

Affirmed and Memorandum Opinion filed May 28, 2009.



In The

Fourteenth Court of Appeals

NO. 14-07-00702-CR

KRYSTAL MICHELE JAHANIAN, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the 183rd District Court
Harris County, Texas
Trial Court Cause No. 1059703**

MEMORANDUM OPINION

A jury found appellant Krystal Michele Jahanian guilty of engaging in organized criminal activity with family members and others to commit and conspire to commit the first-degree felony offense of theft of property valued at over \$200,000. The jury assessed her punishment at confinement in the Texas Department of Corrections, Institutional Division, for twenty-five years, and the trial court sentenced her accordingly. On appeal, Krystal contends the evidence is legally and factually insufficient to support her conviction. We affirm.

Factual and Procedural Background

Krystal does not dispute the evidence that she participated in organized criminal activity. From January 2004 through February 2006, Krystal and other members of the Jahanian family, including her parents, Bahram “B.J.” Jahanian and Cindy Jahanian, and her brother, Nicholas Jahanian, participated in a theft scheme to unlawfully obtain merchandise from stores throughout Texas and to sell the merchandise for profit through Nicholas Jahanian’s eBay account named “Bwatchers.”¹ Others also participated in the scheme, including three accomplices who testified during the trial, Valerie Baker, Elizabeth Espirit, and Richard Schroeder. The stores targeted in the scheme included Target, Wal-Mart, Home Depot, and Lowe’s. Representatives of these stores were named as the owners of the property in the indictment against Krystal.

Krystal’s father, B.J., was confined in a Texas prison during the time the theft scheme operated. Despite his confinement, he instructed the others as to how to carry out the scheme during prison visits with Nicholas or by mail sent from prison to Cindy at her residence, which she shared with Krystal, located at 19615 Spanish Needle in Harris County. B.J.’s advice included telling them to stay away from Target stores, to go out of town more, and to use more than two drivers. He also did not want Nicholas involved in going to the stores.

The scheme operated as follows. Cindy, Krystal, and an accomplice, usually Elizabeth Espirit but sometimes Richard Schroeder, would drive to one of the stores somewhere in Texas, and Cindy and Krystal would enter the store with labels showing UPC codes for low-end or low-priced merchandise that they or someone else in the theft ring had purchased or stolen for the purpose of getting the bar codes.² Once inside the store, Cindy and Krystal

¹ Cindy Jahanian, Krystal Jahanian, and Nicholas Jahanian were tried together, while Bahram Jahanian, who represented himself, was tried separately. All of the defendants have filed appeals in this court.

² There was also evidence indicating that UPC codes were forged for this purpose.

located usually at least two high-end items such as MP3 players, faucets, cameras, phones, DVD recorders, or printers.³ While one acted as lookout, the other placed the bar-code labels for the lower-priced merchandise over the bar code shown on the high-end items so that the desired merchandise could be purchased for a substantially lower price.

Once the bar codes were switched, Cindy or Krystal placed a cell-phone call to the accomplice, who separately entered the store, and gave the accomplice a description of the desired merchandise and its location. Cindy and Krystal then left the store, and the accomplice, who was also permitted to purchase a very low-priced item for personal use at the ring's expense, would locate the merchandise and attempt to check out with it. When possible, the accomplice would take the merchandise to a check-out counter occupied by a young, seemingly inexperienced clerk. When the merchandise rang up at the lower price shown by the switched bar code, the accomplice paid for it and the personal item, left the store, and returned to the car. The three would then either go to another store or quit for the day. Cindy and Krystal would then store the stolen merchandise either at their home or a storage unit they maintained.

To dispose of the merchandise, Nicholas Jahanian sold the items on eBay using his eBay account, known as "Bwatchers," and sent the merchandise to whomever had purchased it.⁴ Nicholas then distributed the profits among himself and the other members of the ring, including Cindy and Krystal. The eBay business prospered and supported Nicholas, Cindy, and Krystal.

³ The indictment against Krystal, as amended, alleged the following types of merchandise: shavers, MP3 players, faucets, music stations, speakers, printers, camcorders, thermostats, cameras, printer docks, print servers, software, phones, DVD-VHS recorders, DVD recorders, paintball markers with masks and tanks, toothbrushes, paintball guns, tennis racquets, gift cards, water filters, and print cartridges. The owners of the property were alleged to be Brady Bailey, Tim Scott, Marshall Poe, and Mary Jo Meador, as representatives of Target, Lowe's, Home Depot, and Wal-Mart, respectively.

⁴ The address for the Bwatchers account was Cindy Jahanian's home on Spanish Needle.

