COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-15-00357-CR

DONDRE JOHNSON — APPELLANT

V.

THE STATE OF TEXAS — STATE

FROM CRIMINAL DISTRICT COURT NO. 1 OF TARRANT COUNTY
TRIAL COURT NO. 1415600R

DISSENTING OPINION

The majority holds that the evidence is insufficient to convict appellant Dondre Johnson of two counts of theft and therefore acquits him of those charges. Because I conclude that a proper application of evidentiary sufficiency principles requires us to hold that sufficient evidence supports the convictions, I respectfully dissent to the majority's opinion and judgment.

I believe that the majority opinion recites but incorrectly applies the *Jackson v. Virginia* evidentiary sufficiency standard, so the standard bears repeating here. 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979). The critical question in an evidentiary sufficiency review is whether, after viewing the evidence in the light most favorable to the guilty verdict, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Id.* Viewing the evidence in the light most favorable to the verdict means that we must defer to the jury's credibility and weight determinations. *Brooks v. State*, 323 S.W.3d 893, 899 (Tex. Crim. App. 2010). One product of the jury's exclusive role of assessing witnesses' credibility is that the jury "is free to believe or disbelieve the testimony of any witness, to reconcile conflicts in the testimony, and to accept or reject any or all of the evidence of either side." *Bottenfield v. State*, 77 S.W.3d 349, 355 (Tex. App.—Fort Worth 2002, pet. ref'd), *cert. denied*, 539 U.S. 916 (2003). The jury's freedom to reject testimony applies even when the testimony is uncontroverted. *Wilkerson v. State*, 881 S.W.2d 321, 324 (Tex. Crim. App.), *cert. denied*, 513 U.S. 1060 (1994).

The State may establish guilt through circumstantial evidence alone. *Orr v. State*, 306 S.W.3d 380, 395 (Tex. App.—Fort Worth 2010, no pet.). Thus, the State may prove intent—the focus of the majority's conclusion that the evidence is insufficient—by circumstantial evidence. *See Guevara v. State*, 152 S.W.3d 45, 50 (Tex. Crim. App. 2004) (explaining that a jury may infer an appellant's intent from his acts and words). In fact, proof of a culpable mental state almost

invariably depends upon circumstantial evidence. *Montgomery v. State*, 198 S.W.3d 67, 87 (Tex. App.—Fort Worth 2006, pet. ref'd). In assessing the sufficiency of the evidence to show an appellant's intent, and faced with a record that supports conflicting inferences, we "must presume—even if it does not affirmatively appear in the record—that the trier of fact resolved any such conflict in favor of the prosecution, and must defer to that resolution." *Matson v. State*, 819 S.W.2d 839, 846 (Tex. Crim. App. 1991).

The first count of appellant's indictment charged him with theft of between $1,500 and $20,000 from Margaret Francois. With respect to this count, appellant argues on appeal only that because Francois gave him a cashier's check made out to Johnson Family Mortuary rather than writing a check to appellant personally or giving him cash, he had "no control over the funds represented by the check [and] there is insufficient evidence that [he] appropriated [the] money."[1] *See* Tex. Penal Code Ann. § 31.03(a) (West Supp. 2016) (stating that a person commits theft by unlawfully appropriating property with the intent to deprive the owner of it); *see also id.* § 31.01(4)(B) (West Supp. 2016) (establishing that "[a]ppropriate" means to "acquire or otherwise exercise control over property"). Appellant emphasizes that he was not a signatory on the mortuary's checking account and that only his wife had access to the account; he

[1]In other words, unlike his challenge to the conviction for the second count of theft, appellant does not contest whether he intended to deprive Francois of the cashier's check by deception at the time he induced her to deliver it.

contends that "even though [he] possessed the check, . . . he in no way controlled the [money] he is alleged to have stolen from [Francois]."

