In The

Court of Appeals

Ninth District of Texas at Beaumont

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NO. 09-07-504 CR

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JOE ISAAC JOHNSON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 258th District Court
Polk County, Texas
Trial Cause No. 18819

MEMORANDUM OPINION

A jury found Joe Isaac Johnson guilty on a three-count indictment for engaging in organized criminal activity and theft. Johnson pled true to enhancement allegations that he had previously been convicted of vehicle theft and engaging in organized criminal activity. The trial court assessed a thirty-five year sentence on each count, to be served concurrently. In five issues, Johnson challenges the legal and factual sufficiency of the evidence supporting the convictions and contends the evidence corroborating the accomplice witness's testimony

is legally and factually insufficient. We hold the evidence is legally and factually sufficient and affirm the judgment.

A person commits the crime of engaging in organized criminal activity if, "with the intent to establish, maintain, or participate in a combination or in the profits of a combination or as a member of a criminal street gang, he commits or conspires to commit . . . theft . . . [.]" TEX. PEN. CODE ANN. § 71.02(a)(1)((Vernon Supp. 2008). "A person commits an offense if he unlawfully appropriates property with intent to deprive the owner of property." TEX. PEN. CODE ANN. § 31.03(a) (Vernon Supp. 2008). The indictment alleged that on or about November 24, 2004: (1) Johnson, with intent to participate in a combination consisting of Johnson, James Lee Williams, Jr., Tanya Larue Grover, and others unknown to the grand jury, committed theft by acquiring or otherwise exercising control over a truck valued at $20,000 or more, but less than $100,000, with the intent to deprive the owners of the property; (2) Johnson unlawfully appropriated, by acquiring or otherwise exercising control over a truck valued at $20,000 or more, but less than $100,000, with the intent to deprive the owners of the property; (3) Johnson unlawfully appropriated, by acquiring or otherwise exercising control over a truck valued at $20,000 or more, but less than $100,000, with the intent to deprive the owners of the property. With regard to the theft charges, the trial court charged the jury on the law of parties. The trial court also gave an accomplice witness instruction as to Williams.

The standard for reviewing the legal sufficiency of the evidence is whether, viewing the evidence in the light most favorable to the jury's verdict, any rational trier of fact could have found the essential elements of the offense charged beyond a reasonable doubt. *Jackson v. Virginia,* 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). In evaluating the sufficiency of the evidence, we must consider all the evidence in the record, including accomplice testimony. *McDuff v. State,* 939 S.W.2d 607, 614 (Tex. Crim. App. 1997). Under the accomplice witness rule, however, "[a] conviction cannot be had upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the offense committed; and the corroboration is not sufficient if it merely shows the commission of the offense." TEX. CODE CRIM. PROC. ANN. art. 38.14 (Vernon 2005). To determine whether there is sufficient corroborating evidence to satisfy the standard set forth in article 38.14, we eliminate the accomplice testimony from consideration and then examine the rest of the record to see if there is any evidence that tends to connect the defendant with the commission of the crime. *Solomon v. State,* 49 S.W.3d 356, 361 (Tex. Crim. App. 2001). The corroborating evidence need neither directly connect the accused to the crime nor be sufficient by itself to establish guilt; it need only tend to connect the defendant to the offense. *Cathey v. State,* 992 S.W.2d 460, 462 (Tex. Crim. App. 1999). Even apparently insignificant incriminating circumstances may provide sufficient corroboration. *Trevino v. State,* 991 S.W.2d 849, 852 (Tex. Crim. App.1999).

