In The
Court of Appeals
Sixth Appellate District of Texas at Texarkana

No. 06-17-00110-CR

CHAD ALAN CAPPIELLO, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 8th District Court
Hopkins County, Texas
Trial Court No. 1725811

Before Morriss, C.J., Moseley and Burgess, JJ.
Memorandum Opinion by Justice Moseley

MEMORANDUM OPINION

A jury convicted Chad Alan Cappiello of theft of property in the amount of $1,500.00 or more but less than $20,000.00.[1] Cappiello was sentenced to twenty-four months' confinement in state jail and was ordered to pay $13,575.00 in restitution. On appeal,[2] Cappiello argues that (1) the jury's verdict is supported by insufficient evidence, (2) the trial court erred in admitting evidence of extraneous offenses to demonstrate the intent to commit theft, and (3) the judgment incorrectly reflects the statute of offense.

We conclude that legally sufficient evidence supported the jury's verdict and that the trial court did not abuse its discretion in admitting the evidence of extraneous offenses. However, we sustain Cappiello's third point of error and modify the judgment to reflect the correct statute of offense. As modified, we affirm the trial court's judgment.

I. Legally Sufficient Evidence Supports the Jury's Verdict

A. The Evidence at Trial

The evidence in this case established that Cappiello, who was doing business both as Extreme Exteriors and as Extreme Remodeling, engaged in a pattern of accepting money without completing work. Testimony from several witnesses established that they hired Cappiello to remodel their homes, that Cappiello cashed checks they had given him to complete various projects, but that he neither completed the work nor returned their money. Witnesses testified that

[1]*See* Act of May 29, 2011, 82d Leg., R.S., ch. 1234, § 21, 2011 Tex. Gen. Laws 3302, 3310 (amended 2015) (current version at TEX. PENAL CODE § 31.03 (West Supp. 2017).

[2]In companion case number 06-17-00109-CR, Cappiello appeals a second conviction for theft of property in the amount of $1,500.00 or more, but less than $20,000.00.

Cappiello also used his birth name, "Chad Russell," when engaging in some of his business dealings and that his wife, Kristi Cappiello (who served as the secretary for the businesses), sometimes used the name of "Kristi Williamson" with customers and at other times denied that she was Cappiello's wife. Kristi further told customers that the company was based in Austin, Texas, and the address there that she often provided to the customers was that of an unoccupied building.

1. The Offenses at Issue

In this case, Cappiello was indicted based on his interactions with Julie Doss and her mother, Mary Doss. Julie testified that she located Extreme Remodeling online and submitted a request for an appointment to discuss the remodel of her kitchen. Cappiello arrived at Julie's home in a suit and handed her a business card which stated his name as "Chad Russell" and claimed that Extreme Remodeling had locations in Austin, Dallas, and Houston.[3] Julie testified that as a result of their conversation, she and Mary decided to hire Cappiello on May 14, 2015, and signed a contract to that effect.

The contract provided that Extreme Remodeling would, among other things, (1) replace the flooring in the kitchen, dining room, laundry room, and pantry with vinyl plank flooring, (2) retexture and paint the ceilings and walls in the kitchen and dining room, (3) install mosaic tile backsplash in the kitchen, (4) replace the existing kitchen cabinets with custom cabinets, (5) replace the kitchen countertops with granite, and (6) replace the sink and faucet in the kitchen.

[3]No address for the business was provided on the card.

The contract listed a projected cost of $23,500.00.[4] On the day Julie and Mary signed the contract, they paid a "10% earnest money deposit" in the amount of $2,350.00,[5] with an understanding that an initial payment in the amount of fifty percent of the project costs was required to begin the project and the remaining payment was due on its completion. In the month of May, Cappiello returned to the home several times to entice Julie and Mary to consider several upgrades on materials. After they decided to select the upgrades, both the contract and the cost of the remodel was amended on June 4, 2015. On that date, Julie paid $13,575.00, representing the initial fifty-percent installment.

