In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-15-00348-CR

TAHRONDA SHANELL WHITE, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

On Appeal from the County Court
Terry County, Texas
Trial Court No. 29906, Honorable J. D. Wagner, Presiding

May 10, 2016

MEMORANDUM OPINION

Before CAMPBELL and HANCOCK and PIRTLE, JJ.

Appellant, Tahronda Shanell White, appeals from the trial court's judgment by which she was convicted of theft of property valued at $500 or more but less than $1,500 and sentenced to serve six months in the Terry County Jail.[1] On appeal, she

[1] *See* TEX. PENAL CODE ANN. § 31.03(e)(3) (West 2011). The 84th Texas Legislature amended Section 31.03(e), effective as of September 1, 2015. *See* Act of May 31, 2015, 84th Leg., R.S., ch. 1251, § 10, 2015 Tex. Gen. Laws 4209, 4213 (current version at TEX. PENAL CODE ANN. § 31.03(e) (West Supp. 2015)). The amended version of this section criminalizes theft of property valued at $750 or more but less than $2,500. Because this case was tried August 31, 2015, we cite, in this instance, to the prior version of the statute under which appellant was tried and convicted.

challenges the sufficiency of the evidence and the validity of her oral waiver of a trial by jury. We will affirm.

Factual and Procedural History

Appellant was employed at a cell phone provider kiosk in a local grocery store in Brownfield, Texas. The grocery store's security camera footage shows appellant take the till out from within the cabinet door and count the money on July 21, 2014. As she counted and appeared to fill out paperwork, she also appeared to be doing some sort of computer work. She placed what appears to be some amount of money and papers in the zippered vinyl bank bag and, after she put the black plastic till tray back underneath in the cabinet and got a clear, coded plastic deposit bag out, she placed the zipped vinyl bank bag in the cabinet as well. She then appeared to do additional paperwork, grabbed some amount of cash she had set aside when handling the money earlier, counted that cash, put the cash and a piece of paper in the clear, coded deposit bag, looked around her as if to see if anyone was watching, and promptly placed the clear plastic bag containing the cash in her purse. After some additional paperwork, some interaction with passing customers, some tidying up and securing of phone accessories, and a conversation on her cell phone that had continued throughout all these events, she locked the cabinet, unlocked it and revisited the contents of the cabinet a number of times, grabbed her purse, and left the kiosk and the store.

When the kiosk manager, Tina Powell, returned to work from vacation on July 31, she learned from the corporate office that there was a deposit missing from July 21, 2014. She promptly set about trying to find the whereabouts of the deposit and

contacted appellant, who claimed to have known nothing of the missing deposit. Powell approached the grocery store management and learned that there was security camera footage and sought the store's assistance in providing that footage to her and to police. The store cooperated and provided the footage that clearly shows appellant count out cash, place it in a clear plastic bag designated for deposits, and put the bag of cash in her purse. Appellant repeatedly denied that she was putting in cash from her employer, claiming instead that it must have been money from her children's fundraisers, money from her makeup sales, or, even, feminine hygiene products.

In a trial to the bench, the State presented evidence that the company's computer point of sale system showed that a deposit of $567.12 was missing from July 21, 2014, the night appellant was recorded at the kiosk. The State presented evidence that appellant would not have been charged with the duty of depositing that amount but had been directed instead to leave the money and deposit slip in the locked cabinet with the till and the $200.00 in starting cash with which the kiosk began each business day. A carbon copy of the deposit slip for $567.12 was completed and initialed "T.W." by appellant.

The trial court found appellant guilty of theft as charged and sentenced her to serve six months in the Terry County Jail. This appeal followed.

