Opinion issued November 3, 2020

In The

Court of Appeals

For The

First District of Texas

NO. 01-19-00915-CR

ERNEST M. SPENCER, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 183rd District Court
Harris County, Texas
Trial Court Case No. 1502284

MEMORANDUM OPINION

A jury convicted appellant, Ernest M. Spencer, of theft in an amount greater than $100,000 but less than $200,000 and assessed his punishment at 15 years'

confinement and a $10,000 fine.[1] In his sole issue on appeal, appellant contends that the evidence is legally insufficient to support his conviction. We affirm.

BACKGROUND

In 2007, appellant incorporated Champion Concepts, Inc. In 2014, he filed a D/B/A for the corporation to do business under the assumed name, Capital Direct Funding. Appellant then obtained a website, telephone line, and set up a virtual office[2] for Capital Direct Funding. The company's website described it as a commercial mortgage-broker business.

In 2015, Officer J. Cervenka, an officer with the Houston Police Department who was assigned to work with the FBI cybercrime task force, began investigating appellant after the FBI received a complaint about him. Cervenka discovered that appellant had been operating Capital Direct Funding, but that he identified himself as "Josh Taylor" when communicating with potential customers. The phone number from which Josh Taylor made calls belonged to appellant. During his investigation, Officer Cervenka identified at least four complainants, all of whom testified at appellant's trial.

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1 *See* TEX. PENAL CODE § 31.03(a), (e)(6).

2 Evidence shows that appellant set up a virtual office with Abby Executive Suites, with an address in 12 Greenway Plaza, Houston, Texas. A virtual office was described at trial as place to receive the client's mail, plus a certain number hours of access to a conference room.

Anke Hernandez testified that, in 2015, she was seeking funding to buy an RV park in Carrizo Springs, Texas for $1.4MM. She could not afford the 20% down payment that a bank would require, so she began researching "hard money" lenders who would offer her 100% financing and a fast closing. She found the website of Capital Direct Funding and contacted a person who introduced himself to her as "Josh Taylor." Taylor offered to finance 100% of the loan with no money down and sent Hernandez a term sheet indicating that she was approved for a $1.4MM loan with an underwriting fee of 2%, or $28,000. Hernandez signed the term sheet and returned it to Taylor. She then took out a personal loan and exhausted her credit lines to pay the $28,000 fee in installments.

Taylor told Hernandez to pay a $4,500 appraisal fee, which she did. And, he set a closing date in May 2015. However, Taylor told Hernandez that the closing was delayed because he could not find an appraiser in the Carrizo Springs area. In the meantime, the sale fell through because the seller of the RV park went into foreclosure. Because the delay in closing was caused by Hernandez's delay in obtaining funding, Hernandez lost the earnest money she had put down on the sale.

Hernandez found another RV park to purchase, and appellant assured her that "[s]he didn't have to worry about anything, the loan would be funded and there were no problems whatsoever [in financing the purchase of the second RV

park].” Taylor sent Hernandez a new commitment letter and a term sheet for an amended loan and set the closing at a title company in San Antonio.

Hernandez drove 10 hours to the San Antonio closing. During the drive, appellant called her and told her that he had not received her appraisal, then he called and said that he had the appraisal, but he had some questions, and finally, he told Hernandez that the appraisal had not come in high enough. He explained to Hernandez that the closing could continue, but the seller would have to be a second lender on a portion of the deal.

When Hernandez arrived for the closing, appellant never arrived and the loan documents were never sent to the title company. Hernandez waited in San Antonio for three days hoping that the scheduled closing would happen. While she waited, appellant sent her a “hold harmless” letter to sign, explaining that she needed to sign it before the loan could close. Hernandez understood that the letter meant that she could not sue Capital Direct Funding to get any of her money back.

On the third day of waiting for the closing to happen, she learned that Capital Direct Funding would not fund the loan and that their underwriting or legal department would call her, but she never received a call. After the failed closing, Hernandez tried to contact Taylor through telephone calls and email, but he was nonresponsive.

Hernandez did some further online research and determined that Josh Taylor was, in fact, Edward Spencer. She sent a certified letter to him demanding the return of her money. Appellant never responded, but his attorney did contact her, and finally, Capital Direct Funding sent Hernandez a letter declining to fund her loan.