Julie testified that Andrew Wyatt, a subcontractor for Cappiello, came to her home once after the contract was signed to take measurements. The contract referenced (but did not contain) a completion date for the project. According to Julie, Cappiello represented that the project would begin in four weeks, but later stated that it would commence on July 30. In preparation, Julie and Mary cleared the kitchen cabinets and waited for the remodel to begin. On July 28, Kristi told Julie that there was a family emergency that required the postponement of the project, but refused to provide a new start date for the project. No work was ever completed on the kitchen. Julie and Mary testified that they called Extreme Remodeling from August through December, that it often took Extreme Remodeling several days to return telephone calls, that the Cappiellos consistently

[4]The contract represented that Extreme Remodeling's business address was 3131 McKinney Ave. #600, Dallas, Texas 75204.

[5]This check, which was cashed, formed the basis of the theft charge in our cause number 06-17-00109-CR.

delayed the start date of the project, and that no one would return their calls after the Christmas holiday.

Frustrated, Julie emailed Cappiello on January 12, 2016, to inform him that she had attempted to contact the company, had left several unanswered messages inquiring about the performance of the contract, and that the "receptionist ha[d] not done a very good job of even explaining why no one [would] call them." Because nothing had been done, Julie wrote, "I feel that you have taken advantage of us for over six months" and requested the immediate return of sums paid by her and Mary. Julie testified that when no one responded to her email, she contacted Wyatt, who had learned of and shared Cappiello's other identity after seeing his mug shot online.

Julie and Mary filed a police report against Cappiello for theft of their money. In August 2016, they finally received a response from Extreme Remodeling informing them that (1) pursuant to the terms of the contract, the deposit and initial payment were nonrefundable, and (2) they had breached the contract by cancelling it and informing third parties of the agreement in spite of the nondisclosure provision. Nevertheless, Cappiello agreed to perform the work on the condition that Julie and Mary would make the final payment up front and drop all charges against him and Extreme Remodeling.

As of the time of trial, no work had been done on the kitchen and, although the checks had been cashed, none of the money had been returned to Julie or Mary. Wyatt testified that because Cappiello had never once contacted him about the preparation of installation of the cabinets, he must have lied when telling Julie and Mary that the installation would begin on certain dates. Julie

and Mary testified that they would never have hired Cappiello if they knew of his other identity and actual reputation.

2. Cappiello's Defense

The evidence at trial established that Cappiello was in jail from July 13, 2015, until December 2, 2015. From December 4–6, he was in the hospital after suffering a heart attack. Thus, Cappiello argued that he never intended to deceive Julie and Mary and that he simply could not complete the work due to his confinement and medical health. Maynor Hernandez, a subcontractor who worked for Cappiello (while Cappiello was using the name "Russell"), testified that he completed six jobs for Cappiello and was always paid.

Additionally, Cappiello sought to establish that he did not intend to deceive others by using the name Russell. Cappiello's ex-wife, Leslie Cappiello, was called by the State and testified that Chad Russell was Cappiello's actual "birth name." Cappiello's birth certificate, which was introduced into evidence, established that his name at birth was, in fact, Chadley Alan Russell. However, Leslie also testified that she had never known Cappiello to identify himself as "Russell" and that she had never known Williamson to be Kristi's last name, which she understood to also be Cappiello.

Texas Ranger Jason Bobo testified that Cappiello had two valid driver's licenses—one in the name of Chadley Alan Russell and another in the name of Chad Alan Cappiello. Both of the driver's licenses were tied to the same social security number.

To establish that Cappiello's dealings with Julie and Mary were not simply business dealings gone awry as a result of the "family emergency," the State offered extraneous-offense evidence.

