Affirmed and Memorandum Opinion filed February 24, 2011.

In The

Fourteenth Court of Appeals

NO. 14-09-00366-CR

ROMIE JEWEL BLOUNT, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 208th District Court
Harris County, Texas
Trial Court Cause No. 1179863

M E M O R A N D U M O P I N I O N

Appellant Romie Jewel Blount appeals his state jail felony conviction for theft[1] on grounds that (1) the evidence is legally and factually insufficient to support his conviction; and (2) he was denied effective assistance of counsel. We affirm.

[1] *See* Tex. Penal Code Ann. § 31.03 (a), (e)(4)(a) (Vernon Supp. 2009).

Background

Appellant was indicted for theft on August 29, 2008. After appellant waived his right to a trial by jury, a bench trial was held on April 15, 2009. At the bench trial, complainant, Samuel L. Graham, testified that appellant had been his mechanic for approximately 15 years. Complainant also testified that appellant would typically come to his residence; repair the cars in complainant's driveway; and then present an invoice which complainant would pay immediately.

Complainant further testified that he had bought a 1993 Lexus LS400 for $3,995 on July 30, 2007. When the "check engine" light lit up, complainant contacted appellant. Appellant came to complainant's residence on September 17, 2007 and informed complainant that he needed to test drive the Lexus "to see if he could get it to duplicate the problem." Appellant drove away in the Lexus and left an Isuzu Rodeo — the vehicle in which he had arrived at complainant's residence — in complainant's driveway. Complainant called appellant later that day and appellant "said that he still needed to drive [the Lexus] longer because he hadn't figured out what the problem was."

Complainant testified that appellant failed to return the Lexus the next day, so complainant called appellant "to ask him what was going on, and [appellant] said he still was test driving the vehicle." Complainant also stated it was his understanding, after speaking to appellant, that appellant would keep the Lexus only for one more day. Thereafter, complainant had no further communications with appellant, even though complainant left appellant numerous telephone messages. Appellant never returned complainant's calls, sent an invoice, or contacted complainant.

Complainant sent a demand letter on November 5, 2007 to the address appellant had listed on his previous invoices. When appellant failed to respond to complainant's demand letter and return the Lexus, complainant filed a stolen vehicle report with the Houston Police Department on November 20, 2007. Complainant testified that the Lexus was returned to him on March 17, 2009; it was very dirty, had significant scratches, had approximately 82,000 additional miles on it, and no longer was in drivable condition.

Sergeant Jose Rosas of the Houston Police Department vehicle crimes division testified that he ran a license plate check on the Isuzu Rodeo appellant had left in complainant's driveway when he drove away with the Lexus; Sergeant Rosas discovered that the Isuzu was reported stolen after it was taken to be repaired, and the suspected thief was appellant.

Appellant testified that he did not intend to steal the Lexus. He further stated that he did not return the Lexus because the repairs were only partially completed, and he held it for 18 months because he wanted to save the complainant money. Appellant claimed he told complainant the repairs would either cost a lot of money or take a lot of time. According to appellant, complainant did not want to spend much money. Appellant claimed he did not put 82,000 miles on the car, and further explained that he installed a different odometer. Appellant also denied that he previously failed to return another car he took from another customer. Additionally, appellant denied abandoning another customer's Isuzu in complainant's driveway.

The trial court found appellant guilty of theft, a state jail felony, and sentenced appellant to 14 months confinement. Appellant filed a timely appeal raising two issues.

Analysis

I. Sufficiency of the Evidence

In his first issue, appellant argues that the evidence is legally and factually insufficient to support his conviction for theft.

We address appellant's sufficiency challenges under a single standard for evaluating legal sufficiency of the evidence to support a finding required to be proven beyond a reasonable doubt. *See Brooks v. State*, 323 S.W.3d 893, 895, 912 (Tex. Crim. App. 2010) (plurality opinion); *id*. at 913-14 (Cochran, J., concurring) (concluding that a separate factual sufficiency standard no longer applies in criminal cases). That standard requires us to determine whether, after considering all the evidence in the light most favorable to the verdict, a factfinder was rationally justified in finding guilt beyond a

reasonable doubt. *Id*. at 902 (plurality opinion).

A person commits the offense of theft "if he unlawfully appropriates property with the intent to deprive the owner of the property." Tex. Penal Code Ann. § 31.03 (a) (Vernon Supp. 2009). The intent to deprive the owner must exist at the time the property is taken. *Mattiza v. State*, 801 S.W.2d 195, 197 (Tex. App.—Houston [14th Dist.] 1990, pet. ref'd) (citing *Peterson v. State*, 645 S.W.2d 807, 811 (Tex. Crim. App. 1983)).

Appellant's argument that the evidence in this case is insufficient to support his conviction for theft states as follows:

> In analyzing this case, it is clear that the vehicle in question was taken by Appellant with permission of the owner so it could be repaired. The Appellant was clearly given the car for at least a short period per Samuel Graham. Appellant's reliability was testified to by Mrs. Graham who said he had done work for them on occasion for thirteen years. Appellant told Mr. Graham due to extensive damage, that it would need a lot of time or money, and he picked time. The Appellant denied putting big miles on the car but did put in a different odometer. Clearly, there is an issue as to whether the case was proven beyond a reasonable doubt as detailed in *Zuniga v. State*, 144 S.W.3d 477 (Tex. Crim. App. 2004).[2] (citations to the record omitted).

