Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-12-00752-CR

Dionisio **TORRES**,
Appellant

v.

The **STATE** of Texas,
Appellee

From the County Court at Law No. 2, Webb County, Texas
Trial Court No. 2012CRB050 L-2
Honorable Jesus Garza, Judge Presiding

Opinion by: Catherine Stone, Chief Justice

Sitting: Catherine Stone, Chief Justice
Marialyn Barnard, Justice
Patricia O. Alvarez, Justice

Delivered and Filed: November 6, 2013

AFFIRMED

Dionisio Torres entered into a contract with Leticia Haynes and Jesse Martinez to construct a commercial space for restaurant use on an empty lot. After hearing testimony relating to this transaction, a jury convicted Torres of committing the offense of deceptive business practice. On appeal, Torres challenges: (1) the sufficiency of the evidence; (2) the trial court's omission of a lesser-included offense from the jury charge; (3) the amount of his bail pending appeal; and (4) the denial of his motion for new trial. We overrule Torres's issues and affirm the trial court's judgment.

SUFFICIENCY OF THE EVIDENCE

In appeals in criminal cases, the only standard a reviewing court applies in reviewing sufficiency challenges is the *Jackson v. Virginia* legal sufficiency standard. *Brooks v. State*, 323 S.W.3d 893, 895 (Tex. Crim. App. 2010). Under that standard, we view all of the evidence in the light most favorable to the verdict to determine whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Adames v. State*, 353 S.W.3d 854, 860 (Tex. Crim. App. 2011). As a reviewing court, we defer to the jury's credibility and weight determinations because the jury is the sole judge of the witnesses' credibility and the weight to be given their testimony. *Id*. We also defer to the responsibility of the trier of fact to draw reasonable inferences from basic facts to ultimate facts. *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007).

Torres was charged with the offense of deceptive business practice by intentionally, knowingly, or recklessly selling less than the represented quantity of a property or service. TEX. PENAL CODE ANN. § 32.42(b)(2) (West 2011). Torres contends that the statute required the State to prove the existence of a culpable mental state at the time he entered into the construction contract; however, Torres relies on case law discussing a different type of deceptive business practice offense in which a defendant makes a materially false and misleading statement in connection with the sale of property or service. *See Ely v. State*, 582 S.W.2d 416, 420 (Tex. Crim. App. 1979) (construing section 32.42(b)(12)(B) of the Texas Penal Code); *see also Guevara v. Datapoint Corp.*, 956 S.W.2d 653, 658 (Tex. App.—San Antonio 1997, no pet.) (same); TEX. PENAL CODE ANN. § 32.42(b)(12)(B) (West 2011). In *Ely*, the Texas Court of Criminal Appeals noted that the culpable mental state "must attach to the proscribed act at the time the conduct is engaged in." 582 S.W.2d at 420. The court then held that under section 32.42(b)(12)(B), "the culpable mental state must attach to the making of the 'materially false or misleading statement'

at the time of 'the purchase or sale of property or service.'" *Id*. The court reasoned, "This is the necessary implication of the phrase 'in connection with.'" *Id*.

In *Bounds v. State*, 355 S.W.3d 252, 255-56 (Tex. App.—Houston [1st Dist.] 2011, no pet.), the Houston court faced the same question with regard to culpable mental state. The appellant in that case also was convicted of deceptive business practice under section 32.42(b)(2), and the court noted the parties' arguments as follows:

> Appellant contends that the State had to prove that he had a culpable mental state of defrauding Hoff [the complainant] when he entered the contract, not later after he began the work, and there is no evidence of any culpable mental state at that time. Appellant specifically argues that the statute prohibits "selling" less than the represented quantity of property or service and that the sale in this case occurred when the contract was signed. Appellant cites no authority to support this proposition. The State responds that appellant's mental state at the time he entered the contract is irrelevant. Instead, the State argues that it was required "to prove appellant's intent at the time he had [Hoff's] money, but chose to no longer deliver his services." The trial court instructed the jury to find appellant guilty if it found beyond a reasonable doubt that he intentionally, knowingly, or recklessly sold less than the represented quantities of a good or service on August 4, 2009, the day he walked off the job.

Id. at 255. The Houston court decided not to resolve the issue because it concluded the evidence was insufficient to show that the appellant had a culpable mental state at either time. *Id*.