Aly Laveaux testified that he located Capital Direct Funding online while he was searching for a company to fund a $1.5MM loan to build a waterpark in Haiti. He had a partnership with a Haitian hotel that planned to provide the property if he paid to build the park. Laveaux filled out some minimal paperwork that did not even include his financial status, and Josh Taylor at Capital Direct Funding told him he was preapproved for a $1.26MM loan. The term sheet Laveaux received showed that an underwriting fee of was due on April 17, 2014, though the letter was not generated until April 23, 2014. Taylor explained to Laveaux that this discrepancy was just an error, but to send the money anyway, which Laveaux did. Laveaux made an initial $18,950 underwriting fee payment. Thereafter he paid a $7,500 appraisal fee, with several $7,500 extensions.

Taylor finally sent Laveaux a closing date, with a conditional approval notification listing all the things he needed to do before closing the loan. Laveaux was surprised because the last item on the list required the payment of a $100,000 commitment fee that the parties had not discussed before. Laveaux was also

surprised because the closing documents that Taylor sent him were only about four pages long when he was expecting much more complicated documents.

However, the closing never occurred. The title company had told Laveaux that they would call him on the date of the closing when the paperwork was ready. They never called. When Laveaux called the title company, he was told that they had declined to complete the closing because Capital Direct Funding wanted to do a "dry closing." Laveaux described a dry funding as one in which he would bring what he owed, the title company would collect it, and then the lender would send the loan money to him on a different date. In other words, the loan money would not go through the title company. Laveaux explained that the closing fell through because the title company was not comfortable doing a dry closing.

Nonetheless, Laveaux continued working with Taylor, even though he began to suspect that Taylor was running a scam. Hoping to close the loan, Laveaux made several more payments to Capital Direct Funding, including $7,500 in attorney's fees, $22,000 in closing amounts, and $2,500 and $5,000 that are undefined in the record. By October, still unable to obtain a new closing date, Laveaux hired an attorney, who discovered that Taylor was, in fact, appellant, Ernest Spencer. Appellant finally notified Laveaux that his loan had been denied. By that time, Laveaux had paid appellant over $70,000 in various fees.

Timothy Broome testified that he intended to buy a piece of property on which to locate his commercial construction business, with space to board a few horses. In searching for a lender online, Broome located Capital Direct Funding and spoke to Josh Taylor, who told Broome, "Oh, yeah, absolutely. We can help you with that." After Broome filled out an application, he received a commitment letter offering him a loan of $755,000, with a lender fee of $15,880 and an application fee of $11,950. Broome signed the letter and returned it with a check for $11,950 in late May. In June, Broome received an approval notification, which he understood to mean that the parties were ready to close the loan. After that, Broome testified that "it was just crickets. I mean, we had no response, no communication." No closing was ever scheduled, and Broome received nothing further from Taylor. Broome testified that he was never "given a written resolution of [his] request for a loan from Capital Direct Funding[.]"

Finally, Yvonne Asencio testified that she located Capital Direct Funding online because she needed a $180,000 loan to buy a mobile home park for her retirement. She called the company and spoke to Josh Taylor, who indicated that the company could provide her with a loan to buy the mobile home park. Asencio filled out a loan application and received a letter in return "telling us that we were going to be able to get financing for the mobile home park." Josh Taylor sent her a term sheet for a $180,000 loan and required a $8,950 payment. Asencio paid the

money and noted on the document that the $8,950 was a "down payment" for the property because she wanted to make sure the payment went towards what she owed on the loan. A closing date was set, but "Josh delayed the — the loan for quite some time. So, by the time we were getting ready to close [someone else] had already bought it, cash." After Asencio lost the first sale, she found another property and Josh "said that he would still be able to provide me with the loan," but she "had to put in more deposit money." Asencio "put down $7,000 more for the [new] down payment." Asencio filled out a new loan application and received a new commitment letter. A closing date was set; Asencio went to the title company for the closing, but Josh Taylor never showed up. Asencio testified that she "[s]at and waited, and then I called him, and I called, and I called, and I called." She received no response from Josh Taylor even though she had done everything required of her for the closing. For some time after the failed closing, Asencio attempted to contact Taylor. She finally received a response from his attorney, promising that she would receive a portion of the money she had paid back, but she never did. Asencio later learned from police that Josh Taylor was, in fact, Ernest Spencer.

All four complainants testified that they never would have given money to the man they knew as Josh Taylor had they known that he never intended to fund their loans.