Although appellant's argument is unclear, it seems that he is contending that there is insufficient evidence he intended to deprive complainant of the Lexus when he took it because the "vehicle in question was taken by Appellant with permission of the owner so it could be repaired."

Permission to take the Lexus for a test drive in order to determine what needed to be repaired does not negate appellant's intent to deprive. *See Thomas v. State*, 753 S.W.2d 688, 693-94 (Tex. Crim. App. 1988) (the fact that the rental agreement authorized appellant to withhold the vehicle for an agreed period of time does not control the issue of appellant's intent; noncompliance with the rental agreement can militate in

[2] We note that the Court of Criminal Appeals overruled *Zuniga* in *Watson v. State*, 204 S.W.3d 404 (Tex. Crim. App. 2006). Additionally, *Zuniga* involved a factual sufficiency claim; as stated above, we review sufficiency challenges under a single standard for evaluating sufficiency of the evidence to support a finding that must be proven beyond a reasonable doubt. *Brooks*, 323 S.W.3d at 895, 912.

favor of a finding that appellant did not intend to comply with the agreement). Further, intent to deprive may be inferred from the circumstances, including "the words, acts and conduct of the accused." *Banks v. State*, 471 S.W.2d 811, 812 (Tex. Crim. App. 1971); *Winkley v. State*, 123 S.W.3d 707, 713 (Tex. App.—Austin 2003, no pet.).

The trial court heard evidence that appellant failed to return the car to complainant as agreed, failed to answer or return any of the complainant's numerous calls, and failed to contact complainant to explain his actions. The court also heard evidence that appellant left an Isuzu Rodeo in complainant's driveway when he took the complainant's Lexus. The Isuzu belonged to another customer, and appellant failed to return it; it had been reported stolen after it was taken to be repaired. This constitutes legally sufficient evidence that appellant had the requisite intent to deprive complainant of his Lexus when it was initially taken. *See Rowland v. State*, 744 S.W.2d 610, 613 (Tex. Crim. App. 1988) (failure to return borrowed truck as promised and contact owner with an explanation is circumstantial evidence of intent to deprive); *Amado v. State*, 983 S.W.2d 330, 333 (Tex. App.—Houston [1st Dist.] 1998, pet. ref'd) (complainant gave her jewelry to appellant so he could have his brother repair it; intent to deprive may be inferred from the failure to return the jewelry); *see also Davis v. State*, No. 14-04-00610-CR, 2006 WL 177581, at *2 (Tex. App.—Houston [14th Dist.] Jan. 26, 2006, pet. ref'd) (mem. op., not designated for publication) (failure to return car to dealership after a weekend test drive, failure to contact dealership and explain failure to return car, and failure to return phone calls was sufficient evidence of intent to deprive).

Accordingly, we overrule appellant's first issue.

II. Ineffective Assistance of Counsel

In his second issue, appellant contends he was denied effective assistance of counsel.

In determining whether his trial counsel's representation was so ineffective that appellant's Sixth Amendment right to counsel was violated, we use the two-prong test

laid out in *Strickland v. Washington*, 466 U.S. 668 (1984). *Thompson v. State*, 9 S.W.3d 808, 812 (Tex. Crim. App. 1999). To establish ineffective assistance of counsel, a defendant must show that (1) his counsel's performance fell below an objective standard of reasonableness; and (2) but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.*

We assess whether a defendant received ineffective assistance of counsel according to the facts of each case. *Id*. at 813. Any allegation of ineffectiveness must be firmly founded in the record, and the record must affirmatively demonstrate the alleged ineffectiveness. *Id*. Appellant bears the burden of proving by a preponderance of the evidence that counsel was ineffective. *Id*. We consider the totality of the representation and particular circumstances of each case in evaluating the effectiveness of counsel. *Id*. We must be "highly deferential to trial counsel and avoid the deleterious effects of hindsight." *Lane v. State*, 257 S.W.3d 22, 26 (Tex. App.—Houston [14th Dist.] 2008, pet. ref'd). Trial counsel is strongly presumed to have acted within the wide range of reasonable professional assistance. *Perez v. State*, 310 S.W.3d 890, 893 (Tex. Crim. App. 2010).

Appellant argues that his trial counsel's actions were unprofessional and not motivated by sound strategy because trial counsel failed to (1) object to hearsay from Sergeant Jose Rosas "regarding what Mr. Graham said, and his comments about hearsay about the Rodeo car being investigated for auto theft, when he was not the officer of record on the case;" (2) "explore what happened to the agreement to dismiss the case;" (3) object to the "State inquiry as to Appellant's Pre-Trial Release Application regarding where he lived;" and (4) explore whether the Lexus was worth more than $1,500.

Although appellant contends trial counsel's actions outlined above were unprofessional and unsupportable as reasonable trial strategy, he makes no effort to show how the record demonstrates that, but for trial counsel's allegedly unprofessional errors, the outcome of the proceeding would have been different. Even if we assume without deciding that trial counsel's actions fell below an objective standard of reasonableness,

because appellant neither argued nor established that he was prejudiced by trial counsel's alleged errors as required under *Strickland*'s prejudice prong, appellant cannot prevail on his ineffective assistance claim. *See Thompson*, 9 S.W.3d at 812.

Accordingly, we overrule appellant's second issue.

Conclusion

We affirm the trial court's judgment.

/s/ William J. Boyce
Justice

Panel consists of Justices Seymore, Boyce, and Christopher.
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