The non-accomplice evidence in the record tends to connect Johnson to the commission of the offenses alleged in the indictment. The manager of a Livingston motor vehicle dealership testified that two African-American males looked at a GMC Sierra pickup truck on November 23, 2004. While the manager could not recall their names at trial, he identified Johnson in court as one of the two men at the dealership, and specifically as the one who was most interested in the vehicle and did most of the talking. A Livingston police officer later testified that the manager had identified Johnson and James Lee Williams, in photo lineups, as the two men who looked at the truck on November 23. The manager testified that they asked for and obtained the keys to two different trucks. Attached to the keys was a small plastic tag that revealed the key code for the vehicle. Before Johnson and his companion left, the manager gave the men his business card. The next morning the manager discovered that both vehicles had been stolen out of the car lot. There was no broken glass on the ground to indicate the vehicles had been broken into. The manager still had the dealer's copies of the keys. One of the manager's business cards, with the key codes written on the back of the card, was later recovered from a vehicle registered to and driven by Johnson.

A salesman from a different Livingston dealership testified that on November 23, 2004, Johnson and a companion expressed interest in a truck. Although Johnson arrived in a small car with faded paint, Johnson told the manager that he was interested in trading in his

Chevy pickup for a Ford. Evidence showed the car to be the same vehicle Johnson was driving at the time of his arrest. The salesman gave Johnson one of his business cards. The salesman's business card was recovered, along with other business cards, during an inventory search of Johnson's vehicle. Someone had written the key code for the vehicle on the back of the card. Four or five days after he showed the truck to Johnson, the salesman discovered that truck had been stolen off of the lot. The dealer's keys were still at the dealership. There was no broken glass or other indication of forced entry.

An officer with the Rio Grande City police department testified that he investigated a three-vehicle accident near the Mexico border on November 29, 2004. A new Ford pickup truck driven by Tanya Grover struck a gray Honda Accord driven by Johnson, which in turn struck another Ford pick-up. In checking the vehicle registration, the officer discovered the license plate on the truck driven by Grover did not match the vehicle, and the officer determined the truck had been stolen from a car lot in Chambers County. Unaware that Grover had already told the officer that Johnson had paid her $150 to drive the truck from the Houston area to Mexico, Johnson denied knowing Grover. Grover's backpack was discovered in the trunk of Johnson's vehicle. Based on further information provided by Grover of their scheme, the officer issued a call to be on the lookout for another vehicle similar to the one Grover was driving. Police twenty miles away in Sullivan City stopped

James Lee Williams, Jr., who was driving a truck stolen from the same Chambers County dealership.

In challenging the sufficiency of the evidence, Johnson argues that only the testimony of the accomplice shows that Johnson, Williams, and Grover were involved in a continuing course of criminal activity. He contends the nonaccomplice evidence is insufficient because it fails to establish a combination of three or more persons to commit a theft and it fails to establish Johnson's intent to establish a continuing criminal enterprise involving three or more persons. However, the nonaccomplice evidence need not establish any of the elements of the crime of engaging in organized criminal activity; instead, to sufficiently corroborate the accomplice's testimony the nonaccomplice evidence must tend to connect Johnson to the offense. *See* TEX. CODE CRIM. PROC. ANN. art. 38.14. "The phrase 'tending to connect' has the ordinary dictionary definition, 'to serve, contribute or conduce in some degree or way . . . to have a more or less direct bearing or effect,' and, while not contemplating conjecture, 'has a tendency to prove the averments in the indictment.'" *Holladay v. State,* 709 S.W.2d 194, 198 (Tex. Crim. App. 1986) (quoting *Boone v. State,* 90 Tex. Crim. 374, 235 S.W. 580, 584 (1921)). In this case: (1) three trucks had been stolen without any apparent forced entry; (2) Johnson had examined those same vehicles shortly before they were stolen; (3) Johnson had the key codes for those same vehicles in his possession; (4) Grover's backpack was discovered in Johnson's car; (4) at the time Grover was driving a truck stolen in Southeast

Texas towards Mexico; (5) Johnson was driving immediately in front of Grover; (6) at the same time, Williams was twenty miles away driving another truck stolen from the same lot as the truck Grover was driving. This evidence tends to connect Johnson to the thefts of all five trucks. Johnson's appearance at the two car lots, followed by his traveling towards Mexico with persons driving stolen trucks, was more than fortuitous. Thus, the nonaccomplice evidence sufficiently corroborates the testimony of the accomplice, Williams.

