In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-16-00266-CR

ALISA RENA NASH, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

On Appeal from the County Court at Law No. 1
McLennan County, Texas[1]
Trial Court No. 20152617CR1, Honorable Mike Freeman, Presiding

July 12, 2017

MEMORANDUM OPINION

Before QUINN, C.J., and CAMPBELL, J. and HANCOCK, S.J.[2]

Appellant, Alisa Rena Nash, appeals her conviction for the offense of theft of property with a value of $50 or more but less than $500.[3] We will affirm the judgment of the trial court.

[1] Pursuant to the Texas Supreme Court's docket equalization efforts, this case was transferred to this Court from the Tenth Court of Appeals. *See* TEX. GOV'T CODE ANN. § 73.001 (West 2013).

[2] Mackey K. Hancock, Justice (Ret.), Seventh Court of Appeals, sitting by assignment.

[3] Acts 1973, 63rd Leg., R.S., ch.399, 1973 Tex. Gen. Laws 929 (amended 2015) (current version at TEX. PENAL CODE ANN. § 31.03(e)(2)(A) (West Supp. 2016)). The 2015 amendment, *inter alia*, changed

Factual and Procedural Background

After shopping at Walmart, appellant, her son, and a friend went through the self-check lane to pay for their items. A Walmart loss prevention officer noticed that the group was not scanning all of the items in their shopping cart. One of the men would simply bypass the scanner and place some of the items into the grocery bag. While appellant did not actually scan any of the items, she stood nearby and watched the transaction. When the transaction was completed, appellant gave the men money to pay for the items that had been scanned.

Before leaving the Walmart, the group was detained. The Walmart loss prevention officer determined that there were twenty items that were not scanned worth a cumulative value of $105.00. Appellant told the loss prevention officer that she had paid for her items.

A misdemeanor information was filed charging appellant with theft. At trial, the loss prevention officer testified and sponsored a videotaped recording of the transaction. One of the men testified that he stole items by not scanning them. Appellant testified that she watched the men scan the items but that she was not aware that they were deliberately not scanning some of the items. After hearing the evidence, the jury returned a verdict finding appellant guilty of theft. The trial court sentenced her to 180 days in jail and a $2,000 fine. The trial court then suspended imposition of the

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the value range for a Class B misdemeanor from $50 or more but less than $500, to $100 or more but less than $750. The amended version of the statute applies to offenses committed on or after September 1, 2015.

sentence and appellant was placed on community supervision for a period of twenty months. Appellant timely filed notice of appeal.

By her appeal, appellant presents two issues. Appellant's first issue challenges the sufficiency of the evidence to support her conviction. By her second issue, appellant contends that the trial court made a comment during closing argument that prejudiced the jury and called into question defense counsel's candor.

Issue One: Sufficiency of the Evidence

By her first issue, appellant contends that the evidence is insufficient to support her conviction. Specifically, appellant argues that there is insufficient evidence of intent.

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 jury'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 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*. at 899.

For appellant to be convicted of theft, the State was required to prove that she unlawfully appropriated property with intent to deprive the owner of the property. TEX. PENAL CODE ANN. § 31.03(a). Appellant was charged as a party to the offense, which means that the State was required to prove that she, with intent to promote or assist another in the commission of the offense, solicited, encouraged, directed, aided, or attempted to aid the other person to commit the offense. *Id*. § 7.02(a)(2) (West 2011). While mere presence at the scene of the offense alone is insufficient to support a conviction as a party, presence combined with other circumstances may be sufficient proof of guilt. *Beardsley v. State*, 738 S.W.2d 681, 685 (Tex. Crim. App. 1987) (en banc). In determining whether a defendant participated as a party to an offense, a court may examine the events occurring before, during, and after the commission of the offense. *Ransom v. State*, 920 S.W.2d 288, 302 (Tex. Crim. App. 1996) (op. on reh'g). The cumulative force of all the incriminating circumstances may be sufficient to warrant a conclusion of guilt. *Beardsley*, 738 S.W.2d at 685.

In the present case, the evidence establishes that appellant was standing near the self-check register at the Walmart while the men were ringing up the items. Appellant testified that she was watching the men ring up the items because her son wanted her to learn how to operate a self-check register. The video recording of the transaction makes it clear that several items were not scanned and that appellant

watched these items not being scanned from a couple of feet away. The Walmart loss prevention officer testified that, for many of the items, the failure to scan was blatant and obvious since the man did not even attempt to act like he was scanning them. She also testified that she felt appellant was a party to the theft due to the obvious manner in which the theft was committed combined with the fact that the group stole twenty items. Appellant testified that she was paying attention to the transaction and that, when she watched the transaction on the video, the theft was clear. After the transaction was completed, appellant gave the men money to pay for the items that had been scanned. After she was detained, appellant told the Walmart loss prevention officer that she had paid for her items. This statement could be interpreted as an acknowledgement that she was aware that the group had not paid for all of the items. When all of the evidence is considered in the light most favorable to the verdict, we conclude that a rational trier of fact could have found that appellant was aware that the men were committing theft and that she assisted, encouraged, aided, or attempted to aid them in the commission beyond a reasonable doubt. *See Jackson*, 443 U.S. at 319; *Brooks*, 323 S.W.3d at 912.

We overrule appellant's first issue.

Issue Two: Judicial Comment

By her second issue, appellant contends that the trial court prejudiced the jury and impugned counsel's candor by cautioning counsel, during closing arguments, that, "we had a conference regarding that before. You know better than to make that statement."

Ordinarily, the failure to object to claimed error occurring during trial forfeits the complaint on appeal. TEX. R. APP. P. 33.1; *Runnels v. State*, No. AP-75,318, 2007 Tex. Crim. App. Unpub. LEXIS 377, at *19 (Tex. Crim. App. Sep. 12, 2007) (not designated for publication). It is fundamental law in Texas that to preserve an issue for appeal, a party must (1) object, (2) state the grounds for the objection with sufficient specificity, and (3) obtain an adverse ruling. *Bara v. State*, No. 07-13-00138-CR, 2015 Tex. App. LEXIS 7435, at *3 (Tex. App.—Amarillo July 17, 2015, no pet.) (mem. op., not designated for publication) (citing TEX. R. APP. P. 33.1, and *Wilson v. State*, 71 S.W.3d 346, 349 (Tex. Crim. App. 2002)).

During closing arguments, appellant's trial counsel stated that appellant has no criminal history. The State objected to the statement and the court sustained the objection. The court told counsel, "we had a conference regarding that before. You know better than to make that statement." Appellant made no objection to this comment and it is, therefore, not before us for review.

In addition, the record does not support the objection appellant asserts on appeal. In her brief, appellant indicates that the State had informed the trial court, in an unrecorded conference, that appellant had been previously arrested in another state for some unspecified offense and that it was this information that led the trial court to make the statement. However, because this conference was not recorded, the record does not include any way for this Court to assess the propriety of the trial court's statement. Consequently, even if appellant had preserved the error she now claims, we cannot determine from this record whether the trial court's statement was erroneous.

Since appellant failed to preserve this complaint in the trial court, it is not before this Court for review. As such, we overrule appellant's second issue.

Conclusion

Having overruled each of appellant's issues, we affirm the judgment of the trial court.

Mackey K. Hancock
Senior Justice

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