Affirmed and Memorandum Opinion filed June 2, 2016.

In The

Fourteenth Court of Appeals

NO. 14-14-00970-CR

JOSEPH MICHAEL PHILLIPS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 177th District Court
Harris County, Texas
Trial Court Cause No. 1401913

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

In a single issue, appellant, Joseph Michael Phillips, contends the evidence is insufficient to support his conviction for theft. We affirm.

I. BACKGROUND

According to the State's evidence, during relevant times, appellant owned an auto repair shop. Complainant, Antonio Robayo, owned a Corvette and a BMW. Apparently, Robayo met appellant when Robayo took the Corvette to appellant's

shop, and at some point, Robayo performed work on appellant's home. Subsequently, in early 2013, appellant called Robayo "out of the blue" about the possibility of appellant selling the Corvette on consignment because he had previously learned Robayo was interested in selling it. Robayo mentioned that he also planned to sell the BMW, and appellant said he could sell that one on consignment also. Robayo wanted to sell the cars because he was behind on his mortgage. According to Robayo, the cars were in "mint" condition at that time.

In February 2013, Robayo and appellant entered into consignment agreements whereby appellant would attempt for 45 days to sell the cars and give Robayo net proceeds of $10,000 for the Corvette and $6,500 for the BMW, minus any liens or encumbrances that appellant paid off. Appellant had the cars towed to his shop. Robayo gave appellant the title to the BMW; at that point, Robayo could not locate the title to the Corvette but said he would provide it in the event of a sale. Appellant told Robayo he already had someone interested in buying the BMW.

During the 45-day consignment period, when Robayo and his wife, Carolyn, inquired about the status, appellant said someone was interested in buying one of the cars and would "string[] . . . along" Robayo by saying appellant had some money to bring Robayo but not come by. In May 2013 (after the 45 days had expired), Robayo called appellant to demand his cars back. After one call, Robayo made a police report, which was investigated as a terroristic threat by appellant although the contents of appellant's statements during that call were not revealed at trial. However, Robayo generally indicated that during the relationship, he would wait to inquire about the cars because appellant made statements that caused Robayo to fear for his life, such as saying appellant had killed people and knew how to get away with hurting people.

Later in May, the Robayos went to appellant's shop, attempting to retrieve the cars. A police officer was unable to escort them although they had earlier been told one would be available. However, another police officer already was at the shop and permitted only Carolyn to enter. Appellant presented Carolyn with a bill for work that appellant purportedly had performed on the BMW and said that appellant would return that car if Robayo paid. That document, entitled "Repair Order," reflected that the car originally was towed to the shop and itemized costs of $2,685.59, plus a storage fee of $30 per day, for various repairs. The document was not signed by Robayo in the designated space but indicated the repairs were authorized by telephone. At trial, the Robayos were emphatic that appellant never contacted them about performing any repairs on the BMW, they never authorized any repairs, and the car needed no repairs. Robayo added that at one point, appellant acknowledged he had not performed any repairs. After reviewing the bill, the officer ordered the Robayos to leave without the BMW. Appellant returned the Corvette, but it was "trashed" and not operating properly. Robayo learned appellant had been driving the Corvette and sold the hard top for drugs.

That same month, Robayo received a letter from appellant, stating he was filing a mechanic's lien on the BMW because of the repairs and demanding payment within ten days of $2,685.59 in cash, plus the storage fees. In August 2013, Robayo wrote appellant demanding, unsuccessfully, the return of the BMW. The Robayos attempted to obtain assistance from the police but were continually told it was a civil issue until an officer in the theft department pursued the matter. The officer was unable to speak with appellant because he would not return calls. In September 2013, the officer listed the car as stolen. The officer eventually located the car when an innocent purchaser attempted to register it and the county records showed it as stolen. Pursuant to a civil-court ruling, the officer seized the

car and returned it to Robayo in May 2014. At that point, the car also had been "totally trashed," including having missing parts, a dent, and mechanical problems. Robayo did not receive any proceeds from the sale to the third party.