Doug Osterberg, an investigator in the Harris County District Attorney's Office Special Crimes Division, testified extensively about his involvement in the investigation of the theft ring and its operation. He also provided testimony about the value of the stolen property. Among other things, Osterberg testified that records obtained from eBay showed that the types of items being sold through the Bwatchers account were MP3 players, faucets, electric razors, cordless phones, print servers, and cameras, most of which were listed as "new in box." For the period that eBay records were available, October 2004 to the end of October 2005, Bwatchers sold 2,109 items for a total of about \$258,000. At this point, Osterberg decided to contact the loss-prevention departments of several of the stores for assistance. Store personnel and additional officers conducted surveillance on the ring, and the jury was shown security-camera videos of the ring's operation.

On cross-examination, Osterberg explained that he went over the records of the Bwatchers account with loss-prevention personnel, and although they were able to show that there were losses in the areas of those types of products, they could not say that specific items on the list actually came from their stores. Osterberg agreed that the only items actually traced back to specific stores were those that the ring was observed stealing during surveillance. He also agreed that the eBay list did not show how much the Jahanians might have paid to acquire the items originally; it showed only the price that eBay customers paid Bwatchers for the items.⁵ He also admitted that some of the merchandise came from other stores not included in the case.

Osterberg further testified that his office calculated the amount of the stores' losses primarily by using the eBay records. When asked if he knew what the ring actually paid for the items, he explained that the sales price was usually either about \$27 or \$7, depending on which of two fake bar codes they decided to use. The bar codes were copied from Lexmark

⁵ Osterberg also testified that the persons who purchased the items from Bwatchers were not contacted by law-enforcement personnel.

ink printer cartridges and water filters the ring purchased. Osterberg stated that his testimony was based on information from other participants in the ring and evidence seized from Cindy's and Nicholas's homes and a storage unit Cindy controlled.

Larry Boucher, another investigator with the Harris County District Attorney's Office, and Osterberg's direct supervisor, also testified concerning his participation in the surveillance of Cindy Jahanian, Krystal Jahanian, and Elizabeth Espirit on January 26, 2006. The surveillance captured both successful and unsuccessful attempts to carry out the theft ring's operation. On that day, Boucher observed the group first going to a Target in Harris County, where their activities were captured on video. Boucher testified that the video showed Cindy and Krystal enter the Target, examine a Kodak printer bundle, consisting of a camera and printer dock, priced at \$249.99, and put two of them in a cart. Elizabeth Espirit entered after Cindy and Krystal, but ultimately they abandoned the effort and went to another Target store.⁶

After leaving the second Target store, the trio then went to a Wal-Mart in Brenham, where they were again captured on video. The video showed Cindy and Krystal going down an aisle where phones were sold, but they left without buying anything. Elizabeth Espirit separately entered the store, went to the same aisle, and picked up two boxes of Panasonic cell phones along with some children's socks. She then went to a self-checkout aisle and attempted to scan the items, but when a cashier came over to assist her, the cashier saw that the phones were ringing up as \$27.97. The cashier peeled off the UPC codes, and the phones rang up as \$154.96. Espirit made an excuse and left the store without purchasing anything.

Boucher testified that the surveillance continued as the trio next went to a nearby Lowe's store. There, after Cindy and Krystal went to an aisle containing water filters, Espirit

⁶ The trio were also captured on video at the second Target store, and the State published to the jury two DVDs depicting Cindy, Krystal Jahanian, and Elizabeth Espirit at this store as part of its examination of Osterberg concerning the theft ring's method of operation.

later went to the same aisle, picked up four Brita water filters, and purchased them for \$6.96 apiece, when their actual price was around \$32 apiece. The trio then continued on to a Home Depot in Brenham. As before, they were captured on video, and Boucher described their activities. At the Home Depot, Cindy and Krystal went down an aisle where faucets were located, and Espirit entered the store separately and went to the same aisle, picked up two faucets, and checked out. The faucets rang up as water filters for \$26.97 apiece. Boucher testified that the faucets were actually priced at \$208. On cross-examination, Boucher admitted that the total amount of loss from the stores where merchandise was purchased, after subtracting what was paid, came to roughly \$600. He also admitted that he did not see Cindy or Krystal switching the UPC codes, nor did he see them walk out of the stores with any merchandise. He also never came in contact with Nicholas Jahanian.

