

Opinion issued June 28, 2016



In The
Court of Appeals
For The
First District of Texas

NO. 01-15-00511-CR

SANJOSEPH TAN, Appellant
V.
THE STATE OF TEXAS, Appellee

**On Appeal from the 179th District Court
Harris County, Texas
Trial Court Case No. 1425902**

MEMORANDUM OPINION ON REHEARING

A jury convicted Sanjoseph Tan of fraudulent use of identifying information, and the trial court assessed his punishment at confinement for one year. *See* TEX. PENAL CODE ANN. § 32.51(b) (West 2011). Tan challenges the legal and factual sufficiency of the evidence, contending that the evidence does not prove beyond a

reasonable doubt that he intended to defraud another person. Tan further challenges the statute under which he was convicted as facially unconstitutional. Tan moves for rehearing of our opinion and judgment dated March 31, 2016. We withdraw our opinion and judgment dated March 31, 2016. We issue this opinion and judgment in its stead. We deny the motion for rehearing.

Background

In 2013, Tony Ho purchased a new car from Ron Carter Hyundai. He brought the car home, but the dealership requested that Ho return the car when it discovered that Ho had bad credit. Realizing that he would have to rely on another person to buy a new car, Ho sent Tan to the dealership to buy a car for him. The dealership staff knew Tan, who had referred customers to them in the past, as Song Jin. Tan presented a passport and international driver's license bearing his picture and Song Jin's name and personal information. Tan filled out the purchase paperwork in Jin's name, with Jin's personal information. Tan completed the purchase. Tony Ho picked up the new car in the dealership's parking lot.

Some months later, the dealership received a letter from the bank that had lent Tan the money to buy the car. The bank informed the dealership that Tan was not Song Jin but someone else. It required the dealership to buy back the loan.

The dealership reported the incident to the Houston Police. T. Hulsey, an officer with the Houston Police Department's auto theft division, investigated the

incident. She examined the purchase paperwork and determined that the address the buyer had given was for a post office box registered in Song Jin's name. Hulsey located and contacted Song Jin, whose full name was Songfan Jin. Jin told Hulsey that he lived in New York City, had never been to Texas, and did not purchase the car.

With the dealership's assistance, the police located the car and arrested Tony Ho. Ho related that a man named "Jordan" had purchased the car for him. The police directed Ho to arrange a meeting with Jordan. At the meeting, several police officers approached the defendant, whom Ho identified as Jordan, and asked him to show identification. Jordan presented a Massachusetts driver's license identifying himself as Sanjoseph Tan. The police confronted Jordan with the driver's license and passport bearing Jin's name that had been presented at the dealership. Jordan admitted that his photograph was on the driver's license, and the police arrested him. The police examined Jordan's fingerprints and confirmed that Jordan was Sanjoseph Tan. When police performed an inventory search of Tan's car, they found a briefcase, which Tan gave them permission to search. In the briefcase, the officers found a receipt for maintenance work on another vehicle. The receipt was in Jin's name and listed the post office box as his address.

At trial, several of the dealership's employees identified Tan as the buyer of the car. Jin testified that he had never seen Tan in his life. Jin also confirmed that

his name, date of birth, and Social Security number were on the documents from the dealership.

Discussion

I. Legal Sufficiency

Tan first argues that the evidence was insufficient to support his conviction.

A. Standard of Review

This Court reviews legal and factual sufficiency challenges using the same standard of review. *Kiffe v. State*, 361 S.W.3d 104, 107 (Tex. App.—Houston [1st Dist.] 2011, pet. ref'd); *Ervin v. State*, 331 S.W.3d 49, 54 (Tex. App.—Houston [1st Dist.] 2010, pet. ref'd). In evaluating the sufficiency of the evidence, we “consider all of the evidence in the light most favorable to the verdict and determine whether, based on that evidence and reasonable inferences therefrom, a rational fact finder could have found the essential elements of the crime beyond a reasonable doubt.” *Gear v. State*, 340 S.W.3d 743, 746 (Tex. Crim. App. 2011) (citing *Jackson v. Virginia*, 443 U.S. 307, 318–19, 99 S. Ct. 2781, 2788–89 (1979)). The Court may not substitute its judgment for that of the jury by reevaluating the weight or credibility of the evidence, but must defer to the jury’s resolution of conflicts in the evidence, weighing of the testimony, and drawing of reasonable inferences from basic facts to ultimate facts. *Isassi v. State*, 330 S.W.3d 633, 638 (Tex. Crim. App. 2010). We apply the same standard to

circumstantial and direct evidence. *Id.* Circumstantial evidence alone can be sufficient to establish a defendant's guilt but the cumulative effect of all incriminating facts must be sufficient to support the conviction. *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007).

B. Analysis

Tan contends that the evidence that he intended to harm or defraud another is legally insufficient. He acknowledges that intent may be proven through circumstantial evidence, but argues that apart from his possession of Jin's identifying information, the State presented no evidence of his mental state, whether direct or circumstantial. *See Williams v. State*, 688 S.W.2d 486, 488 (Tex. Crim. App. 1985). A person is guilty of fraudulent use or possession of identifying information "if the person, with the intent to harm or defraud another, obtains, possesses, transfers, or uses an item of identifying information of another person without the other person's consent." TEX. PENAL CODE ANN. § 32.51(b)(1). A person acts intentionally when it is his "conscious objective or desire to engage in the [prohibited] conduct or cause the [proscribed] result." *See id.* § 6.03(a). "Identifying information" includes, among other things, an individual's name, Social Security number, date of birth, and government-issued identification number. *See id.* § 32.51(a)(1).