Appellant testified at trial and provided a different version of events, as follows. Robayo approached appellant about selling the cars because Robayo needed money. Appellant told Robayo to sign paperwork and appellant would evaluate whether work was necessary to sell the cars and what they were worth. When appellant received the cars, they were not in "mint" condition and had problems. Appellant called Robayo and said the BMW was not worth $6,500 (the amount in the consignment agreement), the buyer whom appellant had contemplated was not interested, but appellant could repair the car for about $2,600 and try to sell it and make Robayo some money on top of that amount. Pursuant to Robayo's authorization, appellant performed the repairs. A few weeks later, Robayo called and said he was no longer interested in selling the cars and wanted to pick them up. Appellant responded that Robayo owed $2,600 on the BMW but could take the Corvette. The Robayos came to the shop with a police officer who confronted appellant about a terroristic threat. Appellant allowed only Carolyn to enter the office because Robayo had threatened appellant. Appellant gave the bill and demand letter to Carolyn. The Robayos left but returned a week later with another police officer. After appellant showed that officer the bill, he suggested appellant file a lien because "these people aren't going away. . . . They're driving us crazy." Appellant then sent Robayo a notice of intent to file a lien and subsequently filed a lien with the county tax office. Appellant sold the car to another auto shop in exchange for some parts worth about $500 and told the buyer about the lien, but appellant did not know the status of the car after that.

Appellant did not give any money to Robayo based on that sale because the amount of appellant's lien was more than $500.[1]

Appellant also presented testimony from Roger Gilliam, who owned a nearby shop and was initially interested in buying the BMW. According to Gilliam, he retrieved the cars at the outset of the consignment arrangement at appellant's request, but he and his wife drove them to appellant's shop as opposed to towing them. Gilliam decided not to buy the BMW because it had problems.

Appellant was charged with theft of property with a value over $1,500 and under $20,000. He pleaded "not guilty" but waived his right to a jury trial. The trial court found appellant guilty of the offense and sentenced him to one-year confinement in state jail.

II. ANALYSIS

In his sole issue, appellant contends the evidence is insufficient to support his conviction. When reviewing the sufficiency of the evidence, we view all evidence in the light most favorable to the finding and determine, based on that evidence and any reasonable inferences therefrom, whether any rational fact finder could have found the elements of the offense beyond a reasonable doubt. *Gear v. State*, 340 S.W.3d 743, 746 (Tex. Crim. App. 2011). This standard gives full play to the responsibility of the trier of fact to fairly resolve conflicts in the testimony, weigh the evidence, and draw reasonable inferences from basic facts to ultimate

[1] Appellant presented two documents purportedly from the county: (1) a letter dated September 25, 2013, indicating the county was returning appellant's "title application" because his filing was improper; and (2) a letter in November 2013, stating the mechanic's lien filing was due for a status check on November 27, 2013 and if approved, appellant would receive authorization to sell after December 27, 2013. Appellant explained that he filed incorrectly at first so he refiled. At trial, appellant presented no documents representing the actual filing of the lien, and the Robayos claimed they could not locate any such filing. Regardless, appellant maintained he had a right to sell the car based on a valid lien, whether or not supporting documents were filed.

facts. *Id.* Circumstantial evidence is as probative as direct evidence in establishing guilt. *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007). Each fact need not point directly and independently to guilt, as long as the cumulative force of all incriminating circumstances is sufficient to support the conviction. *Id.*

Even when reviewing a conviction by the bench, we measure sufficiency of the evidence against a hypothetically correct jury charge. *Taylor v. State*, 450 S.W.3d 528, 535 (Tex. Crim. App. 2014). As in the present case, when an indictment alleges theft in the most general of statutory terms, "the hypothetically correct jury charge embraces any and every statutorily defined alternative method of committing the offense that was fairly raised by the evidence." *Id.* As raised by the evidence in this case, the hypothetically correct jury charge would authorize conviction under the following provisions. A person commits theft "if he unlawfully appropriates property with intent to deprive the owner of property." Tex. Penal Code Ann. § 31.03(a) (West Supp. 2015). "Appropriate" includes "to acquire or otherwise exercise control over property other than real property." *Id.* § 31.01(4)(B) (West Supp. 2015). "Deprive" includes "to withhold property from the owner permanently or for so extended a period of time that a major portion of the value or enjoyment of the property is lost to the owner." *Id.* § 31.01(2)(A) (West Supp. 2015). "Appropriation of property is unlawful if . . . it is without the owner's effective consent." *Id.* § 31.03(b)(1) (West Supp. 2015). Consent is not effective if it is "induced by deception." *Id.* § 31.01(3)(A) (West Supp. 2015). "Deception" includes "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)(E) (West Supp. 2015).