In reviewing the legal sufficiency of the evidence, we must consider the accomplice witness testimony in addition to the nonaccomplice testimony. *McDuff,* 939 S.W.2d at 614. Williams testified that Johnson agreed to pay Williams $200 for each pickup that they stole off of a car lot and an additional sum for driving each stolen truck to Rio Grande City. Williams assisted Johnson in stealing at least three vehicles from a dealership in Galveston. Three men by the names of Steve, Dooby, and Stu also allegedly assisted Johnson with the thefts. Johnson gave Williams the keys. Once they got the trucks to Rio Grande City, Johnson negotiated a transaction with some Hispanic men in a back room. Next, Johnson, Williams, and Dooby stole two more vehicles from a dealership in Houston. On two other occasions, Johnson gave Williams a key to a vehicle which Williams drove off the lot. On or about November 23, 2004, Williams visited the two dealerships in Livingston. Johnson obtained the key codes from the keys the salesmen had given him and Williams wrote the codes on the business cards. Next, they traveled to a lock company in Houston. Johnson told

the locksmith he had lost his keys in a boating accident and had keys made for the vehicles. They returned to the Livingston Ford dealership about 5:30 p.m. and drove the truck off of the lot. After parking the truck at a truck stop in Houston and picking up Steve, they returned to Livingston. Steve became nervous and did not participate in the thefts, but waited at the Wal-Mart. Johnson drove Williams to the dealership and Williams drove away with the first truck. After Williams parked the first truck at the Wal-Mart, Johnson took Williams back to the lot and Williams drove off in the next truck. Johnson, Williams and Steve drove the trucks to Rio Grande City. Johnson also paid Williams $20 for each set of paper temporary license tags or plates that Williams stole. Next, they drove to Chambers County and stole the two trucks that they were driving when they were arrested. Grover went with Williams to obtain the key boxes. Johnson took Williams and another person to the Chambers County dealership and Williams and the other person drove the trucks off of the lot. On the trip to Rio Grande City, Williams drove one truck and Grover drove the other. According to Williams, it was the first time Grover had been involved with the truck thefts.

Johnson contends the State failed to prove that Grover was a member of the combination. For there to be a combination, three or more people must collaborate in carrying on criminal activities. TEX. PEN. CODE ANN. § 71.01(a) (Vernon 2003). The "membership in the combination may change from time to time." *Id.* § 71.01(a)(2). Furthermore, section 71.03 states,

It is no defense to prosecution . . . that:

> (1) one or more members of the combination are not criminally responsible for the object offense; [or that]
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> . . . .
>
> (4) once the initial combination of three or more persons is formed there is a change in the number or identity of persons in the combination as long as two or more persons remain in the combination and are involved in a continuing course of conduct constituting an offense under this chapter.

Id. § 71.03(1), (4). In this case, Johnson and Williams remained in the combination through a series of seven transactions in which twelve vehicles were stolen. Four other people, including Grover, participated with Johnson and Williams in four of those transactions.[1] Williams testified that "basically the same people" known to Williams only as "Steve" "Dooby" and "Stu" assisted Johnson and Williams in acquiring the vehicles from the lots and transporting them to South Texas. The evidence that the combination included Grover is established by her admission that she was to be paid $150 to drive the truck from Houston to the Valley. Thus, she participated in the illegal activities of the combination and shared in its profits. Although the evidence at trial showed Grover participated in only one theft, the members of the combination may change while both Johnson and Williams remained in

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[1]The indictment did not name the other members of the combination. *See* TEX. CODE CRIM. PROC. ANN. art. 21.07 (Vernon Supp. 2008). Their names are non-essential elements of the offense for purposes of a sufficiency analysis. *See generally Brown v. State,* 159 S.W.3d 703, 709 (Tex. App.--Texarkana 2004, pet. ref'd) (citing *Gollihar v. State,* 46 S.W.3d 243, 246-48 (Tex. Crim. App. 2001)).

the combination throughout. *See id.* § 71.03(4). Rather than show a single *ad hoc* effort, the evidence adduced at trial established the collaboration required to prove the existence of a combination for purposes of section 71.01(a).