I would hold that appellant appropriated the cashier's check and the underlying money the cashier's check represented, as charged in the indictment. The State proved that appellant held himself out as a co-owner of the mortuary, that he did everything "but the paperwork" there,[2] that he negotiated contracts, that he signed documents that the mortuary submitted to the medical examiner's office, that he alone represented the mortuary in negotiating a lease, that he accepted cash from clients on behalf of the business and gave them receipts (including signing Francois's receipt), that he alone was the point person in conversations about paying rent and about eviction for failure to pay the rent (including making a "gentleman's handshake" agreement on rent matters), and that he assisted the police in identifying decomposing bodies (while his wife believed "there was only one body there"). Francois testified that she spoke only with appellant about services the mortuary agreed to provide for a decedent. Perhaps more significantly, the State also proved that appellant received funds from a bank account of the mortuary and that the mortuary's business account,

[2]One client testified that she never saw appellant's wife at the mortuary. The State proved that appellant's wife took a "back seat" to operations at the mortuary before the police became involved there. A man who helped the mortuary perform certain services testified that he "always dealt with [appellant]." An owner of a crematory that provided services for the mortuary testified that he "might have seen" appellant's wife once but that he "never really talked to her that much."

including money representing the $1,500 paid by Francois, had withdrawals for personal expenses, including restaurants, cell phone expenses, a grocery store, gas stations, and other stores. A financial analyst testified that none of Francois's $1,500 was withdrawn by the mortuary to pay cremation expenses.

Appellant cites no authority supporting the proposition that he did not exercise control over the cashier's check or the money it represented merely because the check was not made out to him (and neither does the majority cite such authority). Instead, I would hold that when appellant exercised control over the cashier's check, he also exercised control over the money it represented, either on the mortuary's behalf or his own behalf, especially considering the facts above that show his primary management of the mortuary's business and the personal benefits he accrued from the mortuary's income. *See Grogen v. State*, 745 S.W.2d 450, 450 (Tex. App.—Houston [1st Dist.] 1988, no pet.) ("The Court of Criminal Appeals has repeatedly held that there is *no* variance between an indictment that alleges theft of 'money' and proof at trial that establishes theft of a 'check.'"); *see also* Tex. Penal Code Ann. § 7.23(a) (West 2011) ("An individual is criminally responsible for conduct that he performs in the name of or in behalf of a corporation or association to the same extent as if the conduct were performed in his own name or behalf."); *Freeman v. State*, No. 01-13-00343-CR, 2014 WL 2626728, at *3 (Tex. App.—Houston [1st Dist.] June 12, 2014, pet. ref'd) (mem. op., not designated for publication) (applying section 7.23(a) in a theft case); *Aguirre v. State*, Nos. 04-98-00718-CR, 04-98-00719-CR, 1999 WL 417943, at

*4 (Tex. App.—San Antonio June 23, 1999, no pet.) (not designated for publication) (citing section 7.23 and explaining that to "determine whether an individual acquired or exercised control over property under the theft statute, the focus is on the person's intent, not the person's ability to own or exercise actual possession of the [property]").

I would hold that viewing the evidence in the light most favorable to the verdict, appellant appropriated Francois's property, and the evidence is therefore sufficient to support his guilt for count one. *Jackson*, 443 U.S. at 319, 99 S. Ct. at 2789.

The second count of appellant's indictment charged him with theft of between $1,500 and $20,000 from several individuals. With respect to this count, appellant contends that the evidence is insufficient to support theft because it fails to show that he intended to unlawfully appropriate the individuals' money and deprive them of it at the moment he received it.[3] *See* Tex. Penal Code Ann. §§ 31.01(1)(E), (3)(A), .03(a), (b)(1); *Taylor v. State*, 450 S.W.3d 528, 536 (Tex. Crim. App. 2014) (explaining that a claim of theft made in connection with a contract requires proof that the appropriation was a result of a false pretext or fraud and that the "accused intended to deprive the owner of the property at the time the property was taken"); *Price v. State*, 456 S.W.3d 342, 346 (Tex.

[3]Thus, with respect to this count, appellant does not contest the sufficiency of the evidence to prove that he appropriated others' property or to show the value of the property.

App.—Houston [14th Dist.] 2015, pet. ref'd) (stating the same and noting that intent may be inferred from the surrounding circumstances); *see also Merryman v. State*, 391 S.W.3d 261, 271–72 (Tex. App.—San Antonio 2012, pet. ref'd) ("In reviewing sufficiency of the evidence of this type of theft, the appellate court considers the events before, during, and after commission of the offense, as well as the defendant's actions which show an understanding and common design to commit the offense."). He emphasizes that he performed some services for the individuals named in count two, and he contends that this evidence shows that he originally intended to complete the services.[4] He appears to argue that at most, the evidence shows that he breached a contract with the individuals, not that he committed theft against them.