At trial, the State called Jim Emerson as an expert in private lending, sometimes referred to as "hard money lending." Emerson testified that he had been in the private lending business in Houston for 29 years; he had never heard of Capital Direct Funding, Josh Taylor, or Ernest Spencer. He also noted that private lending on the commercial side was not a government-regulated business, which could make people vulnerable to those who might want to take advantage of people seeking loans. He testified that hard money lending was often done because the individuals seeking the private loan were unable to qualify for a bank loan. Emerson testified that he would never loan more than 70% of the value of the property. He also noted that fees were not collected until closing, and it was an industry standard that a closing would not be set until the loan had been approved. He noted that closing documents would often be 50 to 75 pages long; appellant's closing documents were just a few pages.

In examining some of the documents used by appellant, Emerson noted that the applications did not require enough information to move forward with a loan. Some did not even have the borrower's financial information. He noted that fixed loans at low interest rates, as offered by appellant, were unusual for private loans, which generally had higher interest rates. Emerson stated that private loans were an "alternative source of financing," and that you would go to a bank to get a loan at the rates appellant was offering. He noted that appellant's commitment letters

were contradictory. In some places they indicated that the lender was committing to make the loan, and in other places the letter was equivocal and left a lot of "wiggle room" for the lender. He also noted that appellant's documents were not signed by him, but just said, "Very truly yours, Capital Direct Funding." Emerson also noted that appellant's documents did not make clear whether his company was a broker or whether it was the actual intended lender. In Emerson's opinion, the purpose of appellant's commitment letters was "to collect funds from the borrower in advance of providing a loan."

Jeremy McAfee, a fraud examiner with the Harris County District Attorney's Office, reviewed appellant's bank accounts. He noted deposits totaling $667,779.72 and withdrawals totaling $668.817.80. Of the withdrawals, approximately 68% ($356,317.42) were cash withdrawals. Withdrawals totaling $127,375.72 were identified as personal expenditures. Only 8% ($43,723.16) of the withdrawals were readily identifiable as business expenditures.[3] McAfee considered 8% expenditures to be "a very low amount to spend on business expenses." McAfee also noted that appellant wrote no checks, which seemed unusual for a lending business. McAfee noted a pattern of deposits from payments made by the complainants, followed soon thereafter by cash withdrawals and personal expenditures. According to McAfee, "a new deposit would come in from

[3] The withdrawal totals McAfee classified do not equal $668,817.80 because he did not include the amounts that appellant moved between accounts.

someone else to bring the account balance up, and [he would] spend it down." McAfee acknowledged that there was no way to determine what appellant used the cash withdrawals for. They were not used to fund loans by any of the complainants.

SUFFICIENCY OF THE EVIDENCE

In his sole issue on appeal, appellant contends that the evidence is legally insufficient to support his conviction. Specifically, appellant claims that "the evidence failed to prove that appellant intended to commit theft when he took funds from the complainants."

Standard of Review

We review an appellant's challenge to the sufficiency of the evidence under the standard enunciated in *Jackson v. Virginia*, 443 U.S. 307 (1979). *See Brooks v. State*, 323 S.W.3d 893, 895 (Tex. Crim. App. 2010). We examine all the evidence in the light most favorable to the jury's verdict to determine whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson*, 443 U.S. at 318–19; *Merritt v. State*, 368 S.W.3d 516, 525 (Tex. Crim. App. 2012).

"The jury is the sole judge of credibility and weight to be attached to the testimony of witnesses." *Merritt*, 368 S.W.3d at 525 (citing *Jackson*, 443 U.S. at 319). As the sole factfinder, the jury may reasonably infer facts from the evidence

presented, credit the witnesses it chooses, disbelieve any or all of the evidence or testimony proffered, and weigh the evidence as it sees fit. *See Canfield v. State*, 429 S.W.3d 54, 65 (Tex. App.—Houston [1st Dist.] 2014, pet. ref'd). We afford almost complete deference to the jury's determinations of credibility. *See id.* (citing *Lancon v. State*, 253 S.W.3d 699, 705 (Tex. Crim. App. 2008)). In the event of conflicting evidence, we presume that the jury resolved conflicts in favor of the verdict and defer to that determination. *Isassi v. State*, 330 S.W.3d 633, 638 (Tex. Crim. App. 2010); *Canfield*, 429 S.W.3d at 65.