3. Extraneous Offenses

Nash Peterson testified that he had known Cappiello since childhood and that Cappiello had never used the name Russell. Peterson worked for Cappiello in 2012 when he was doing business as Southland Exteriors. He testified, "I had sold jobs that were not done, and it seemed that they were dragging on. . . . [M]y bills were stacking up and I wasn't getting paid. . . . [S]o I just quit." Peterson testified that he became aware that the Cappiellos were receiving a lot of negative reviews online that could be located by typing "Cappiello" into an internet search toolbar. Peterson had replied to one of the reviews by attempting to clear his name so as not to be held responsible by those that had been "defrauded."

Wyatt testified that he met Cappiello when working together on a small project in Tyler, Texas, which was actually completed. After he was paid for the Tyler project, Wyatt agreed to take on four other projects for Cappiello, finished his portion of the work, asked for payment several times, but was never paid. According to Wyatt, Cappiello used the completed Tyler project as an exposition to build trust with him and with other victims, who toured the project site prior to hiring Cappiello to work on their homes. In hindsight, Wyatt testified that Cappiello's appearance and demeanor should have raised a red flag because, instead of "show[ing] up with tape measures, [and a] truck" to contracting jobs, Cappiello always arrived in a nice Cadillac SUV while wearing

a three-piece suit, and seemed to only have vague knowledge for a contractor. Wyatt also said that Cappiello went only by Chad Russell and never revealed that Kristi was his wife.

Delia Snider testified that she hired Cappiello in January 2013 as a result of a "cold-call[]" by Kristi Williamson, who was advertising remodeling services provided by Extreme Exteriors. Snider testified that Kristi identified the company's general manager as Chad Russell, never revealed the name Cappiello, and claimed that the company was based out of Austin, Texas. Snider hired Cappiello after he appeared at her house in a suit, handed her a business card that failed to contain an address, and assured her that he was "an expert in build-outs." Snider entered into a written contract similar to the one signed by Julie and Mary and wrote an "earnest money check" for $1,500.00, which Cappiello deposited. In April, the contract was amended after Cappiello successfully upsold Snider on various upgrades and a second check for $21,730.00, written by Snider's parents, Jenaro and Margarita Soltis, was delivered by Snider. Snider testified that she instructed Cappiello that the work had to be completed by June 8, 2013, and that Cappiello represented that he would have no problems meeting that deadline.

Snider soon came to realize that Cappiello would be unable to meet the deadline. According to Snider, Cappiello first claimed that he had to obtain a building permit from the city of Temple, Texas, and later gave her the "runaround" after several weeks passed without any action. Snider said that Cappiello later claimed he was waiting on plans from engineers, but never revealed their identity despite Snider's repeated inquiries to get the information so she could contact the engineers to speed things along. No work was ever completed on Snider's contract,

and the money was never returned. Snider called the police after learning of Cappiello's other identity.

Evidence introduced at trial established that in 2015, Cappiello had pled no contest to theft of Soltis' money, in an amount of $20,000.00 or more, but less than $100,000.00, in Bell County, Texas. In 2016, Cappiello was placed on deferred adjudication community supervision in Bell County and was ordered to pay restitution to Soltis. Snider testified that she never would have hired Cappiello if she had known of his other identity and reputation.

Barbara Daniels also testified that she hired Extreme Exteriors to install a new roof as a result of an unsolicited telephone call from Kristi and a visit from Cappiello, who wore a suit, had manicured hands, and provided her with a business card that failed to include any last name. Daniels gave a deposit of $5,000.00 in January or February 2013 and received assurances that the project would begin in March. Cappiello never started the project. Daniels testified that she kept contacting Kristi, who simply claimed that Cappiello was busy. In May 2013, Daniels testified that she sent a letter to Extreme Exteriors demanding that they return her money, but that the letter, which was sent to the Austin address by certified mail, was returned as undeliverable. Daniels decided to drive to Austin to the address provided by Cappiello, discovered that the building was unoccupied, and called the police. At trial, Daniels also testified that her money was never returned.

