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

No. 06-22-00044-CR

DESEAN LAVERNE MCPHERSON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 6th District Court
Lamar County, Texas
Trial Court No. 27362

Before Morriss, C.J., Stevens and van Cleef, JJ.
Opinion by Justice van Cleef

O P I N I O N

Desean Laverne McPherson appeals his conviction of tampering with or fabricating physical evidence and the resulting ten-year prison sentence, suspended in favor of five years' community supervision. Because we find that the evidence (1) is legally insufficient to support McPherson's conviction of tampering with evidence but (2) is legally sufficient to support a conviction of the lesser-included offense of attempted tampering with evidence, we reverse McPherson's tampering conviction and remand to the trial court with instructions to modify the judgment to reflect a conviction of the offense of attempted tampering with evidence and to conduct a new punishment hearing.

I. Procedural and Factual Background

This is McPherson's third appeal in this Court. In his first appeal, McPherson argued—as his sole point of error—that the State failed to prove he knew a law enforcement investigation was in progress at the time of the alleged tampering. We disagreed and affirmed McPherson's conviction. *See McPherson v. State*, No. 06-18-00218-CR, 2019 WL 2220119, at *4 (Tex. App.—Texarkana May 23, 2019, no pet.) (mem. op., not designated for publication). Next, McPherson appealed the trial court's denial of his application for a writ of habeas corpus in which McPherson claimed ineffective assistance of counsel pursuant to Article 11.072 of the Texas Code of Criminal Procedure. *See* TEX. CODE CRIM. PROC. ANN. art. 11.072 (Supp.). In that appeal, McPherson argued that his appellate counsel was ineffective for failing to raise a point of error challenging the sufficiency of the evidence to prove the element of concealment. We agreed, reversed the trial court's order, and granted McPherson an out-of-time appeal of his

judgment of conviction to address the issue of whether the State proved McPherson concealed or attempted to conceal evidence. *Ex parte McPherson*, No. 06-20-00092-CR, 2022 WL 107108, at *18 (Tex. App.—Texarkana Jan. 12, 2022, no pet.) (mem. op., not designated for publication). This appeal ensued.

We recounted the facts of McPherson's case in detail in his habeas appeal. For purposes of this appeal, we quote the facts as stated in that opinion.

> The evidence at trial showed that Trooper Michael Townes of the Texas Highway Patrol stopped McPherson for speeding after McPherson sped past Townes in his truck going eighty-four miles per hour (m.p.h.) in a seventy-five-m.p.h. zone. *McPherson*, 2019 WL 2220119, at *1. "Attempting to stop the truck, Townes turned on his patrol car's overhead lights and pulled his patrol car behind the truck . . . ." *Id.* McPherson eventually moved to the shoulder of the road but continued traveling there for approximately one or two miles. As Townes followed McPherson on the shoulder of the road, he noticed some brown objects fly out of the truck's window and hit the windshield of his patrol vehicle. At that point, Townes activated the siren "to mark the location of where it initially happened." The truck stopped shortly thereafter. After issuing McPherson a citation for speeding, Townes "turned around and went back to the area where [he saw] the objects fly out and went to look[] on the shoulder and in the bar ditch as far as the objects that . . . [he] had seen thrown out, and [he] discovered . . . five joints and one little short one that would have been smoked." Townes identified the objects as marihuana wrapped in brown cigar paper.
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> The dash camera recording from Townes's patrol vehicle reflects that, when Townes returned to the area where the objects hit his windshield, he exited his vehicle at 2:10 p.m. Approximately eight seconds later, he picked up the first object. Townes's testimony relative to that discovery was that, once he "step[ped] out of the car, immediately right there on the shoulder where [he sat] there[] [was] one [joint] on the shoulder." Approximately seventeen seconds later, he picked up the second object. Approximately ten seconds after that, he picked up the third object. Townes located the discarded objects, which he described as "joints," in less than forty seconds, the first having been located after eight seconds. After having found those objects, Townes pulled his car up a few feet and searched for additional objects for less than a minute. The recording does not reflect any additional discoveries. Townes returned to his vehicle, bagged the evidence, and placed it in the trunk of his vehicle.

> A different view from the front dash camera shows Townes in front of his vehicle displaying five "cigarillo joints" described by Townes as four to five inches long, with the circumference of a pencil, and one smaller blunt. The State's exhibit six depicts one of the objects thrown from McPherson's truck in mid-air, as captured by Townes's dash camera. The State's exhibit seven shows another such discarded object in mid-air, headed for Townes's windshield. According to Townes, he "saw the brown cigarillo hit the windshield right in front of [him]." Townes testified that those were "cigarillos" that McPherson threw from the driver's side window of his car. They could not have been "random cigarillos thrown out [of somebody else's] window" because Townes saw "them thrown out of the driver's window," hitting the windshield of [his vehicle].