Pat Smith, also an investigator with the Harris County District Attorney's Office, rode with Boucher during the surveillance. He testified that, after Cindy, Krystal, and Espirit left the Brenham Home Depot, they went to a Wal-Mart and a Lowe's in Bryan. They left the Wal-Mart without any merchandise. At the Lowe's, however, he observed Cindy and Krystal go to the plumbing aisle where they were "handling and looking at" Delta brand faucets. He saw Krystal return a box to the shelf as Cindy talked on a cell phone. They left the aisle, but then returned and handled the boxes again, as Krystal talked on a cell phone. He then saw Espirit, who was talking on her cell phone, go directly to the same area, where she picked up the same boxes, put them in her basket, and purchased them. After the trio left the store, Smith spoke with the cashier and determined that they had purchased two Delta faucets retailing for \$208 apiece for approximately \$27 apiece. The tape register from the transaction reflected that Espirit purchased water filters, but Smith testified that was not what he saw her purchase, and a still photograph taken from video of the purchase also showed that she was buying a Delta faucet.

Smith also testified that, as a part of the investigation, he used his own eBay account to purchase a Delta faucet from Bwatchers. Emails confirmed that the purchase was shipped from “baywatch” at Cindy’s Spanish Needle address, and that Smith paid “nickjahanian@hotmail.com” \$157.50 for the “new in box” faucet. The return address on the packaging in which he received the faucet also reflected Cindy’s Spanish Needle address. On cross-examination, Smith admitted there was no way to determine where the faucet he bought from Bwatchers came from. He also testified that there was no way for retailers to trace an item purchased on eBay back to a particular store.

Valerie Baker, Nicholas Jahanian’s former girlfriend, testified that Nicholas eventually revealed to her the theft ring’s operation after the relationship grew more serious. Among other things, Baker testified that they often chose Wal-Mart and Target stores because they had young cashiers who did not know the price of electronics. The types of items she saw Cindy and Krystal deliver to Nicholas included shavers, paintball guns, faucets, phones, cameras, and other electronics. Baker testified that she helped Nicholas steal by assisting him in packaging the stolen items to be sent to purchasers. On cross-examination, Baker admitted that she never saw Nicholas, Cindy, or Krystal steal anything, and all her information concerning the theft ring’s operation came from Nicholas only. She also admitted that she and Nicholas sold some legitimate items on eBay and that they had joined a wholesalers club. She further admitted that she could not deny that Cindy or Krystal may have obtained items from places like flea markets or pawn shops to sell on eBay.

Dee Williams, a loss-prevention manager at Target, also participated in the surveillance of Cindy, Krystal, and Espirit on January 26, 2006. She testified about details of the ring’s operation from her observations and the videos. She also testified that, while visiting a Pasadena Target, she learned that two days earlier, on January 24, Cindy, Krystal, and Espirit attempted to carry out their operation at that store. Store video showed Cindy and Krystal entering the store, and Espirit entering shortly thereafter. Cindy and Krystal removed

Kodak bundle packs from a shelf and went to the back of the store. Several minutes later, they returned the merchandise to the shelf. Espirit then picked up two Kodak bundle packs from the shelf and attempted to check out with them. The items, which were priced at \$249.99 apiece, rang up as Lexmark printer cartridges for \$27.99 apiece. The cashier saw that the items were not ringing up at the correct price and informed the loss-prevention team. She also peeled off the UPC codes and re-scanned the items at their correct price. Espirit did not purchase the items.

Williams further testified that the Jahanians' operation enabled them to actually pay as little as \$6 for each stolen item, and that they could even make money on the purchases aside from just the sales on eBay. She explained that they would purchase a Lexmark printer cartridge costing \$27 for \$6 by switching the correct UPC code with the UPC code for a \$6 water filter. Once the printer cartridge was obtained, the Jahanians would have a UPC code for that item to use to purchase the more expensive items like cameras, high-dollar phones, and shavers for \$27 each. When they purchased a more expensive item for \$27, they received a receipt showing the purchase of a Lexmark printer cartridge for \$27. They would then use that receipt to return the printer cartridge (for which they actually paid \$6) and obtain a refund of \$27 (for a net profit of \$21). Thus, Williams testified, the ring could actually make money on the Lexmark printer cartridge purchase. And, by employing this scheme, it cost the Jahanians \$6 to steal a high-dollar item like a shaver, phone, or camera.

Williams also testified that the ring had made such a transaction at the Pasadena Target. She explained that video from that Target showed that a little less than an hour before Espirit attempted to purchase the Kodak printer bundles, Cindy was shown returning two Lexmark printer cartridges in exchange for cash totaling \$57.50. From the original receipt, Williams was able to determine that the purchase was made on January 19, 2006, five days earlier, at a Target in San Antonio. Photographs from that store showed Espirit buying two shavers, priced at between \$150 and \$250, that rang up as Lexmark printer cartridges.