Unlike section 32.42(b)(12)(B), section 32.42(b)(2) does not focus on a statement made in advance of the sale. Instead, section 32.42(b)(2) criminalizes "selling" less than the "represented" quantity. TEX. PENAL CODE ANN. § 32.42(b)(12) (West 2011). The term "sell" is defined in the statute as including "offer for sale, advertise for sale, expose for sale, keep for the purpose of sale, *deliver for or after sale*, solicit and offer to buy, and every disposition for value." *Id*. at § 32.42(a)(9) (emphasis added). Thus, the definition of sale encompasses the delivery stage of the sale in addition to the offer stage of the sale. Moreover, a determination of whether the quantity sold was less than the quantity "represented" could only be made at the time of delivery. The statute's use of the past tense "represented" further bolsters its intent to criminalize a defendant's

failure to deliver the quantity stated in the contract or otherwise promised. The jury charge also adopts this logic, instructing the jury to find Torres guilty if he "sold property and services to Leticia Haynes and Jesse Martinez to construct a commercial space for restaurant use and thereafter failed to deliver the property and services to construct a commercial space for restaurant use as represented."

Although we tend to agree with the State's position in *Bounds* that the State was required "to prove [Torres's] intent at the time he had [the complainant's] money, but chose to no longer deliver his services,"[1] the resolution of this issue also is unnecessary in the instant case. Unlike *Bounds*, however, we hold the evidence is sufficient to show Torres had the requisite culpable mental state both at the time he entered into the contract and at the time he chose to no longer deliver his services.

"[T]he State may prove the defendant's … criminal culpability by either direct or circumstantial evidence, coupled with all reasonable inferences from that evidence." *Gardner v. State*, 306 S.W.3d 274, 285 (Tex. Crim. App. 2009). A culpable mental state can be inferred "from the acts, words, and conduct of the accused." *Patrick v. State*, 906 S.W.2d 481, 487 (Tex. Crim. App. 1995); *see also Ramirez v. State*, 229 S.W.3d 725, 729-30 (Tex. App.—San Antonio 2007, no pet.). "Further, in determining culpability for an offense, a jury may consider events occurring before, during, and after the offense." *In re I.L.*, 389 S.W.3d 445, 456 (Tex. App.—El Paso 2012, no pet.).

In this case, Torres was charged with intentionally, knowingly, or recklessly committing the offense, and the jury charge defined all three culpable mental states. For purposes of our analysis, we will focus on the sufficiency of the evidence to support a finding that Torres intended

[1] In the instant case, the State did not respond to Torres's contention that it had to prove he had the requisite mental state at the time he entered into the contract to build the restaurant.

to sell less than the represented quantity. A person acts intentionally "when it is his conscious objective or desire to engage in the conduct or cause the result." TEX. PENAL CODE ANN. § 6.03(a) (West 2011).

Viewing the evidence in the light most favorable to the jury's verdict, the evidence established that Torres entered into a contract on September 7, 2010, to construct a commercial space although his experience was in building residences. The contract price was $127,200, and he immediately requested $9,000 to start. Torres stated that the project would be completed by Thanksgiving.

When questioned about the reason no work was being performed in September, Torres stated that the City of Laredo did not want to issue the necessary permits. The testimony later established, however, that Torres did not apply for the necessary permits until October 8, 2010. Although work began on the project toward the end of October, the evidence established that Torres was not paying the subcontractors for their work.

On November 2, 2010, Torres requested a second check in the amount of $20,000 for the building foundation, and Torres requested a third check in the amount of $30,000 on November 23, 2010, for the building frame. The evidence established, however, that Torres failed to timely pay the subcontractor who provided materials for the project and the subcontractor who provided the concrete. Torres's failure to pay even resulted in a lien being filed against the property.[2]

By the beginning of December, the only construction that had been completed was the foundation and the building frame. After Haynes paid Torres an additional $25,000 on December 13, 2010, sheetrock was added to the frame by the end of December. When Haynes asked Torres about the failure to progress, Torres again blamed the problem on the City's failure to issue the

[2] Torres subsequently paid the money to have the lien released.

necessary permits. When Haynes offered to discuss the issue with the City, Torres told her that he would handle the issue. The evidence established, however, that the necessary permits had been issued by October 25, 2010.

After Haynes paid Torres another $25,440 on February 28, 2011, the windows, insulation, and part of the electrical wiring was completed; however, the electrical subcontractor testified that Torres paid him only a portion of what he was owed. Torres informed Haynes in February that the construction would be completed in a month. In March of 2011, Haynes agreed to pay Torres an additional $26,000 to add a parking lot, and informed Torres of her intention to host an event at the restaurant on April 8, 2011. Although Torres completed the parking lot by the date of the event, there were no entry ramps into the parking lot, and the restaurant remained a shell with no lights, electricity, or running water. Moreover, the concrete supplier subsequently filed another lien on the property, and the evidence established that the concrete layer/finisher also was not paid.