The intent of the accused is not ordinarily determined by direct evidence but is inferred from circumstantial evidence. *Dillon v. State*, 574 S.W.2d 92, 94 (Tex. Crim. App. 1978); *Salisbury v. State*, 867 S.W.2d 894, 896–97 (Tex. App.—Houston [14th Dist.] 1993, no pet.). "[I]ntent may be inferred from the acts, words, or conduct of an accused, including the circumstances surrounding the acts in which the accused engages." *Salisbury*, 867 S.W.2d at 897; *see also Mauldin v. State*, 628 S.W.2d 793, 795 (Tex. Crim. App. 1982); *Dues v. State*, 634 S.W.2d 304, 305 (Tex. Crim. App. 1982). The absence of direct evidence is not dispositive of the issue of guilt; rather, circumstantial evidence is as probative as direct evidence in establishing guilt, and circumstantial evidence, alone, can be sufficient. *See Jenkins v. State*, 493 S.W.3d 583, 599 (Tex. Crim. App. 2016).

Applicable Law

A person commits the offense of theft if that person "unlawfully appropriates property with the intent to deprive the owner of the property." TEX. PENAL CODE § 31.03(a). The penal code contains an aggregation provision, which provides that amounts obtained by theft "pursuant to one scheme or continuing course of conduct, whether from the same or several sources, may be considered as one offense." *Id.* § 31.09.

"Appropriation" is unlawful if "it is without the owner's effective consent." *Id.* § 31.03(b)(1). Consent is not effective if induced by deception or coercion. *Id.* § 31.01(3)(A). "Deception" is defined, among other things, as:

> (A) creating or confirming by words or conduct a false impression of law or fact that is likely to affect the judgment of another in the transaction, and that the actor does not believe to be true;
>
> (B) failing to correct a false impression of law or fact that is likely to affect the judgment of another in the transaction, that the actor previously created or confirmed by words or conduct, and that the actor does not now believe to be true;
>
> (C) preventing another from acquiring information likely to affect his judgment in the transaction; [or]
>
> . . .
>
> (E) promising performance that is likely to affect the judgment of another in the transaction and that the actor does not intend to perform or knows will not be performed, except that failure to perform the promise in issue without other evidence of intent or

> knowledge is not sufficient proof that the actor did not intend to perform or knew the promise would not be performed.

Id. § 31.01(1)(A), (B), (C), (E); *see Demond v. State*, 452 S.W.3d 435, 454 (Tex. App.—Austin 2014, pet. ref'd).

A claim of theft made in connection with a contract requires proof of more than an intent to deprive the owner of property and subsequent appropriation of the property; the State must prove that the appropriation was a result of a false pretext, or fraud. *Wirth v. State*, 361 S.W.3d 694, 697 (Tex. Crim. App. 2012). The evidence must also show that the accused intended to deprive the owner of the property at the time the property was taken. *Id.*

Here, appellant was charged with aggregate theft by deception. *See* TEX. PENAL CODE § 31.01(1)(A), (B), (C), (E), 31.03(a), 31.09; *see also Fernandez v. State*, 479 S.W.3d 835, 838 (Tex. Crim. App. 2016) (providing that evidence of "the deception must precede the consent given"). Therefore, it was the State's burden to prove that appellant unlawfully appropriated property, valued at more than $100,000 but less than $200,000, by inducing "consent of its transfer because of a deceptive act," namely under § 31.01(A), (B), (C), or (E) of the Penal Code, and amounts obtained by theft were pursuant to one scheme or continuing course of conduct. *See* TEX. PENAL CODE §§ 31.01(1)(A), (B), (C), (E), 31.03(a), (e)(6).

Analysis

Appellant challenges the legal sufficiency of the "intent" element of the theft statute, contending that his failure to meet his contractual obligations is no evidence that he intended to defraud the complainants at the time he took their money. Specifically, he alleges that "[i]nept business practices do not necessarily amount to proof of fraud without additional evidence of intent to deceive." He points out that his documentation provides that the fees were non-refundable and that his commitment letters did not actually promise to fund the complainants' loans.

We agree that evidence showing a failure to perform a contractual agreement, standing alone, is insufficient to show an intent to defraud. *See Wirth*, 361 S.W.3d at 697. And, a person who acquires a "down payment" pursuant to a contract may not be convicted of acquiring that down payment 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 fulling his contractual obligation[.]" *Taylor v. State*, 450 S.W.3d 528, 536 (Tex. Crim. App. 2014). Thus, the issue we decide is whether a rational trier of fact could have concluded that, at the time he took the preclosing fees from the complainants, appellant had no intention of funding, or even attempting to obtain funding for, their loans. Factors to consider when evaluating if the defendant possessed the requisite intent to commit theft include

whether the defendant personally gained from what was allegedly taken, whether the defendant partially performed, and the "logical force of the combined pieces of circumstantial evidence in the case, coupled with reasonable inferences from them." *Christensen v. State*, 240 S.W.3d 25, 32–36 (Tex. App.—Houston [1st Dist.] 2007, pet. ref'd) (quoting *Evans v. State*, 202 S.W.3d 158, 166 (Tex. Crim. App. 2006)).