That purchase generated the receipt Cindy used to return Lexmark printer cartridges in exchange for cash. Thus, Williams testified, the ring was able to purchase about \$400 worth of merchandise for about \$50, and then obtain a refund of about \$50 from a \$6 purchase. Williams further testified that she was able to identify numerous similar transactions at Target stores in other locations, such as Galveston, Clear Lake Shores, Kemah, Baybrook, Pearland, Tomball, and San Antonio.

On cross-examination, Williams testified that the overall loss figure for the transactions she observed and was able to document was approximately \$2,500. On redirect, however, she explained that this amount was based on her investigation of a roughly thirty-day period in a limited geographical area.

The State's next witness was Elizabeth Espirit. She testified that she had served jail time for engaging in the theft ring involving Cindy, Krystal, and Nicholas. She explained that she became involved through her husband, who was in the Harris County jail with B.J. Jahanian. B.J. had given her husband Krystal's phone number so that Espirit could call her about some work. She testified that Cindy and Krystal would give her instructions, and they would go to Target, Lowe's, Wal-Mart, Home Depot, and Academy stores to carry out the scheme. She also testified to the details of the theft ring's operation, and confirmed that the ring stole all of the kinds of items listed on the indictment. She testified that they typically went out once or twice a week to steal, and each time they would go to between four and seven stores. Usually they would get one or two expensive items, unless they were getting ink cartridges, in which case they would get several. Concerning refunds, Espirit testified that they would use receipts to get cash, but if they did not have a receipt, they would take a previously stolen item to one of the stores and get a gift card. She estimated that she personally stole about \$160,000 worth of merchandise.

On cross-examination, Espirit admitted that she really did not know how much she had stolen. She also admitted that she had met Nicholas Jahanian only once, and testified

that he never gave her any instructions and she never saw him handle any stolen merchandise. She also testified that, after she spent time in jail, she pleaded guilty and was sentenced to ten years' deferred-adjudication probation and ordered to pay \$50,000 in restitution.

Richard Schroeder, another participant in the theft ring, testified that he stole with the Jahanians from 2004 until 2006, and that he had previously been arrested for stealing with them. Most of the time, he would go with Cindy and Krystal, or Krystal and her ex-husband, to stores in and around various Texas cities, including Austin, San Antonio, Dallas, Fort Worth, Arlington, and Houston. As an example, Schroeder testified that they would go to Dallas about once a month and spend three or four days there. Each day they would go to eight to ten stores. In Houston, they would go out three or four days a week, and he went with them for over a year. Schroeder also testified that he and Nicolas once went to a Wal-Mart where Nicholas changed the bar code on a flat-screen television and Schroeder was arrested when he attempted to check out with the item. Nicholas was not arrested because he had already left the store. On cross-examination, Schroeder admitted that Nicholas never gave him any instructions or bar codes, and never gave him any money.

Jeremy Roble, a fraud investigator at eBay, explained how the eBay online-auction process works, and confirmed that the market is worldwide for items sold on eBay. He also explained that to put something for sale on eBay, one must create an eBay username or account, and have an e-mail address. He testified that he responded to a subpoena for records in this case, and in searching for information, he found that Nicholas Jahanian first established an account with eBay in August 2003, under the username Nick Jahanian, and he provided the e-mail address of "NickJahanian@hotmail.com." In October 2004, the username changed from Nick Jahanian to Bwatchers and the e-mail address changed to "eBaywatchers@hotmail.com." Roble further testified that State's Exhibit 2A listed all of the transactions involving the Bwatchers account, and that the total sales price for the listed

items was \$258,970.36. He further testified that the list would not include sales after the end of October 2005, when he responded to the subpoena, and so it would not include sales from November 2005 through February 2006.

Todd Quattlebaum, the president of EZ Bayer, Incorporated, testified that his company buys and sells inventory for businesses and individuals on eBay. He testified that in 2003, Nicholas Jahanian listed some Panasonic DVD recorders and other items for sale through the company. Quattlebaum testified that Nicholas told him he was getting the items from a wholesaler. Quattlebaum also testified that the items Nicholas brought were all factory-sealed. After subtracting the company's fees for its services, Quattlebaum's records reflected 141 transactions for Nicholas totaling \$13,611.23. Quattlebaum also estimated that his records did not reflect an additional twenty or thirty transactions.

