Affirmed and Memorandum Opinion filed May 10, 2011.

In The

Fourteenth Court of Appeals

NO. 14-10-00596-CR

DWIGHT FRISCO ROBERT, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 182nd District Court
Harris County, Texas
Trial Court Cause No. 1186876

MEMORANDUM OPINION

Appellant Dwight Frisco Robert was charged with the state jail felony of theft of property of $1,500 or more but less than $20,000,[1] as enhanced by two prior convictions. A jury found him guilty, and the court assessed punishment at twelve years' confinement.

[1] *See* Tex. Penal Code § 31.03(e)(4)(A).

In a single issue, he contends the trial court erred in denying his request for lesser-included charges of Classes A, B, and C misdemeanor theft. We affirm.

Background

After completing approximately one month's training in March 2008, appellant began working as a marketing manager at the Love's gas station and convenience store in Waller, Texas. In September 2008, just two days before Hurricane Ike, a new general manager, Morven Joseph, also began working at the Waller store. After Ike, Love's was the only convenience store that was open for miles, and business was hectic. During that time, Joseph, who was still acclimating himself to the store, did not perform the required daily reconciliation of shift change paperwork against receipts for returns and exchanges.

In the week beginning September 16, 2008, there was a sharp increase in the number of returns at the Waller store. In the four weeks before September 16, returns had been between $317 and $594, but they rose to $1,191 in the week of September 16 and to $2,351 in the week of October 7.

Love's District Manager Kirk Johnson discussed the matter with Joseph, who then printed the receipts that were unusually high and checked video surveillance that corresponded to the dates on the receipts. Appellant was the one person who was processing the returns, and he was generally doing them when no one else was present. Joseph noted that significantly more returns were processed during appellant's shifts and the returned items were generally higher-priced items. Johnson terminated appellant around October 9, 2008, and the number of returns immediately dropped. Johnson and Joseph provided Waller police with the receipts and video excerpts, and appellant was subsequently charged with aggregate theft of $1,500 or more but less than $20,000, a state jail felony.

Trial was to a jury. The State called Joseph, Johnson, and the investigating Waller police officer. The State also introduced copies of return receipts from September 11,

2008, through October 7, 2008, and video excerpts showing transactions from September 25 through October 7, 2008. Appellant rested without presenting evidence.

Appellant requested lesser-included offense instructions for Class A (less than $50), Class B (between $50 and $500), and Class C (between $500 and $1500) misdemeanor theft. The trial court denied the request, and the jury found appellant guilty as charged in the indictment.

Analysis

In a single issue, appellant argues the trial court erred in denying his request for lesser-included offense instructions. A defendant is entitled to submission of an instruction on a lesser-included offense if the following two conditions are met: (1) the offense is a lesser-included offense of the charged offense pursuant to Texas Penal Code section 37.09; and (2) the record includes some evidence by which a jury could rationally find that, if the defendant is guilty, he is guilty only of the lesser offense. *See Hall v. State*, 225 S.W.3d 524, 534–37 (Tex. Crim. App. 2007); *Hernandez v. State*, 171 S.W.3d 347, 351 (Tex. App.—Houston [14th Dist.] 2005, pet. ref'd). An offense is a lesser-included offense under section 37.09 if "it differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property, or public interest suffices to establish its commission." Tex. Penal Code § 37.09. The parties agree that misdemeanor theft is a lesser-included offense of state jail felony theft.

In determining whether the second condition is met, we review all the evidence presented at trial without considering the credibility of the evidence or whether it conflicts with other evidence. *Delacruz v. State*, 278 S.W.3d 483, 488 (Tex. App.—Houston [14th Dist.] 2009, pet. ref'd). Anything more than a scintilla of evidence is sufficient to entitle a defendant to an instruction on the lesser-included offense. *Dobbins v. State*, 228 S.W.3d 761, 768 (Tex. App.—Houston [14th Dist.] 2007, pet. dism'd, untimely filed). It is not enough, however, for the jury to disbelieve evidence pertaining to the greater offense. *Id.*

There must be some evidence directly germane to the lesser-included offense before an instruction on the lesser-included offense is warranted. *Id.* In other words, there must be some evidence that the amount of appellant's theft was in one of the misdemeanor category amounts rather than over $1,500.

Regarding why the court should have included the misdemeanor offenses, appellant argues:

> In the instant case, the district manager took the jury through a series of recorded returns while the state played video clips from surveillance tapes made at the Love's truck stop. At some points during his explanation even the manager could not be certain whether the transaction he was viewing was a fraudulent return or a legitimate transaction. At what [sic] point the prosecutor asked the witness about a particular transaction, saying, "do you still think it's legitimate?" The witness answered, "I can't be certain. It doesn't look to be." . . .
>
> The degree of the theft in the instant case was based on aggregate amounts from a large number of returns, many of which may or may not have been legitimate. A rational jury could have believed, based on the evidence presented by the State, that . . . some of the recorded transactions were legitimate transactions occurring in the regular flow of business.[2]

The cited transaction about which the manager was uncertain involved the return of a GPS system. The transaction appeared on one of fifty-one return receipts and accounted for only $238.14. It is the only transaction about which the manager expressed uncertainty. Essentially, appellant is using this single transaction to argue the jury could have disbelieved the evidence of appellant's illicit involvement in some of the remaining transactions, which accounted for total losses in excess of $3,000.[3] Appellant has not presented evidence of any misdemeanor amount of theft nor evidence otherwise directly germane to the requested lesser-included offenses. *See Dobins*, 228 S.W.3d at 768.

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[2] Record citations omitted.

[3] Returns of beef jerky and cigarettes alone accounted for over $1,500. Johnson testified Love's never had beef jerky returned and was not allowed to accept returns on cigarettes.

For the preceding reasons, we overrule appellant's single issue.

Conclusion

Having overruled appellant's single issue, we affirm the judgment.

/s/ Martha Hill Jamison
Justice

Panel consists of Justices Frost, Jamison, and McCally.

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