Sufficiency of the Evidence

It is in her second point of error that appellant contends the evidence is insufficient to support her conviction for theft; however, because this point of error would, if sustained, afford the greatest relief to appellant, we will address the sufficiency

of the evidence first. *See Chaney v. State*, 314 S.W.3d 561, 565 & n.6 (Tex. App.—Amarillo 2010, pet. ref'd) (citing TEX. R. APP. P. 43.3 and *Bradleys' Elec., Inc. v. Cigna Lloyds Ins. Co.*, 995 S.W.2d 675, 677 (Tex. 1999) (per curiam)). Appellant contends that the State failed to prove beyond a reasonable doubt that she committed theft.

Standard of Review

In assessing the sufficiency of the evidence, we review all 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. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); *Brooks v. State*, 323 S.W.3d 893, 912 (Tex. Crim. App. 2010). "[O]nly that evidence which is sufficient in character, weight, and amount to justify a factfinder in concluding that every element of the offense has been proven beyond a reasonable doubt is adequate to support a conviction." *Brooks*, 323 S.W.3d at 917 (Cochran, J., concurring). We remain mindful that "[t]here is no higher burden of proof in any trial, criminal or civil, and there is no higher standard of appellate review than the standard mandated by *Jackson*." *Id.* When reviewing all of the evidence under the *Jackson* standard of review, the ultimate question is whether the [trier of fact]'s finding of guilt was a rational finding. *See id.* at 906–07 n.26 (discussing Judge Cochran's dissenting opinion in *Watson v. State*, 204 S.W.3d 404, 448–50 (Tex. Crim. App. 2006), as outlining the proper application of a single evidentiary standard of review). "[T]he reviewing court is required to defer to the [trier of fact]'s credibility and weight determinations because the [trier of fact] is the sole judge of the witnesses' credibility and the weight to be given their testimony." *Id.* at 899. In a trial to the bench, the trial court sits as the trier of fact. *See Joseph v. State*, 897

S.W.2d 374, 376 (Tex. Crim. App. 1995) (en banc) (citing *Mattias v. State*, 731 S.W.2d 936, 939–40 (Tex. Crim. App. 1987) (en banc)).

Analysis

Without question or dispute, the security camera footage shows appellant place something in her bag. Appellant's challenge to the sufficiency of the evidence turns on whether the State established that the object she put in her purse was money belonging to her employer. From the Court's observation, it certainly appears that the object she placed in her bag was a clear plastic bag containing cash that she just counted out. From the video evidence and evidence that appellant was the only employee with access to the cash at the closing of business on the day for which the deposit was missing, the trial court, sitting as finder of fact, could have concluded that the object appellant placed into her purse was, in fact, the money missing from her employer's deposits rather than some other amount of cash or personal items as she contends. The trial court, as the finder of fact in a bench trial, was entitled to resolve any conflicts in the evidence, to evaluate the credibility of the witnesses, and to determine the weight to be given any particular evidence. *See Winkley v. State*, 123 S.W.3d 707, 711 (Tex. App.—Austin 2003, no pet.) (citing *Jones v. State*, 944 S.W.2d 642, 647 (Tex. Crim. App. 1996)).

Based on the video evidence showing appellant place what appears to be a plastic deposit bag with cash into her bag and on documentary evidence demonstrating that appellant's employer was missing the deposit for the time at which appellant was the only employee working, a rational trier of fact could have found the essential

elements of the offense charged. We overrule appellant's point of error challenging the sufficiency of the evidence.

Waiver of Trial by Jury

A criminal defendant has constitutional and statutory rights to a trial by jury. *See* U.S. CONST. amend. VI; TEX. CONST. art. 1, § 15; TEX. CODE CRIM. PROC. ANN. art. 1.12 (West 2005); *see also Hobbs v. State*, 298 S.W.3d 193, 197 (Tex. Crim. App. 2009). However, a defendant also has the right to waive the right of trial by jury. *See Adams v. United States*, 317 U.S. 269, 275, 63 S. Ct. 236, 87 L. Ed. 268 (1942); *Hobbs*, 298 S.W.3d at 197; *see also* TEX. CODE CRIM. PROC. ANN. art. 1.13(a) (West Supp. 2015).