Marshall Poe, a loss-prevention manager for Home Depot, testified as a representative of Home Depot and was one of the persons alleged in the indictment to be the owner of the stolen property. He testified that he participated in the surveillance on January 26, 2006, of Cindy and Krystal at the Home Depot. He identified numerous items from State's Exhibit 2A as the type of items sold by Home Depot. He also testified that he had a greater right to possess items stolen from Home Depot than the thief who had stolen them. On cross-examination, Poe acknowledged that Home Depot did not sell some of the types of items on the list. He also could not attribute the loss of specific items to the Jahanians, and he did not know whether items on the list came from the Home Depot. Poe further testified that Home Depot did not have the technology to determine whether someone had been switching bar codes, and there was no way for them to check to see if they had video of the Jahanians conducting their activities in their stores. Poe also confirmed that Home Depot did not have the ability to track a serial number from a package to a particular store. He further testified that Home Depot employees purchased two items over the internet from Bwatchers, and the items were shipped from Cindy's Spanish Needle address.

Tim Scott, who worked in loss prevention at Lowe's, also testified as that store's representative and was alleged in the indictment to be an owner of the stolen property. He identified items on State's Exhibit 2A as the types of items Lowe's sells, and testified that he had a greater right to possess merchandise stolen from Lowe's than the thief who had stolen it. On cross-examination, he acknowledged that there were items on the list that Lowe's did not sell, and other than the items he saw the Jahanians steal during his participation in the January 2006 surveillance, he could not tell whether the items on State's Exhibit 2A were Lowe's property. Scott also acknowledged that Lowe's did not have the technology to match a bill of lading for items at Lowe's to the items sold on eBay.

Thomas Brady Bailey similarly testified as Target's representative and was another person alleged in the indictment to be an owner of the stolen property. Bailey, an investigator specializing in organized-crime investigations with Target, and who was then assigned to the United States Secret Service Federal Task Force, was also involved in the surveillance of the Jahanians on January 26, 2006. He testified that he had a greater right to possess the stolen items than the thief. He also testified that Target did not have the technology to trace a specific item back to a particular Target store. Bailey identified the types of items listed on State's Exhibit 2A that were sold at Target.

At the prosecutor's request, Bailey had previously picked out some of the items from the list to compare what Nicholas Jahanian sold them for on eBay to the sales price at Target. He testified that the average difference was thirty percent. Accordingly, Bailey testified that, applying that percentage to all of the stores, the \$258,970.36 figure shown on State's Exhibit 2A would have to be increased by approximately thirty percent to determine the approximate retail value of the property. On cross-examination, Brady identified items on State's Exhibit 2B that Target did not sell. He also confirmed that the percentage of loss numbers he was asked to calculate by the district attorney's office were estimates.

The last of the store representatives who was alleged in the indictment to be an owner of the stolen property was Mary Jo Meador, who testified as a representative of Wal-Mart. She testified that Wal-Mart sold many of the types of items listed on State's Exhibit 2B, and also testified that she had a greater right to possess the items stolen than the thief. On cross-examination, she identified items on the list that Wal-Mart does not sell. She also admitted that she could not trace any of the items on the list back to Wal-Mart, and she acknowledged that some of the items were sold by numerous retailers. She also admitted that she was not able to document any loss resulting from the Jahanians' activities. Finally, she acknowledged that she could not say that she had a greater right of control over any item specifically listed on State's Exhibit 2A.

Larry Boucher, Osterberg's supervisor at the district attorney's office, was recalled to the stand, and he testified concerning the arrests of Cindy, Krystal, and Nicholas Jahanian and the execution of the related search warrants. He described how Cindy and Krystal were arrested at Cindy's house on Spanish Needle. In executing the search warrant, the officers found, among other things, a printer and fax machine, an envelope containing UPC codes, and the paper stock on which UPC codes would be printed. The codes matched those recovered during the surveillance of Cindy, Krystal, and Espirit. In Krystal's car, parked outside the house, they found more UPC codes in Krystal's purse, and in the passenger-door compartment they found more of the paper stock used to print UPC codes as well as two pairs of scissors. In the trunk, they found several Target bags and receipts from Target, Wal-Mart, and Lowe's for items purchased for use in the theft scheme.

Boucher also described what was found in a storage unit that was searched with Cindy's consent. There, the investigation team found nearly one hundred shopping bags. The largest number came from Target, and many of the bags had loose UPC codes stuck to them. There were also bags from Wal-Mart, Lowe's, Home Depot, and Academy, along with

some crumpled UPC codes. The officers also found at the storage facility shipping boxes labeled with Nicholas Jahanian's name and address.

The defendants, including Krystal, rested after the State presented its case and did not present any testimony or other evidence.