Bobo investigated Daniels' complaint. He testified that the telephone number on the business card given to Daniels was "a Voice-over-IP . . . Internet phone," "that there were just a plethora of phone numbers that were associated to the business" that changed frequently, and that

the address used by Cappiello's businesses was fictitious. Bobo also said that a search of the name Cappiello revealed "quite a bit" of negative information, while nothing of consequence appeared when using the name "Chad Russell" as the search object. Bobo testified that it took him approximately two years to locate Cappiello.

Etta Humphries also hired Cappiello after an unsolicited telephone call by Kristi in 2015. By that time, the company name had been changed to Extreme Remodeling. Humphries testified that Cappiello came out in a shirt and tie, wore a Rolex, and drove an SUV on one occasion and a pick-up truck on another. Cappiello identified himself as Chad Russell and produced a Texas driver's license bearing that name after Humphries asked for it. Humphries entered into a contract with Extreme Remodeling on January 15, 2015, and wrote a check for $13,375.00 on that day. In April, Cappiello sold Humphries on several upgrades and cashed additional checks written to cover the cost of the more expensive materials. In total, Humphries testified that she gave Cappiello approximately $36,000.00. This time, however, work began on the project in June, but Cappiello never appeared to supervise the subcontractors as he had promised. As a result, Humphries testified that her floor was never leveled, she never received the custom paint job as she was promised, workers left "footprints" on her porch and "overspray" on her tile floor, and she was unsatisfied with the other work done. Humphries further testified that Cappiello said the workers leveled the floors with "mud," but that the floor was never flat. Nevertheless, she paid the full amount of the contract.

After hearing all of the evidence, the jury determined that Cappiello was guilty of theft as alleged in the State's indictment.

B. Standard of Review

In evaluating legal sufficiency, we review all the evidence in the light most favorable to the trial court's judgment to determine whether any rational jury could have found the essential elements of the offense beyond a reasonable doubt. *Brooks v. State*, 323 S.W.3d 893, 912 (Tex. Crim. App. 2010) (plurality op.) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)); *Hartsfield v. State*, 305 S.W.3d 859, 863 (Tex. App.—Texarkana 2010, pet. ref'd). Our rigorous legal sufficiency review focuses on the quality of the evidence presented. *Brooks*, 323 S.W.3d at 917–18 (Cochran, J., concurring). We examine legal sufficiency under the direction of the *Brooks* opinion, while giving deference to the responsibility of the jury "to fairly resolve conflicts in testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007) (citing *Jackson*, 443 U.S. at 318–19); *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007).

Legal sufficiency of the evidence is measured by the elements of the offense as defined by a hypothetically correct jury charge. *Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997). The hypothetically correct jury charge is "one that accurately sets out the law, is authorized by the indictment, does not unnecessarily increase the State's burden of proof or unnecessarily restrict the State's theories of liability, and adequately describes the particular offense for which the defendant was tried." *Id.* "The 'law as authorized by the indictment' consists of the statutory elements of the offense and those elements as modified by the indictment." *Thomas v. State*, 444 S.W.3d 4, 8 (Tex. Crim. App. 2014) (citing *Curry v. State*, 30 S.W.3d 394, 404 (Tex. Crim. App. 2000)).

The State's indictment alleged that Cappiello unlawfully appropriated "Check Number 1340" from Julie Doss, without her effective consent, by deception and with intent to deprive her of the property. The $13,575.00 check, which was affixed to the State's indictment, demonstrated that it was for a kitchen remodel.