Johnson relies on three cases: *Nguyen v. State,* 1 S.W.3d 694 (Tex. Crim. App. 1999); *Davis v. State,* 89 S.W.3d 725 (Tex. App.--Corpus Christi 2002, no pet.); and *Smith v. State,* 36 S.W.3d 908, 909 (Tex. App.--Houston [1st Dist.] 2001, pet. ref'd). All three cases are distinguishable on their facts.

In *Nguyen,* the appellant and a group of friends attended a party sponsored by the Asian Cultural Committee on the University of Texas campus. *Nguyen*, 1 S.W.3d at 695 n.1. Later, while eating breakfast at a restaurant, an argument erupted between the group and members of the University of Texas Latin American Students Association over an insult to one of the appellant's companions. Later that night, several members of the appellant's group murdered one of the Latino students. *Id.* The court noted that the State need not prove that members of a combination committed a series of criminal acts. *Id.* at 697. Because there was no evidence though that the actors intended to carry on a course of criminal activities, the evidence did not support the allegation that the appellant was a member of a combination. *Id.* at 696-97. Although the students were members of a group, and the students committed a murder, there was no evidence that they intended to engage in a continuing series of

criminal activity. In contrast, here, Johnson recruited the others solely for the purpose of engaging in a continuing series of automobile thefts.

Johnson and his companions stole more than one vehicle on more than one occasion. Additionally, Johnson and his companions engaged in a continuing course of criminal activities to achieve the thefts. They visited dealerships prior to stealing the vehicles. They stole key codes and had keys cut in order to gain access to the vehicles. The vehicles were taken off the lots and then driven to Rio Grande City where they were sold.

In *Smith,* the court held the State failed to prove that the appellant, a convenience store owner, intended to work with the two accomplices in a continuing course of criminal activities involving the sale of stolen cigarettes. *Smith,* 36 S.W.3d at 909-10. Although the appellant indicated an intention to engage in future transactions, the only evidence supporting the element of "continuing course" of criminal activities were statements by the appellant and accomplice that they wanted to make future deals. *Id.* The court reasoned that the State failed to prove the continuity of the combination required to sustain a conviction for engaging in organized criminal activity. *Id.* at 910. While the evidence showed that appellant was trading in stolen cigarettes, it did not show that appellant's transaction with his accomplice was anything more than a one-time deal. *Id.* In contrast, Johnson and Williams together stole vehicles out of car lots on at least seven occasions.

In *Davis,* the appellant brought two stolen cows to a stockyard. *Davis,* 89 S.W.3d at 727-28. A stockyard employee testified that he had seen the appellant previously at the stockyard with an accomplice. *Id.* at 728. The accomplice, who was in prison at the time of the cattle theft, testified that he and the appellant brought stolen cows to the stockyard on prior occasions and split the proceeds. *Id.* at 730. On one occasion, the appellant asked the accomplice's brother to pick up a check and cash it. *Id.* The brother did so, although he knew he did not own any cattle, and split the proceeds with the appellant. *Id.* The evidence showed that the appellant committed a series of crimes with one accomplice and that he committed the charged offense. However, there was no evidence that the original twosome ever turned into a group of three or more. Nor was there sufficient evidence that a group of three or more committed the charged offense. Additionally, the court found that had a group of three or more existed, there was no evidence that the group intended to steal cattle on more than the occasion in question. *Id.* at 731. Therefore, the continuity required for a combination was not established by the evidence. *Id.* In contrast, here the evidence establishes that Johnson and Williams recruited four other people to drive trucks off of the lots and transport the stolen vehicles to the Valley on more than one occasion.