By this time, Torres was refusing to answer Haynes's phone calls. As a result, Haynes began calling Torres's brothers, one of whom had referred her to Torres when she was looking for a contractor. On May 22, 2011, Torres agreed to attend a meeting with his two brothers, Martinez, and Haynes's interior decorator. Although Torres signed a document at the meeting stating that he would complete the construction in fifteen days, he verbally told his brother as they were leaving that he was not finishing the project. On May 26, 2011, Haynes observed a truck on the site with two air conditioning units; however, Torres arrived, transferred the units to his truck, and left. No air conditioning units were installed in the restaurant.

In June of 2011, Haynes and Martinez confronted Torres and told him if he did not finish the restaurant, they would contact the authorities. Torres responded, "Do what you got to do. Nothing happens to me. I already know how to do it." When Torres was subsequently arrested, he informed the officer that the complaint involved a civil matter, not a criminal offense.

Ruben Salinas, who was the City's inspector for thirty-two years before his retirement, and Nubia Davila, a general contractor, both testified as experts at trial. Both Salinas and Davila testified that the work was only 70% complete. In addition, portions of the completed work were not in compliance with applicable building codes and some of the materials used were not of commercial quality, like the windows and the toilets. Davila estimated that it would cost an additional $90,000-99,000 to correct the problems and complete the construction. Salinas testified that Torres had not delivered a commercial space for restaurant use.

From the foregoing, we hold the jury could have inferred that Torres entered into the contract with the objective of obtaining Haynes's money and without any objective of delivering a commercial space for restaurant use. The jury also could have found that Torres intentionally failed to deliver to Haynes a commercial space for restaurant use. Accordingly, we hold the evidence is legally sufficient to support Torres's conviction.

LESSER-INCLUDED OFFENSE

In his second and third issues, Torres contends the trial court erred in failing to charge the jury on the lesser-included offense of committing the offense of deceptive business practice with criminal negligence as the culpable mental state.

Whether the offense of selling less than the represented quantity of a property or service is a Class A misdemeanor or a Class C misdemeanor is determined by the defendant's culpable mental state. *See* TEX. PENAL CODE ANN. § 32.42(c) (West 2011). If the offense is committed intentionally, knowingly, or recklessly, the offense is a Class A misdemeanor. *Id*. at § 32.42(c)(2). If the offense is committed with criminal negligence, however, the offense is a Class C misdemeanor. *Id*. at § 32.42(c)(1).

"A defendant is entitled to an instruction on every issue raised by the evidence." *Cavazos v. State*, 382 S.W.3d 377, 384 (Tex. Crim. App. 2012). "[A]nything more than a scintilla of

evidence may be sufficient to entitle a defendant to a charge on a lesser offense." *Id*. at 385. "However, the evidence produced must be sufficient to establish the lesser-included offense as a 'valid, rational alternative' to the charged offense." *Id*. "While it is true that the evidence may be weak or contradicted, the evidence must still be directly germane to the lesser-included offense and must rise to a level that a rational jury could find that if [Torres] is guilty, he is guilty only of the lesser-included offense." *Id*. "Meeting this threshold requires more than mere speculation — it requires affirmative evidence that both raises the lesser-included offense and rebuts or negates an element of the greater offense." *Id*.

"A person acts with criminal negligence, or is criminally negligent, with respect to circumstances surrounding his conduct or the result of his conduct when he ought to be aware of a substantial and unjustifiable risk that the circumstances exist or the result will occur." TEX. PENAL CODE ANN. § 6.03(d) (West 2011). "The key to criminal negligence is the failure of the actor to perceive the risk." *Still v. State*, 709 S.W.2d 658, 660 (Tex. Crim. App. 1986).

In his brief, Torres states, "it is clear that the evidence during the guilt-innocence phase raised the issue that [Torres], if at all, had committed a Class C misdemeanor." Torres does not, however, describe what evidence shows that he did not perceive the risk that he would be unable to deliver a commercial space for restaurant use when he failed to use the money he was paid to hire the necessary subcontractors, purchase the necessary supplies, and complete the necessary work in compliance with the building codes and in conformity with commercial quality standards. Torres's defense at trial was not that he was unaware of this risk. Instead, Torres's defense at trial was that he did not complete the work because he was not paid the full contract price and he was not given the opportunity to complete the job. During closing argument, defense counsel argued, "They didn't give him the chance to finish it," and he could not finish the restaurant "because he wasn't paid to finish the project." Because no evidence was produced to establish criminal

negligence as a "valid, rational alternative" to the charged culpable mental states, the omission of the lesser-included offense from the charge was not erroneous. *See Cavazos*, 382 S.W.3d at 384.