In order to establish that Cappiello committed theft, the State had the burden to establish that (1) Cappiello, (2) with intent to deprive Julie of property, (3) unlawfully appropriated property (4) without Julie's effective consent. *See Ehrhardt v. State*, 334 S.W.3d 849, 852 (Tex. App.—Texarkana 2011, pet. ref'd). As set forth in *Taylor v. State*:

> Appropriate means "to acquire or otherwise exercise control over property other than real property." An intent to deprive an owner of his property means an intent "to withhold the property from the owner permanently or for so extended a period of time that a major portion of the value or enjoyment of the property is lost to the owner." Appropriation is unlawful if it is without the owner's effective consent. Consent is not effective "if induced by deception." There are two statutory definitions of "deception" that are relevant on the facts presented here:
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> • creating or confirming by words or conduct a false impression of law or fact that is likely to affect the judgment of another in the transaction, and that the actor does not believe to be true; and
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> • promising performance that is likely to affect the judgment of another in the transaction and that the actor does not intend to perform or knows will not be performed, except that failure to perform the promise in issue without other evidence of intent or knowledge is not sufficient proof that the actor did not intend to perform or knew the promise would not be performed.

Taylor v. State, 450 S.W.3d 528, 535–36 (Tex. Crim. App. 2014) (footnotes and citations omitted).

Here, Cappiello argues that the evidence was insufficient to demonstrate his intent "to appropriate property under a written contract by deception." "When the charged conduct concerns a matter for which the alleged victim and the accused had a contractual relationship, certain

concerns arise." *Ehrhardt*, 334 S.W.3d at 853; *see Taylor*, 450 S.W.3d at 536. "Neither the mere failure to perform a contract nor the mere failure 'to return or pay back money after failing to perform a contract, for the performance of which the money was paid in advance,' are sufficient to establish guilt of theft." *Ehrhardt*, 334 S.W.3d at 853–54 (citation omitted) (quoting *Phares v. State*, 301 S.W.3d 348, 352 (Tex. App.—Beaumont 2009, pet. ref'd)). Thus, "[a] claim of theft made in connection with a contract . . . requires proof of more than an intent to deprive the owner of property and subsequent appropriation of the property." *Taylor*, 450 S.W.3d at 536 (quoting *Wirth v. State*, 361 S.W.3d 694, 697 (Tex. Crim. App. 2012)). There must be proof that "the defendant did not perform the contract and knew he was not entitled to the money, not merely that there is a dispute about the amount rightfully owed." *Ehrhardt*, 334 S.W.3d at 854 (quoting *Jacobs v. State*, 230 S.W.3d 225, 229 (Tex. App.—Houston [14th Dist.] 2006, no pet.)).

"[W]hat separates lawful acquisitive conduct from theft is knowledge of a crucial 'circumstance surrounding the conduct'—that the acquisition is 'without the owner's consent.'" *Ehrhardt*, 334 S.W.3d at 854 (quoting *McClain v. State*, 687 S.W.2d 350, 354 (Tex. Crim. App. 1985) (footnotes omitted)). "One method of establishing theft, in connection with a contractual dispute, is to establish the 'appellant had no intention of fulfilling his obligation under the agreement, and his promise to perform was 'merely a ruse to accomplish theft by deception.'" *Id.* (quoting *Jacobs*, 230 S.W.3d at 229).

"The requisite criminal intent can be formed after the formation of a contract." *Id.* at 856. However, "the State must prove 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."

Taylor, 450 S.W.3d at 536 (quoting *Wirth*, 361 S.W.3d at 697); *see Ehrhardt*, 334 S.W.3d at 856. Because "the deprivation of property cannot occur prior to the formation of the requisite intent[,] . . . if the intent to unlawfully deprive did not develop until after the formation of the contract, there must be an additional deprivation of property in connection with the recently formed criminal intent." *Ehrhardt*, 334 S.W.3d at 856. "In reviewing the sufficiency of the evidence, though, we should look at events occurring before, during and after the commission of the offense and may rely on actions of the defendant which show an understanding and common design to do the prohibited act." *Taylor*, 450 S.W.3d at 536 (quoting *Wirth*, 361 S.W.3d at 697).