As a matter of protecting a defendant's constitutional right to a jury trial, the State must establish on the record an express, knowing, and intelligent waiver. *See Hobbs*, 298 S.W.3d at 197. Regarding a defendant's statutory right, the waiver of a jury trial must be made in person by the defendant in writing in open court with the consent and approval of the trial court, and the attorney representing the State. *See* TEX. CODE CRIM. PROC. ANN. art. 1.13(a).

Knowing and Voluntary Waiver

In her first point of error, appellant contends that the record failed to show that she knowingly and voluntarily waived her right to a trial by jury. When the voluntariness of a waiver is challenged on appeal, the State must establish through the trial record an express, knowing, and intelligent waiver of jury trial. *See Hobbs*, 298 S.W.3d at 197

(citing *Guillett v. State*, 677 S.W.2d 46, 49 (Tex. Crim. App. 1984) (en banc), and *Samudio v. State*, 648 S.W.2d 312, 314 (Tex. Crim. App. 1983) (en banc)).

The record contains evidence that appellant was aware of her right to a jury trial and that she voluntarily waived that right. We find the following exchange as the case is called for trial:

> THE COURT: All right. If y'all are ready, this is – welcome to Terry County Court this morning for a bench trial. The Court calls Cause Number 29,906; State versus Tahronda Shanell White. Is the State ready?
>
> THE STATE: We are ready, your Honor. And we would ask the Defendant to go ahead and waive her right to a jury trial on the record.
>
> THE COURT: The Defendant ready?
>
> [DEFENSE COUNSEL]: The Defense is present and ready, your Honor.
>
> THE COURT: And you are waiving your right for a jury trial; is that correct?
>
> THE DEFENDANT: Yes, that is.

Appellant's waiver of a jury trial is reflected in the trial court's judgment captioned as "Judgment of Conviction by Court – Waiver of Jury Trial." Further, the docket sheet indicates that on June 18, 2015, approximately three weeks before trial, the trial court sent notice that the matter was set for bench trial on July 10, 2015.

Appellant cites *Davidson v. State* to support her contention that she merely acquiesced to the absence of a jury and did not voluntarily waive her right. *See* 225 S.W.3d 807, 808 (Tex. App.—Fort Worth 2007, no pet.). In that case, Davidson asked his attorney, after the bench trial commenced, "when do we start picking the jury?" *See id.* Making a vague reference to an earlier conversation, Davidson's attorney informed him that he had given up his right to a jury. *See id.* When Davidson began to protest

this development, his attorney urged him to be quiet and not make a scene or else run the risk of a longer punishment. *See id.* There was no evidence of waiver in the record, and Davidson testified at the abatement hearing that his attorney never asked him if he waived his right to a jury trial and he never agreed to do so. *See id.* The Fort Worth court concluded that Davidson had been denied his right to a jury trial because he had not expressly waived his right and had merely acquiesced in proceeding to trial without a jury. *See id.* at 811 (citing *Marin v. State*, 851 S.W.2d 275, 279 (Tex. Crim. App. 1993) (en banc), for the proposition that an express waiver requires an "intentional relinquishment or abandonment of a known right or privilege").

Davidson is distinguishable from the case at bar because, in *Davidson*, there was no evidence in the record that the defendant had waived his right to a jury trial. In the instant case, the record includes the representations by appellant personally in open court that she had waived her right to a jury trial. We also see, after she is sentenced and denied any extra time before serving her sentence, that she expressed that she wished she would have just requested a jury trial—"rescheduled"—now so that she could have gotten more time to get her affairs in order before going to jail:

> THE DEFENDANT: Do I have to go today?
>
> THE COURT: You understand that punishment? Yes, ma'am.
>
> THE DEFENDANT: So I can't pick my older kids up from school, and I can't tell my baby nothing. Because it ain't no problem, I can turn myself in next week. I can't get stuff situated for them? It's my word that I'll turn myself in next week.
>
> THE COURT: Ms. White, you knew when you came to court today there was a chance of that.