Here, there was sufficient evidence for the jury to conclude that appellant took the complainants' preclosing fees without intending to fund, or even consider funding, their commercial loans. All four complainants testified that appellant promised to fund their commercial loans, and in three of the four cases went so far as to set a closing date for the loan. There was evidence that it was an industry standard not to set a closing date unless the loan had, in fact, been approved. There was also evidence that the interest rates were unusually low for a hard money lender, and that a fixed rate loan was also unusual for a hard money lender. The documentation upon which the loans were "approved" was, in the opinion of the State's expert, insufficient upon which to base an approval because some did not even require the borrower's financial information. All these circumstances before the exchange of money could suggest to a reasonable jury that appellant never intended to even consider funding the loans but used the unusually lenient loan application requirements to entice the complainants to pay fees.

Further, all four complainants testified that, in the early stages of their discussions with appellant, he was very attentive and positive, never mentioning that the loans might not be funded, and, indeed, setting the loans for closing. The evidence also showed a pattern of delayed and failed closings by appellant. For Hernandez and Ascencio, appellant's delayed closings caused them to lose the initial sales for which they were seeking loans, but appellant continued to assure them that he could fund their loans on new properties. Sometimes additional fees were required to continue the loan process. There was evidence that appellant continued to demand a total of some $70,000 in fees from Laveaux, some paid even after the closing failed. In all cases in which a closing was set, appellant either cancelled it, or, more disturbingly, simply failed to show up. And, Broome testified that after appellant received his preclosing fees, "it was just crickets," and no closing was ever set and no written resolution of his request for a loan was ever given. All complainants testified that, at some point after they paid their fees, appellant simply ceased communicating with them. Appellant's pattern or *modus operandi* of delayed and cancelled closings after receiving the complainants' funds, along with his refusal to communicate with the complainants further, could suggest to a reasonable jury that appellant never intended to even consider funding the loans, but set the closing dates as a way to extract the payment of fees from the complainants with no intent to do more. *See Taylor*, 450 S.W.3d at 539 (noting

that defendant "had a *modus operandi*, as evidence by his other recent business dealings, to put on an *appearance* of intending to satisfy his contractual obligations while knowing he would not").

Appellant's bank records also suggest that he was not operating as a legitimate hard money lender. He never wrote checks, which was unusual for a lender. Only 8% of the expenditures from his accounts could be attributed to business expenses; the rest were personal expenses and cash withdrawals. His accounts showed a habit of depositing the checks received from the complainants, then immediately withdrawing a similar amount in cash or making non-business purchases until the accounts were almost depleted. There was no evidence that appellant ever used his accounts to fund any loans or to pay any fees associated with lending. To the extent that appellant now contends that he might have used the cash withdrawals for business purposes, the jury could have resolved this inference against him. *See Murray v. State*, 457 S.W.3d 446, 448–49 (Tex. Crim. App. 2015) ("When the record supports conflicting inferences, we presume that the factfinder resolved the conflicts in favor of the verdict, and we defer to that determination"). Appellant's use of the complainants' fees for personal purchases and cash withdrawals could suggest to a reasonable jury that appellant obtained those funds with no intent to fund or attempt funding their loans. *See Christensen*, 240 S.W.3d at 32 (noting that personal gain from funds taken is circumstance to

consider in evaluating intent); *see also King v. State*, 17 S.W.3d 7, 17 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd) (noting that evidence appellant had criminal intent is shown in part by use of complainant's money for purpose of paying personal expenses and purchasing items for personal benefit).

Finally, there were other circumstances indicating fraud or deception. Most tellingly, appellant always communicated with the complainants using the alias "Josh Taylor" and became unreachable after the failed or abandoned closings.

The "logical force of the combined pieces of circumstantial evidence in the case, coupled with reasonable inferences from them" is legally sufficient to show that appellant intended to deprive the complainants of their money by inducing their consent through deception. *Christensen*, 240 S.W.3d at 31 (quoting *Evans*, 202 S.W.3d at 158).

We overrule appellant's sole issue.

CONCLUSION

We affirm the trial court's judgment.

Sherry Radack
Chief Justice

Panel consists of Chief Justice Radack and Justices Hightower and Adams.

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