For example, while

> a contractor accused of theft may not be convicted of that offense on the theory that he acquired a down payment from his customer by deception if there is no reason to doubt from the evidence that he had every expectation at the time that the money changed hands of fulfilling his contractual obligation; at the time of the down payment, the customer paid voluntarily, and the accused neither intended nor knew he would not perform.
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> . . . .
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> a contractor may yet be found guilty of theft if, at some point after the formation of the contract, he formulates the requisite intent to deprive and appropriates additional property by deception; that is, he induces his customer to make further payment on the contract while no longer intending to perform, or at least knowing that he will not.

Id. at 536–37. Additionally,

> 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. A contractor still may be convicted of theft under circumstances—to be sure, circumstances beyond the mere "failure to perform the promise in issue"—in which a rational fact-finder could readily conclude that he never intended, even at the outset, to perform fully or satisfactorily on the contract, and always harbored the requisite intent or knowledge to deceive

> his customer and thereby deprive him of the value of at least a substantial portion of the property thus unlawfully appropriated.

Id. at 537 (citations omitted).

Thus, we focus our inquiry not on whether Cappiello deprived Julie of property, but on whether Cappiello unlawfully deprived Julie of property without her effective consent, i.e., by deception. This requires us to determine whether Cappiello ever intended to perform the contract and whether his promise to perform was an illusion.

C. Analysis

The jury heard that Cappiello never used the name "Russell" with his childhood friend or ex-wife. In 2012, Cappiello's business was called Southland Exteriors. After receiving several negative reviews online, which prompted Peterson to opine that people had been defrauded, Cappiello changed the name of the business to Extreme Exteriors, started using the name "Russell," and had Kristi make cold calls to potential customers. According to Bobo, Cappiello provided others with telephone numbers that changed frequently and business addresses that were fictitious.

In 2013, the jury heard from Snider and Daniels that Cappiello had collected money from them, failed to perform any work, and never returned their money. They testified that they called Kristi in order to get answers, but that they were given the runaround. Several witnesses complained of unacceptable delays after Cappiello's successful attempts at selling them more expensive remodels. In 2015, Cappiello had changed the name of his business again to Extreme Remodeling and enlisted Wyatt to assist him in remodeling homes. Wyatt testified that Cappiello failed to pay him for several jobs and questioned his knowledge of home remodels. Later on,

Cappiello pled no contest to theft in an amount of $20,000.00 or more, but less than $100,000.00, and was placed on deferred adjudication community supervision.

The jury heard of Julie and Mary's attempts to either get the work completed or get their money returned. Although evidence at trial established that Cappiello himself was out of commission from July through December, the evidence also demonstrated that Cappiello did not hire subcontractors to complete the necessary work as he had done for Humphries, failed to return any money, and in August 2016, sent a letter to Julie and Mary that accused them of breach of contract, demanded full payment under the contract for work not performed, and requested that they drop all charges against him.[6]

Cappiello argues that this case merely exhibits a failure to perform a contract. However, in light of the testimony of Snider and Daniels, who also paid large sums of money to Cappiello and could never get him to perform, the jury was free to determine that, (1) like with Snider and Daniels, Cappiello created a false impression by using the name Russell, changing his company's name, falsely representing that the company had offices in major Texas cities, and dressing in lavish clothing not characteristic of a contractor on the job in order to affect Julie and Mary's judgment with respect to the transaction, (2) like with Snider and Daniels, Cappiello promised performance likely to induce Julie and Mary to enter into the transaction when he did not intend to perform, (3) that Cappiello either intended to deprive Julie of the $13,575.00 obtained by her

[6]Cappiello contends that this case is similar to *Ehrhardt*, 334 S.W.3d at 856. Unlike in *Ehrhardt*, where a substantial amount of work was performed, Cappiello performed no work on Julie and Mary's contract. Thus, *Ehrhardt* is easily distinguished on the facts and a rational juror here could have determined that Cappiello had no intention of fulfilling his obligation under the agreement.

check (either when the contract was initially formed or when the check was later taken), and (4) that Cappiello knew he was not entitled to the money.