Applying the *Jackson* standard, there was evidence upon which the jury could have found that Tan intended to harm or defraud Jin or the dealership. According to the dealership's records, Tan used Jin's identifying information to establish his creditworthiness to buy a car. He filled out the loan application in Jin's name and used two pieces of identification bearing Jin's information and Tan's photo. The State admitted a passport and an international driver's license into evidence. Scott Kimbrough, an employee of Ron Carter Hyundai, testified that this driver's license bears Tan's photograph and that the driver's license was used to purchase the car under the name of Songfan Jin. Officer Hulsey testified that she showed the international driver's license to Tan and Tan admitted that it was his photo. A salesperson and a finance employee at the dealership separately identified Tan in a photographic lineup as the person who presented the identification in the name of Songfan Jin. When Tan was arrested, he was found with a receipt for auto repair work obtained in Jin's name.

Jin also testified at trial. He received a letter from a collection agency in 2012 that alerted him that his identity had been stolen. Jin filed a police report and hired an attorney to clarify that he had not incurred the debt. He verified that the copy of the passport admitted into evidence had his information, but someone else's photo. He testified that he did not know Tan, had never been to Texas, and did not give Tan permission to use his identification.

Tan cites several cases in which the Court of Criminal Appeals held that there was insufficient evidence of the defendant's criminal intent. *See Crittenden v. State*, 671 S.W.2d 527, 528 (Tex. Crim. App. 1984); *Knapp v. State*, 504 S.W.2d 421, 437 n.2 (Tex. Crim. App. 1973) (on reh'g). These cases are distinguishable. In *Crittenden*, the defendant was convicted of forgery after he attempted to deposit a check bearing the signature of a person who denied signing it. *Crittenden*, 671 S.W.2d at 527–28. The court held that insufficient evidence supported Crittenden's conviction because the State presented no evidence that Crittenden knew the signature was forged. *Id.* In *Knapp*, the defendant, a state representative, was convicted of theft for trading State-issued stamps for a pickup truck. *Knapp*, 504 S.W.2d at 424. The court noted that Knapp's initial receipt of the stamps was not evidence of his criminal intent. *Id.* at 437 n.2. This case differs from *Crittenden* and *Knapp* because here the State presented evidence that creditworthiness was a factor in the decision to sell the car on credit, and that Tan presented the false identification with the intent that the dealer and the bank rely on that information to approve a loan that otherwise would not have been made. It was reasonable for the jury to infer fraudulent intent from this evidence. *See* TEX. PENAL CODE ANN. §§ 6.03(a), 32.51(b)(1); *Hooper*, 214 S.W.3d at 13; *Rowshan v. State*, 445 S.W.3d 294, 299 (Tex. App.—Houston [1st Dist.] 2013, pet. ref'd)

(inferring criminal intent from circumstances surrounding filing of forged court order).

Tan also alleges that the evidence was factually insufficient to support his conviction. He acknowledges *Brooks v. State*, in which the Court of Criminal Appeals abandoned factual sufficiency review, holding that the standard of review established in *Jackson v. Virginia* applies to all challenges to the sufficiency of the evidence. *See Jackson*, 443 U.S. at 318–19, 99 S. Ct. at 2788–89; *Dobbs v. State*, 434 S.W.3d 166, 170 (Tex. Crim. App. 2014); *Brooks v. State*, 323 S.W.3d 893, 912 (Tex. Crim. App. 2010) (plurality opinion). He claims that *Brooks* was wrongly decided, citing a provision of the Texas Constitution providing that the decisions of the Courts of Appeals are “conclusive” on all questions of fact, such as a factual sufficiency challenge. TEX. CONST. art. V, § 6(a). He further contends that by applying the *Jackson* standard to his factual sufficiency challenge, we would deny him the due process guaranteed to him by the federal constitution. *See* U.S. CONST. amend. XIV, § 1; *Trevino v. Thaler*, 133 S. Ct. 1911, 1921 (2013) (“[A] distinction between (1) a State that denies permission to raise [a] claim on direct appeal and (2) a State that in theory grants permission but, as a matter of procedural design and systemic operation, denies a meaningful opportunity to do so is a distinction without a difference.”).

We addressed both of Tan’s contentions in *Kiffe v. State*, in which we upheld the use of the *Jackson* standard against similar challenges under the Texas and federal constitutions. *Kiffe v. State*, 361 S.W.3d 104, 109–10 (Tex. App.—Houston [1st Dist.] 2011, pet. ref’d). We explained that while the intermediate appellate courts have final jurisdiction over all questions of fact, the applicable standard of review is a question of law, on which the Court of Criminal Appeals’ precedent is determinative. *Id.* Thus, we must apply the *Jackson* standard to factual insufficiency claims. *See Martinez v. State*, 327 S.W.3d 727, 730 (Tex. Crim. App. 2010); *Brooks*, 323 S.W.3d at 912; *Kiffe*, 361 S.W.3d at 109–10.

II. Constitutional Challenge

Tan further contends that the statute under which he was convicted, Section 32.51 of the Penal Code, is unconstitutional. He argues that the statute is an overbroad speech restriction and is unconstitutionally vague, citing the First, Fifth, Sixth, and Fourteenth Amendments to the federal constitution. With certain exceptions not applicable here, to preserve a facial constitutional challenge for appeal, a defendant must present the challenge to the trial court. *Karenev v. State*, 281 S.W.3d 428, 434 (Tex. Crim. App. 2009). Because Tan did not present his challenge to the trial court, we hold that this complaint was not preserved for appellate review. *See id.*

Conclusion

We hold that the evidence is sufficient to support the conviction, and that Tan failed to preserve his constitutional challenge for review. We therefore affirm the judgment of the trial court. We deny Tan's motion for rehearing.

Jane Bland
Justice

Panel consists of Justices Bland, Brown, and Lloyd.

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