Torres's second and third issues are overruled.[3]

BAIL PENDING APPEAL

In his fourth issue, Torres complains about the excessiveness of his post-conviction bail. In his brief, Torres provides no citations to the clerk's record to indicate the manner in which this issue was raised before the trial court. In addition, Torres provides no citations to a reporter's record to enable this court to review the evidence the trial court considered in setting the amount of the bail. Torres does, however, cite article 44.04(g) as the statute which governs his right to have this court review the amount of bail the trial court sets pending appeal. TEX. CODE CRIM. PROC. ANN. art. 44.04(g) (West 2006).

Rule 31 of the Texas Rules of Appellate Procedure contains the rules that govern an appeal of an order in a bail proceeding. *See* TEX. R. APP. P. 31; *Ortiz v. State*, 299 S.W.3d 930, 933 (Tex. App.—Amarillo 2009, no pet.). "An article 44.04(g) appeal 'is separate from the appeal of the conviction and punishment, and it must be perfected by a separate notice of appeal ….'" *Ortiz*, 299 S.W.3d at 933 (quoting *Davis v. State*, 71 S.W.3d 844, 845 (Tex. App.—Texarkana 2002, no pet)); *see also Delangel v. State*, 132 S.W.3d 491, 494 (Tex. App.—Houston [1st Dist.] 2004, no

[3] Torres's second issue asserted, "The Trial Court violated Appellant's right to due process of law when it submitted a jury charge that did not allow the jury to decide whether Appellant had committed a Class C misdemeanor or a Class A misdemeanor." In a single sentence at the end of Torres's argument on his second issue, Torres states, "Further, the Trial Court's instruction that '[A] culpable mental state can be inferred from the acts, words, and conduct of the parties' violates Brown v. State, 122 S.W.3rd 794, 802-803 (Tex. Cr. App. 2003), an opinion that is binding on the Court of Appeals. Notably, the Trial Court refused to grant a new trial even after the error was pointed out." This complaint makes Torres's second issue multifarious and gives this court the discretion to refuse to consider it. *Prihoda v. State*, 352 S.W.3d 796, 801 (Tex. App.—San Antonio 2011, pet. ref'd) (noting issue is multifarious if it raises more than one specific complaint or is based on more than one legal theory). Even if this court were to consider the issue, we would overrule it based on the court's holding in *Brown* that although such an instruction is improper, it is "benign" and "not, in any sense, harmful under *Almanza*," which "sets out the standard for analyzing harm from a jury charge error in a criminal setting." 122 S.W.3d at 803-04 (citing *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1984)).

pet.) (same); *Ex parte Enriquez*, 2 S.W.3d 362, 363 (Tex. App.—Waco 1999, orig. proceeding) (same). Because Torres did not file a separate notice of appeal with regard to the trial court's order setting his bail pending appeal, we do not have jurisdiction to consider this issue.

MOTION FOR NEW TRIAL

In his final issue, Torres contends the trial court erred in denying his motion for new trial. "An appellate court reviews a trial court's denial of a motion for new trial for an abuse of discretion, reversing only if the trial court's ruling was clearly erroneous and arbitrary." *Okonkwo v. State*, 398 S.W.3d 689, 694 (Tex. Crim. App. 2013).

Torres first contends his motion for new trial should have been granted based on the omission of the Class C misdemeanor from the jury charge. For the reasons previously stated, the charge was not erroneous.

In his second contention, Torres asserts:

> … the appellate record is rife with instances in which the State was allowed to introduce inadmissible evidence that was prejudicial to Appellant's right to a fair trial. Although a Defendant should make a timely objection to inadmissible evidence, a Trial Court is not permitted to sit idly by while inadmissible evidence is introduced.

We read Torres's second contention as an admission that he did not object when the evidence about which he complains was offered at trial. By failing to object at trial, Torres waived any error with regard to the admissibility of the evidence. TEX. R. APP. P. 33.1; *Tapps v. State*, 257 S.W.3d 438, 447 (Tex. App.—Austin 2008), *aff'd*, 294 S.W.3d 175 (Tex. Crim. App. 2009).

Torres's fifth issue is overruled.

CONCLUSION

The judgment of the trial court is affirmed.

Catherine Stone, Chief Justice