Cappiello's intent was an issue for the jury to resolve. Viewing the evidence in a light most favorable to the verdict, we conclude that a rational fact-finder could have concluded, beyond a reasonable doubt, that Cappiello's promise to perform was merely a ruse to accomplish theft by deception. Thus, the jury's finding that Cappiello had the requisite criminal intent is supported by legally sufficient evidence. We overrule Cappiello's first point of error.

II. The Trial Court Did Not Abuse Its Discretion In Allowing Evidence of Extraneous Offenses

Under Rule 404(b)(1) of the Texas Rules of Evidence, "[e]vidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." TEX. R. EVID. 404(b)(1). Cappiello objected to the introduction of evidence related to his interactions with Snider, Daniels, Humphries, and Wyatt, and to Bobo's testimony regarding his internet searches on the grounds that such evidence violated Rule 404(b)(1).

However, the trial court overruled Cappiello's objections after concluding it necessary to demonstrate intent under Rule 404(b)(2), which reads, as applicable, "This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." TEX. R. EVID. 404(b)(2). Cappiello contends that the trial court's evidentiary ruling was erroneous. We disagree.

A. Standard of Review

We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *Martinez v. State*, 327 S.W.3d 727, 736 (Tex. Crim. App. 2010). Abuse of discretion occurs only if the decision is "so clearly wrong as to lie outside the zone within which reasonable people might disagree." *Taylor v. State*, 268 S.W.3d 571, 579 (Tex. Crim. App. 2008); *Montgomery v. State*, 810 S.W.2d 372, 391 (Tex. Crim. App. 1990) (op. on reh'g). We may not substitute our own decision for that of the trial court. *Moses v. State*, 105 S.W.3d 622, 627 (Tex. Crim. App. 2003). We will uphold an evidentiary ruling if it was correct on any theory of law applicable to the case. *De La Paz v. State*, 279 S.W.3d 336, 344 (Tex. Crim. App. 2009).

B. Analysis

Rule 404(b)(2) allows for the presentation of extraneous offenses for the purposes of demonstrating intent, or the absence of mistake or accident.[7] Moreover, the theft statute contains another rule regarding extraneous offenses. *See Lopez v. State*, 316 S.W.3d 669, 678 (Tex. App.—Eastland 2010, no pet.). Section 31.03(c)(1) states that for purposes of establishing that appropriation of property is unlawful, "evidence that the actor has previously participated in recent transactions other than, but similar to, that which the prosecution is based is admissible for the purpose of showing knowledge or intent and the issues of knowledge or intent are raised by the actor's plea of not guilty." TEX. PENAL CODE ANN. § 31.03(c)(1).

"In a theft case arising from a construction contract, the issue of the defendant's intent at the time he received funds under the contract in consideration of his promise to perform future

[7]The trial court provided the jury with Rule 404(b) limiting instructions.

work will invariably be a contested issue at trial." *Lopez*, 316 S.W.3d at 678–79. Thus, extraneous offense evidence may be admitted under either Rule 404(b)(2) or Rule 31.03(c)(1). *Id.*

Cappiello's argument on appeal asserts (1) that the Snider and Daniels transactions were not recent transactions as required by Section 31.03(c)(1), (2) that the Humphries transaction "was completed satisfactorily" and "was no more than an opportunity for the witness to speak badly of" Cappiello, (3) that the Wyatt testimony regarding an extraneous act of not being paid was neither recent nor similar to the indicted offense, and (4) that Bobo's internet testimony "was truly a general slander" of Cappiello.