THE DEFENDANT: I didn't know I was going to jail. Honest to God. Or I would have it already set up for a jury trial. Because she came back in and said, "Well, they'll do it and it will be on the 29th." If I did, I swear I would have went for a jury trial. But now all I'm asking for is a week to get my two big kids at school. They don't understand. And I got my baby right here. I got my house. I need to call my school and let them know. I just need to get everything situated.

THE COURT: Ms. White, you can do a lot of that from the jail. They'll let you make calls. You understand – what you've been through, I understand. But there's a lot of stuff that didn't make sense today, and that's my assessment today is go to jail today for six months, $2,000 fine –

THE DEFENDANT: I can't even have just a week to get my kids and stuff situated?

THE COURT: No, ma'am. Anything else?

[DEFENSE COUNSEL]: No, your Honor.

THE STATE: No, your Honor.

THE DEFENDANT: I got to go to jail for six months. I don't care. Take me to jail. Get me out of here, please.

THE COURT: Ma'am, you could stay longer.

THE DEFENDANT: Why I got to go? I didn't do nothing. It's too many criminals on the street. I did that when I was 17. I take care of my kids. It ain't no way I should be leaving out today going to jail. Can't even kiss my baby, nothing, just going to jail. I would have rescheduled for the 29th if I knew I was going to jail today. Going to jail for six months. They made sure I was in jail. Can't even say nothing. I hope y'all happy you took me away from my daughter. I hope y'all happy now. They putting me in jail today. Not even five days.

By her declarations, appellant acknowledges that she knew in advance of trial of her right to a trial by jury and that she later came to regret not exercising that right simply because doing so would have given her more time before going to jail. Based on the record before us, we conclude that appellant was aware of her right to a jury trial and voluntarily waived said right. We overrule her point of error contending to the contrary.

Absence of Written Waiver

In her second and alternative point of error, appellant maintains that the absence of a written waiver per Article 1.13 was harmful error. Failure to comply with Article 1.13 is statutory, non-constitutional error because neither the federal nor state constitution requires that a jury waiver be in writing. *See Johnson v. State*, 72 S.W.3d 346, 348 (Tex. Crim. App. 2002). Accordingly, we must disregard the error unless appellant's substantial rights are affected. *See* TEX. R. APP. P. 44.2(b). The absence of a written jury waiver is not harmful if the record reflects that the defendant was aware of her right to a jury trial and waived it. *See Johnson*, 72 S.W.3d at 349.

That being so, we reiterate that the record reveals that appellant personally announced her decision to waive her right to a trial by jury. We note again that the trial court judgment reflects that appellant waived her right to a jury trial. *See id.* (quoting *Breazeale v. State*, 683 S.W.2d 446, 450 (Tex. Crim. App. 1984) (en banc) (op. on reh'g), for principle that recitation of waiver of jury trial in judgment is "binding in the absence of direct proof of [its] falsity"). We also look again to appellant's declarations upon being denied time to get her affairs in order before going to jail. In those declarations, she acknowledges that she was aware of the right to have a jury trial and that, had she known that she would not be given time to get everything squared away, she would have "rescheduled" for the later jury trial setting so that she could enjoy a little more time before going to jail.

We see that, indeed, the record contains no written waiver of the right to a jury trial, the absence of which constitutes error. Evaluating that error for harm, however,

we see that appellant was well-aware of her right to a jury trial and that she waived said right and only later came to regret her decision to do so when it became clear that she could have had more time before going to jail. Such regret does not constitute harm stemming from the absence of a written waiver of the right to a trial by jury.

We conclude that the error in failing to procure a written waiver of appellant's right to a jury trial did not affect her substantial rights and was, therefore, harmless error. *See* TEX. R. APP. P. 44.2(b). We overrule appellant's point of error on this issue.

Conclusion

Having overruled appellant's points of error on appeal, we affirm the trial court's judgment of conviction. *See* TEX. R. APP. P. 43.2(a).

Mackey K. Hancock
Justice

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