidence here was sufficient to show appellant guilty as a principal. We agree. Actual possession is not necessary for the crime of theft. *See Stewart*, 44 S.W.3d at 589. In *Stewart*, the "[a]ppellant 'exercise[d] control' over the property and committed theft when, by his threats, he caused the complainant to release the money to the police . . . ." 44 S.W.3d at 589.

The jury could have reasonably concluded that appellant's text messages threatened Bullock and directly led to the transfer of the $1,700. Appellant then exercised control over the money and committed theft when he orchestrated the series of transfers and, by his threats, caused Bonsal to give the $1,700 to Grijalva. *See Id.*

The jury could have reasonably concluded from, *inter alia*, appellant's text messages that appellant acted with the intent to deprive Bonsal of the property. Accordingly, there is sufficient evidence to show that appellant, acting as principal, was guilty of theft. *See* TEX. PENAL CODE ANN. § 31.03 (West 2010).

Considering all the record evidence in the light most favorable to the verdict, a rational jury could have found that each essential element of the charged offense

was proven beyond a reasonable doubt on one of the theories on which the jury was charged. *See Jackson*, 443 U.S. at 319, 99 S. Ct. at 2789.

JURY CHARGE

In his second point of error, appellant contends that the trial court erred in instructing the jury on the law of parties. Appellant argues that a correct jury charge would have named Grijalva and/or Harbin in its instruction on the law of parties.

Appellant contends that this error was committed "at the State's urging over the objection of the appellant." This is incorrect. Defense counsel objected to the jury charge at trial asserting that "I don't believe there's been any evidence that's been presented nor has there been any testimony in and of itself that directly indicates that my client and anyone else were acting together in order to commit the offense[] of . . . theft." At trial, appellant objected that no evidence had been introduced to support the charge that appellant acted together with another party; on appeal, appellant asserts that the charge should have named Grijalva and/or Harbin because appellant and Grijalva and/or Harbin were acting together. The error alleged on appeal is not the same error objected to at trial.

Because the appellant did not properly object to the error asserted on appeal we review the error to see if it was so egregious that appellant was denied a fair

and impartial trial. *See Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1984).

For both preserved and unpreserved charging error, the actual degree of harm is assessed in light of the entire jury charge, the state of the evidence, including the contested issues and weight of the probative evidence, the argument of counsel, and any other relevant information in the record. *Id.*; *see also Hutch v. State*, 922 S.W.2d 166, 171 (Tex. Crim. App. 1996). "Where the evidence clearly supports a defendant's guilt as a principal actor, any error of the trial court in charging on the law of parties is harmless." *Black v. State*, 723 S.W.2d 674, 675 (Tex. Crim. App. 1986).

CONCLUSION

We affirm the trial court's judgment.

Sherry Radack
Chief Justice

Panel consists of Chief Justice Radack and Justices Bland and Huddle.

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