With respect to the Snider and Daniels transactions, although the term "recent" is not defined in Section 31.03(c)(1), Texas courts have held that events occurring a little more than two years prior to the offense in question fall within the category of recent events, whereas events occurring six years prior to the offense cannot be considered recent. *Cf. Benson v. State*, 240 S.W.3d 478, 484 (Tex. App.—Eastland 2007, pet. ref'd) *with Ballard v. State*, 945 S.W.2d 902, 905 (Tex. App.—Beaumont 1997, no pet.). Here, Cappiello took Snider's and Daniels' money deposits in January 2013 and Mary and Julie's money in May 2015. No bright line temporal rule has been set with respect to what constitutes a recent period under Section 31.03(c)(1). However, we need not decide whether the Snider and Daniels transactions qualify as evidence admissible under Section 31.03(c)(1), because even if they do not, such evidence was admissible under Rule 404(b) to demonstrate Cappiello's modus operandi, intent, and lack of mistake or accident. *See Lopez*, 316 S.W.3d at 678; *Hegar v. State*, 11 S.W.3d 290 (Tex. App.—Houston [1st Dist.] 1999, no pet.).

Next, Cappiello mistakenly asserts that the Humphries transaction was completed in a satisfactory manner. Yet, Humphries testified that she paid for a custom paint job, Cappiello's supervision of the subcontractors at the job site, and the leveling of her home, but never received those services. Humphries' testimony also demonstrated that Cappiello had changed the company name and was using the name "Russell," possibly to prevent others from learning about negative online reviews. She also recalled her frustration in dealing with the company in attempting to secure the services promised to her. Like Snider, Daniels, and Julie and Mary, Humphries paid for services that she never received. Thus, the trial court properly concluded that this evidence was admissible under Rule 404(b)(2).[8]

With respect to Wyatt, evidence of non-payment demonstrated that Cappiello had not used the fifty-percent initial installment to purchase materials to begin the projects on several jobs. According to Wyatt, because he had never been contacted by Cappiello after Julie and Mary paid him, he must have lied when telling them that the project would commence on certain dates. Under Rule 404(b)(2), the trial court did not err in determining that this evidence was admissible to demonstrate lack of mistake or accident and an intent not to perform the contract.

Last, without any analysis with respect to Rule 404(b)(2), Cappiello merely states that Bobo's internet testimony "was truly a general slander." Yet, the trial court was free to admit this testimony to shed light on whether Julie and Mary's consent was induced by deception, i.e., whether Cappiello had an intent to create a false impression of fact likely to affect customer

[8]Her testimony was also admissible to demonstrate that if Cappiello had the intent to perform the contract with Julie and Mary, he could have hired subcontractors to do so.

judgment when distancing himself from prior online reviews by changing the business name and using the name Russell to secure new customers.

We conclude that the trial court did not abuse its discretion in admitting evidence of these extraneous offenses under Rule 404(b)(2). Accordingly, we overrule Cappiello's second point of error.

III. The Judgment Must Be Modified

In his last point of error, Cappiello argues that the judgment must be modified. We agree. The judgment recites that the statute of offense is Section 31.03(f) of the Texas Penal Code. However, the record reflects that the correct statute of offense is Section 31.03(e)(4)(A) under a prior version of the theft statute. *See* Act of May 29, 2011, 82d Leg., R.S., ch. 1234, § 21, 2011 Tex. Gen. Laws 3302, 3310 (amended 2015) (current version at TEX. PENAL CODE § 31.03).[9]

The Texas Rules of Appellate Procedure give this Court authority to modify judgments to make the record speak the truth when the matter has been called to our attention by any source. TEX. R. APP. P. 43.2; *French v. State*, 830 S.W.2d 607, 609 (Tex. Crim. App. 1992); *Rhoten v. State*, 299 S.W.3d 349, 356 (Tex. App.—Texarkana 2009, no pet.). We sustain Cappiello's third point of error and modify the statute of offense from Section 31.03(f) to Section 31.03(e)(4)(A).

[9]Under either the prior or current version of the theft statute, Cappiello's offense was classified as a state jail felony under Section 31.03(e)(4)(A).

IV. Conclusion

We modify the trial court's judgment to reflect that Section 31.03(e)(4)(A) of the Texas Penal Code is the correct statute of offense. As modified, we affirm the trial court's judgment.

Bailey C. Moseley
Justice

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Date Decided: November 30, 2017

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