A claim of theft made in connection with an unfulfilled contract requires proof of more than intent to deprive the owner of property and subsequent appropriation of the property. *See Taylor*, 450 S.W.3d at 536; *see also* Tex. Penal Code Ann. § 31.01(1)(E). Under a contract, an individual typically has the right to deprive the owner of property, albeit in return for consideration. *Baker v. State*, 986 S.W.2d 271, 274 (Tex. App.—Texarkana 1998, pet. ref'd). Thus, to establish a criminal offense, the State must prove that the appropriation was a result of a false pretext or fraud. *See Taylor*, 450 S.W.3d at 536. Further, the State must prove that the accused intended to deprive the owner of the property at the time the property was taken. *Id.* However, in reviewing sufficiency of the evidence, we consider events occurring before, during, and after the commission of the offense and any actions of the defendant which show an understanding and common design to do the prohibited act. *Id.*

Appellant contends the State failed to prove appellant gained possession of the BMW by false pretext or fraud. Appellant suggests he intended to perform the consignment agreement when he gained possession, failed to return the car only because Robayo had not paid for the repairs, and this matter is merely a civil contractual dispute over whether appellant had a valid lien. We conclude the evidence is sufficient to support a finding that appellant gained possession of the BMW via pretext and at that time, he did not intend to perform the contract.

In this regard, the trial court was free to believe the State's evidence rather than appellant's evidence on all disputed matters. The State's evidence reflects that Robayo released the BMW to appellant based on Robayo's belief that appellant would sell the car and give certain proceeds to Robayo or return the car

after 45 days. The following evidence collectively supports a finding that appellant did not intend to take such actions when Robayo released the car; rather, appellant intended to falsely claim he had a mechanic's lien, retain the car past the consignment period, use the car for his own purposes, and keep all of the proceeds when he sold the car or its parts: (1) it was appellant who solicited a consignment arrangement; (2) appellant having had both cars towed to his shop, despite their being in "mint" condition, raised an inference he was setting up a claim that they needed repairs; (3) even appellant's bill and the testimony of his own witness were inconsistent on whether appellant had the cars towed; (4) the trial court could have questioned appellant's claim that he would accept the cars on consignment before assessing whether they needed repairs and whether he could sell them for at least the amounts in the consignment agreements; (5) appellant strung along and effectively threatened Robayo when Robayo attempted to learn the status of the consignment; (6) appellant failed to return either car once the consignment period expired, even the Corvette on which he was not claiming a lien; (7) then, after Robayo persisted, appellant falsely said he had a mechanic's lien on the BMW for over $2,600 in repairs authorized by Robayo, refused to return that car when Robayo would not pay, and eventually sold the car; (8) appellant gave conflicting accounts to Robayo on whether he actually performed any repairs; (9) appellant's "trash[ing]" and selling the top of the Corvette reflected his intent with respect to both cars, and it is a reasonable inference he eventually returned the Corvette only because Robayo confronted him and appellant lacked the title to effect a sale; (10) appellant evaded the police officer attempting to investigate; (11) appellant did not give Robayo proceeds from the sale of the BMW, irrespective of the amount or nature of the proceeds, or any consideration from appellant's sale of the Corvette top; and (12) the BMW was also "trashed" when it was finally returned to Robayo, indicating appellant drove the car excessively and used its parts. Alternatively, the

evidence supports a finding that when appellant gained possession of the BMW, he intended to retain possession past the consignment period and keep all of the proceeds from any sale even if he first decided to claim a mechanic's lien after Robayo demanded the car back.

Accordingly, because the evidence is sufficient to support the trial court's finding that appellant committed theft, we overrule appellant's sole issue.

We affirm the trial court's judgment.

/s/ John Donovan
Justice

Panel consists of Chief Justice Frost and Justices Christopher and Donovan.
Do Not Publish — Tex. R. App. P. 47.2(b).