Analysis

On appeal, Krystal raises two issues. In the first issue, she contends that the state's evidence proved only that she was guilty of theft of property of a value constituting no more than a third-degree, state-jail felony. In the second issue, she contends that the evidence of the value of the property stolen was factually insufficient.

A. Standards of Review

In reviewing the legal sufficiency of the evidence, we look at the evidence in the light most favorable to the verdict and determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Vasquez v. State*, 67 S.W.3d 229, 236 (Tex. Crim. App. 2002). Although we consider all evidence presented at trial, we may not re-weigh the evidence and substitute our judgment for that of the jury. *King v. State*, 29 S.W.3d 556, 562 (Tex. Crim. App. 2000). The jury is the exclusive judge of the credibility of witnesses and of the weight to be given their testimony, and it is the exclusive province of the jury to reconcile conflicts in the evidence. *Mosley v. State*, 983 S.W.2d 249, 254 (Tex. Crim. App. 1998).

In reviewing the factual sufficiency of the evidence, we view all of the evidence in a neutral light. *See Cain v. State*, 958 S.W.2d 404, 408 (Tex. Crim. App. 1997); *Clewis v. State*, 922 S.W.2d 126, 134 (Tex. Crim. App. 1996). We may set the verdict aside if (1) the evidence is so weak that the verdict is clearly wrong and manifestly unjust; or (2) the verdict is against the great weight and preponderance of the evidence. *Watson v. State*, 204 S.W.3d 404, 414–15 (Tex. Crim. App. 2006) (citing *Johnson v. State*, 23 S.W.3d 1, 11 (Tex. Crim.

App. 2000)). While we may disagree with the jury's conclusions, we must exercise appropriate deference to avoid substituting our judgment for that of the jury, particularly in matters of credibility. *Drichas v. State*, 175 S.W.3d 795, 799 (Tex. Crim. App. 2005); *see also Watson*, 204 S.W.3d at 414 (stating that an appellate court should not reverse a verdict it disagrees with unless it represents a manifest injustice, though supported by legally sufficient evidence). Thus, while we are permitted to substitute our judgment for that of the jury when considering credibility and weight determinations, we may do so only to a very limited degree. *Marshall v. State*, 210 S.W.3d 618, 625 (Tex. Crim. App. 2006).

Circumstantial evidence is as probative as direct evidence in establishing an actor's guilt. *Guevara v. State*, 152 S.W.3d 45, 49 (Tex. Crim. App. 2004). Indeed, circumstantial evidence alone is sufficient to establish guilt. *Id.* Furthermore, the standard of review on appeal is the same for both direct- and circumstantial-evidence cases. *Id.*

A person engages in organized criminal activity "if, with the intent to establish, maintain, or participate in a combination or in the profits of a combination, . . . he commits or conspires to commit" one of several enumerated offenses, including theft. Tex. Penal Code Ann. § 71.02(a)(1) (Vernon 2003 & Supp. 2008). Theft is committed when a person "unlawfully appropriates property with intent to deprive the owner of property." Tex. Penal Code Ann. § 31.03(a) (Vernon 2003 & Supp. 2008). "Appropriate" means "to acquire or otherwise exercise control over property other than real property." *See* Tex. Penal Code Ann. § 31.01(4)(B) (Vernon 2003 & Supp. 2008). Appropriation of property is unlawful if it is "without the owner's effective consent" or "the property is stolen and the actor appropriates the property knowing it was stolen by another." *See* Tex. Penal Code Ann. § 31.03(b)(1), (2).

B. Application of Law to Facts

1. Legal Sufficiency and Factual Sufficiency of the Evidence

On appeal, Krystal does not challenge the sufficiency of the evidence to prove beyond a reasonable doubt that she engaged in organized criminal activity. Rather, Krystal contends only that the State's proof was deficient concerning the ownership and value of the stolen property. Specifically, Krystal asserts that "it is undisputed" that the testimony of the alleged owners of the stolen property shows "that none of their stores carried, sold and therefore owned, all of the items alleged in the indictment" and therefore the evidence was insufficient to show that they "had care, custody and control of all the items of property." Consequently, she contends, the evidence is insufficient to support the jury's finding that the value of the property stolen was in excess of \$200,000.