In Johnson's case, the participants' course of collaboration in carrying on a series of vehicle thefts establishes their intent to work together in a continuing course of criminal activity. We hold that the jury could rationally find beyond a reasonable doubt that Johnson,

with the intent to establish, maintain, or participate in a combination or in the profits of a combination, committed theft as alleged in the indictment.

Johnson argues that the evidence of organized criminal activity is so weak that the verdict is clearly wrong and manifestly unjust. *See Johnson v. State,* 23 S.W.3d 1, 10-11 (Tex. Crim. App. 2000). To determine if the evidence is factually sufficient, we review all of the evidence in a neutral light. *Watson v. State,* 204 S.W.3d 404, 414 (Tex. Crim. App. 2006). Then, we determine whether the evidence supporting the verdict is so weak that the verdict is clearly wrong and manifestly unjust or whether the verdict is against the great weight and preponderance of the conflicting evidence. *Watson,* 204 S.W.3d at 414-15; *Johnson*, 23 S.W.3d at 10-11.

Johnson does not explain how the evidence is weak, but he does argue that Grover's statements were hearsay and argues that Grover is either innocent or an accomplice. Johnson concedes there was no trial objection to the officer's testimony regarding Grover's statements. Hearsay that is not objected to is not denied probative value merely because it is hearsay. *See* TEX. R. EVID. 802. A statement against penal interest is admissible. *See* TEX. R. EVID. 803 (24). Furthermore, the reliability of Grover's statements to the officer was established through confirmation that her backpack was in the trunk of Johnson's car and that Williams was nearby in a stolen truck similar to the one she was driving. Moreover, the State did not have to prove that Grover was criminally responsible for the thefts from the

Livingston dealership in order to prove that Johnson was acting as a member of a combination when Johnson stole the trucks. *See* TEX. PEN. CODE ANN. § 71.03(1). Because the evidence when viewed in a neutral light is not too weak to support the jury's verdict, the jury could reasonably have concluded that Johnson engaged in organized criminal activity.

Johnson also challenges the legal and factual sufficiency of the evidence supporting his convictions for theft. Johnson argues that the nonaccomplice evidence does not tend to connect him to the thefts. In this case: (1) the two trucks had been stolen without any apparent forced entry; (2) Johnson had examined those same vehicles shortly before they were stolen; (3) Johnson had the key codes for those same vehicles in his possession; (4) while he was convoying with a person who was driving a truck stolen in Southeast Texas towards Mexico. This evidence bears directly on the truth of the allegations in the indictment. Because the nonaccomplice evidence tends to connect Johnson to the thefts alleged in the second and third counts of the indictment, it sufficiently corroborated the testimony of the accomplice. *See* TEX. CODE CRIM. PROC. ANN. art. 38.14.

Johnson argues the evidence is legally and factually insufficient to support the theft convictions because that evidence does no more than establish his presence at the scene with the accomplice. To the contrary, Johnson actively participated in acquiring the key codes and in obtaining the keys that made it possible for Williams to drive the trucks off of the lot without the owners' permission.

We hold the nonaccomplice evidence sufficiently corroborates the accomplice testimony. Considering all of the evidence in the light most favorable to the verdict, a rational jury could have found all of the elements of the count of engaging in organized criminal activity and the two counts of theft to have been proven beyond a reasonable doubt. *See Jackson*, 443 U.S. at 319. Considering all of the evidence in a neutral light, that evidence is not so weak that the jury's verdict is clearly wrong and unjust. *See Watson*, 204 S.W.3d at 414-15. Accordingly, we overrule issues one through five and affirm the judgment.

AFFIRMED.

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CHARLES KREGER
Justice

Submitted on July 29, 2008
Opinion Delivered December 17, 2008
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Before Gaultney, Kreger, and Horton, JJ.