The State argues that appellant's position amounts to a request for this court to reweigh evidence and to infer from his partial performance of services that he initially intended to complete the services, which is perhaps one reasonable inference but not the reasonable inference that the jury chose. *See Laster v. State*, 275 S.W.3d 512, 523 (Tex. Crim. App. 2009) ("As long as the verdict is supported by a reasonable inference, it is within the province of the

[4]However, the fact that partial or even substantial work has been done on a contract will not invariably negate either the intent to deprive or the deception necessary to establish the unlawfulness of the initial appropriation. *See Taylor*, 450 S.W.3d at 537. As the State posits, appellant could have intended to deprive customers of money designated for cremation while not intending to deprive them of money designated for other services that he later performed, and under the evidence in this case, such a finding by the jury would not be irrational.

factfinder to choose which inference is most reasonable."); *Raybon v. State*, No. 02-12-00071-CR, 2013 WL 4129126, at *5 (Tex. App.—Fort Worth Aug. 15, 2013, pet. dism'd) (mem. op., not designated for publication) ("[T]he jury was entitled to choose between two reasonable inferences, and we must defer to that choice.")

In 2014, appellant took $300 to provide for an infant's cremation, represented that the infant had been cremated, and gave ashes to the infant's mother, but the police later found the infant's decomposing body in the mortuary. Also in 2014, appellant took $2,800 to perform a wake, a funeral, and a cremation for a deceased woman. When the woman's son became concerned about the length of the wait for the cremation, he called appellant, and appellant told him that he had "sent her body off already" to the crematory and was waiting for the state to issue a death certificate. The son later discovered that his mother's body was still decomposing at the mortuary. The son testified that "from day one in the funeral home, [appellant] lied" and that appellant "knew what was going on."

The same year, a daughter contracted with the mortuary for cremation, a wake, and a funeral of her mother. Using money donated by friends and family, the daughter paid $3,025 to appellant. When the cremation took longer to complete than expected, the daughter repeatedly called appellant, who consistently said that the cremation of the mother was "not ready yet." Eventually, after a period of approximately six weeks, appellant told the daughter

that her mother's cremains were ready, and the daughter received cremains. Later, however, the daughter discovered that her mother's decomposing body remained at the mortuary.

Similarly, Francois testified that she contracted with appellant for a cremation of her aunt, that she paid appellant $1,500, that appellant did not tell her at that time that the mortuary did not have a funeral director in charge (FDIC),[5] and that the cremation never occurred. The jury heard of similar accounts from other witnesses. The evidence also shows that appellant failed to enter information about some decedents into the Texas Electronic Registration (TER) system and that he could not have obtained a cremation permit without entering that information.

A detective who investigated these matters testified, "These people were being clearly deceived, in my opinion, and led to believe that things were happening with their loved ones that just wasn't happening and that was obvious. . . . I do believe there was theft, and I think that the investigation showed that as it played out."

[5]The evidence shows that toward the end of 2013 or the beginning of 2014, appellant contacted Michael Pierce about becoming the FDIC at the mortuary, that Pierce agreed to do so, and that Pierce later resigned as the FDIC after the mortuary used Pierce's license to hold a funeral service without allowing Pierce to make the funeral arrangement. The evidence also shows that after Pierce resigned as the FDIC, without his knowledge or permission, the mortuary continued to use his name and license to arrange funeral services.

As the State contends in its brief, deferring to the jury's resolution of competing inferences concerning appellant's intent, the jury could have inferred his intent to deceive customers of the mortuary from the moment he entered contracts with them by the facts that

> the [mortuary] did not have an FDIC at the time he entered into the contract[s], which prevented it from obtaining a death certificate and other documents necessary to cremate remains; the mortuary's failure to have other, older remains cremated, or cremated in a timely manner; the poor financial position of the Johnsons' businesses; and . . . [a]ppellant's representations . . . that the ashes he had given [customers] were the ashes he had contracted to give them, when he knew they were not.

Applying the deferential standard of review properly—*see Matson*, 819 S.W.2d at 846—I would conclude that the evidence is sufficient to support appellant's conviction for count two. *See Jackson*, 443 U.S. at 319, 99 S. Ct. at 2789.

Because the majority's opinion and judgment reverse appellant's convictions and acquit him of two counts of theft although the evidence is sufficient to prove those crimes, I dissent from the opinion and judgment.

/s/ Terrie Livingston
TERRIE LIVINGSTON
CHIEF JUSTICE

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DELIVERED: December 8, 2016