In addition to the testimony of the store representatives, Krystal points to investigator Osterberg's testimony, in which he admitted that the store representatives could not confirm to him that particular items listed on State's Exhibit 2A actually came from their stores, and that he assumed all of the listed items had been stolen. She also points to the evidence that the value of the items investigator Boucher and Dee Williams of Target actually observed being stolen during surveillance was about \$600 and \$2,500, respectively. She further complains that, although Elizabeth Espirit initially testified that she had stolen about \$160,000 in merchandise from various stores, on cross-examination she admitted she did not really know how much she had stolen; and Richard Schroeder, although testifying to numerous thefts in several cities, did not identify what items he actually stole or their value. Thus, Krystal argues, the State proved only that she and the theft ring stole over \$1,500 but less than \$20,000, supporting "at most a conviction for a third degree felony." Because Krystal relies on the same arguments to support her factual-sufficiency analysis, we will address both legal and factual sufficiency together.

Krystal cites no cases to support her position on ownership. Concerning value, however, she relies on three cases applying the rule that in circumstantial evidence cases in which the State relies solely on the defendant's unexplained possession of recently stolen property to sustain a theft or burglary conviction it must prove the property in the defendant's possession was the identical property taken. *See Bibbs v. State*, 658 S.W.2d 618, 619–20 (Tex. Crim. App. 1983) (holding that evidence was insufficient to sustain theft conviction when State failed to show that pipe defendant sold was same pipe identified as stolen pipe); *Owens v. State*, 576 S.W.2d 859, 860–60 (Tex. Crim. App. [Panel Op.] 1979) (holding evidence insufficient to support burglary conviction when State failed to prove rifles handled by defendant were same or similar to stolen rifles); *York v. State*, 511 S.W.2d 517, 518–19 (Tex. Crim. App. 1974) (applying rule and holding that evidence was insufficient to sustain theft conviction when State failed to prove blinker light in defendant's possession was same property stolen from complainant).

But here Krystal was convicted of engaging in organized criminal activity, and the State did not solely rely upon possession of recently stolen property to prove the ownership or identity of the stolen property. Thus, the cases Krystal relies upon are distinguishable. The jury heard the cross-examinations of the witnesses, including the store representatives' admissions that they could not specifically connect any of the items on State's Exhibit 2A to their stores and the testimony that the value of the items the witnesses actually saw being stolen was relatively small. But, the State's inability to demonstrate a connection by serial number or other identifier does not by itself render the evidence legally or factually insufficient.⁷ *See Guevara*, 152 S.W.3d at 49 (“[T]he lack of direct evidence is not

⁷ The evidence showed that Nicholas Jahanian promptly sold the property taken by the theft ring through his eBay account and shipped it to the purchasers throughout the country and elsewhere. Testimony from the store representatives established that property taken from the stores was not susceptible of identification by serial number or other unique identifier. Thus, as a practical matter, in an organized-criminal-activity case of this type the State could rarely ever prove that all the property a theft ring stole and sold in a worldwide market such as eBay was the exact property taken from the victims because of the

dispositive of the issue of a defendant's guilt.”). To support its allegations, the State presented not only circumstantial evidence, but also accomplice testimony and other evidence to establish that most, if not all, of the property shown on State's Exhibit 2A was stolen from the stores whose representatives are named in the indictment. The testimony from the store representatives established that each of the stores sold in varying degrees merchandise of the types alleged in the indictment that State's Exhibit 2A reflected was sold by Nicholas Jahanian on his eBay account. The accomplice testimony and other evidence, discussed above, showed that (1) the theft ring of which Krystal was a part stole large quantities of the types of merchandise alleged in the indictment from the stores during the relevant time, and (2) Nicholas sold the merchandise stolen by the ring from those stores on eBay for the benefit of the theft ring's members.

Additionally, State's Exhibit 2A showed not only the vast quantity of merchandise of the types alleged in the indictment—over 2,000 items—but also the price at which he actually sold each of the items. The State concedes that the aggregate total sales price amount of \$258,9770.36 shown on State's Exhibit 2A included some items that were either not alleged in the indictment, mentioned in the charge, or within the types of merchandise shown sold by the stores, and therefore were not to be included in calculating the value of the merchandise stolen from the stores.⁸ But the jury was aware from the cross-examinations of the witnesses that some of the items should not be considered in its value determination. The jury was capable of reviewing State's Exhibit 2A and determining which items should be

manner in which the theft ring disposed of it.

⁸ Although Krystal does not complain about the presence of such items listed on State's Exhibit 2A in her argument, the items included, for example, two Bally's Premier Lifetime Gym Memberships sold for a total of \$1,317.00, several pairs of U2 tickets, sold for a total of \$1,045.35, an Oldsmobile Cutlass sold for \$338.00, three other cars sold for a total of \$10,349.99, and a used black leather sofa sold for \$51.00. Also on the list were several gift cards from stores not represented in the indictment, such as Office Depot, Linens-N-Things, Best Buy, and Academy. These items reflected a small portion of the extensive list of items on State's Exhibit 2A.

disregarded and which were included in the indictment. From that, the jury could determine the aggregate value of the items it found were stolen from the stores whose representatives were named in the indictment and conclude that the value of the stolen items exceeded \$200,000. *See Valdez v. State*, 116 S.W.3d 94, 98–99 (Tex. App.—Houston [14th Dist.] 2002, pet. ref'd) (rejecting claim that evidence of value over \$200,000.00 was legally and factually insufficient in theft prosecution in which investigator calculated the value of stolen electronic components by determining the lowest price for which the items could have been purchased near the time of the theft and appellant offered contradictory testimony that the value was much lower based on the amount for which he could sell certain of the stolen items).

Moreover, it is well established that a fact finder can determine the identity and ownership of stolen property from circumstantial evidence. *See Jordan v. State*, 707 S.W.2d 641, 644–45 (Tex. Crim. App. 1986) (“Proof of ownership may be made by circumstantial evidence, just as any other issue in a criminal case.”); *Jones v. State*, 458 S.W.2d 89, 91–92 (Tex. Crim. App. 1970) (“[A]rticles in an accused’s possession may be identified by circumstantial evidence as well as by direct testimony. If it appears it or they correspond with articles that were stolen, the question may go to the jury.”); *Villani v. State*, 116 S.W.3d 297, 306 (Tex. App.—Houston [14th Dist.] 2003, pet. ref'd) (“Proof of ownership may be made by circumstantial evidence.”); *Robinson v. State*, No. 01-85-00970-CR, 1986 WL 12889, at *2 (Tex. App.—Houston [1st Dist.] Nov. 13, 1986, pet. ref'd) (not designated for publication) (“It is well settled that the identity and ownership of stolen property may be established by circumstantial evidence.”).

We conclude that this case is more analogous to the authorities the State cites, in which the facts and circumstances surrounding the defendant’s possession of stolen property were evaluated to determine whether the evidence was sufficient to identify the property as that stolen from the complainant. *See Benson v. State*, 240 S.W.3d 478, 481–82 (Tex.

App.—Eastland 2007, pet. ref'd) (“We hold that the evidence is sufficient to support Benson’s conviction. . . . In this case, Benson was shown having several items similar to those taken without there being any variance between the description and the items she had in her possession. . . . As noted by Benson, a conviction may no longer fall because the property possessed is not shown to be the identical property taken.”); *Rogers v. State*, 929 S.W.2d 103, 108 (Tex. App.—Beaumont 1996, no pet.) (rejecting claim that evidence was insufficient to support burglary conviction and noting that it was for the fact finder to weigh whatever descriptive evidence and circumstances of guilt are presented regarding identification of the missing property to determine whether the property possessed by the defendant is the same property taken from the complainant’s residence, including the particular setting in which the accused possessed the property and the specific type and quantity of the property possessed); *see also Nickerson v. State*, 810 S.W.2d 398, 399–401 (Tex. Crim. App. 1991) (holding that evidence was legally sufficient to establish that equipment recovered from car in which defendant was passenger was same equipment taken from electronics store even though the evidence did not show that it was the identical property taken).

Under these facts, therefore, the jury could have rationally inferred that all of the types of merchandise shown on State’s Exhibit 2A and that were alleged in the indictment and named in the court’s charge had been stolen from those stores by the theft ring’s members and that the value of the stolen merchandise exceeded \$200,000. And, viewed in a neutral light, the evidence is not so weak that the jury’s verdict seems clearly wrong and manifestly unjust, nor is the contrary evidence so strong that the jury’s verdict is against the great weight and preponderance of the evidence. *See Watson*, 204 S.W.3d at 415–16; *Jahanian v. State*, No. 14-07-00703-CV (Tex. App.—Houston [14th Dist.] May 28, 2009, no pet. h.) (mem. op., not designated for publication) (holding evidence of identity and value of property legally and factually sufficient to support conviction of co-defendant Cindy Jahanian); *Jahanian v.*

State, No. 14-07-00700-CR (Tex. App.—Houston [14th Dist.] May 28, 2009, no pet. h.) (mem. op., not designated for publication) (holding evidence that allegedly stolen items were taken from the complaining witnesses’ stores was legally and factually sufficient to support conviction of co-defendant Nicholas Jahanian).

Conclusion

We overrule Krystal Jahanian’s issue and affirm the trial court’s judgment.

/s/ Jeffrey V. Brown
Justice

Panel consists of Chief Justice Hedges and Justices Guzman and Brown.

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