Id. at *1–2. In this appeal, McPherson argues that this evidence does not prove, beyond a reasonable doubt, that the cigarillos tossed from his vehicle were hidden, removed from sight or notice, or kept from discovery or observation.

II. The Evidence Was Insufficient to Prove Actual Concealment

"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." *Williamson v. State*, 589 S.W.3d 292, 297 (Tex. App.—Texarkana 2019, pet. ref'd) (citing *Brooks v. State*, 323 S.W.3d 893, 912 (Tex. Crim. App. 2010) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). "Our rigorous [legal sufficiency] review focuses on the quality of the evidence presented." *Id.* (citing *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.'" *Id.* (quoting *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007)).

In *Brooks*, Judge Cochran explained:

> Legal sufficiency of the evidence is a test of adequacy, not mere quantity. Sufficient evidence is "such evidence, in character, weight, or amount, as will legally justify the judicial or official action demanded." In criminal cases, only that evidence which is sufficient in character, weight, and amount to justify a fact[-]finder in concluding that every element of the offense has been proven beyond a reasonable doubt is adequate to support a conviction. There 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*. All civil burdens of proof and standards of appellate review are lesser standards than that mandated by *Jackson*.

Brooks v. State, 323 S.W.3d 893, 917 (Tex. Crim. App. 2010) (Cochran, J., concurring) (footnote omitted) (citation omitted).

"Legal sufficiency of the evidence is measured by the elements of the offense as defined by a hypothetically correct jury charge." *Williamson*, 589 S.W.3d at 298 (quoting *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.* (quoting *Malik*, 953 S.W.2d at 240).

The jury, as "the sole judge of the credibility of the witnesses and the weight to be given their testimony[, could] 'believe all of [the] witnesses' testimony, portions of it, or none of it.'" *Id.* at 297 (second alteration in original) (quoting *Thomas v. State*, 444 S.W.3d 4, 10 (Tex. Crim. App. 2014). "We give 'almost complete deference to a jury's decision when that decision is based upon an evaluation of credibility.'" *Id.* (quoting *Lancon v. State*, 253 S.W.3d 699, 705 (Tex. Crim. App. 2008)).

The indictment charged that McPherson, "knowing that an investigation was in progress, . . . intentionally and knowingly conceal[ed] marijuana . . . by throwing the marijuana out the vehicle window before being stopped by a law enforcement officer, with intent to impair its availability as evidence in the investigation." *See* TEX. PENAL CODE ANN. § 37.09(a)(1) (Supp.). Here, the charge would instruct the jury to find McPherson guilty of tampering with physical evidence as charged if: (1) knowing that an investigation was pending or in progress, (2) he concealed the marihuana, (3) with intent to impair its availability as evidence in the investigation. *See id.* The narrow issue before us is whether the State proved, beyond a reasonable doubt, that McPherson concealed the marihuana cigarillos that he tossed from his truck window as he was being stopped by Townes.

"Conceal" is not defined by the statute or elsewhere in the Texas Penal Code. In *Lewis v. State*, this Court adopted the *Hollingsworth* definition of "conceal" to mean "[t]o hide or keep from observation, discovery, or understanding; to keep secret." *Lewis v. State*, 56 S.W.3d 617, 625 (Tex. App.—Texarkana 2001, no pet.) (quoting *Hollingsworth v. State*, 15 S.W.3d 586, 595 (Tex. App.—Austin 2000, no pet.) (utilizing the dictionary definition of "conceal")). Since that time, the Texas Court of Criminal Appeals has adopted much the same definition. It has determined that "[a]ctual concealment requires a showing that the allegedly concealed item was hidden, . . . removed from sight or notice, or kept from discovery or observation." *Stahmann v. State*, 602 S.W.3d 573, 581 (Tex. 2020) (agreeing with appellate court's definition of concealment).[1] Under this definition, the State must prove that McPherson actually concealed

[1]Both parties rely on this definition of "conceal" in their briefing to this Court.

the marihuana. *See id.*; *Denny v. State*, 630 S.W.3d 253, 261 (Tex. App.—Eastland 2020, pet. ref'd) (finding that State must prove intent to impair availability of evidence and that defendant actually concealed evidence).

Stahmann informs our analysis. In that case, Stahmann was involved in an automobile accident, following which witnesses saw him exit his vehicle, walk over to a wire fence, and toss a pill bottle containing promethazine. The bottle landed in plain view on top of the grass. *Stahmann*, 602 S.W.3d at 576. Both witnesses stated that they never lost sight of the pill bottle. When a police officer arrived on scene, witnesses told the officer about the bottle and pointed it out to him. *Id.* Following his conviction of tampering by concealment, the appellate court determined that Stahmann did not conceal the pill bottle, reversed his conviction, and "remand[ed] the cause to the trial court with instructions to reform the judgment to reflect a conviction . . . of attempted tampering with physical evidence, a state-jail felony." *Stahmann v. State*, 548 S.W.3d 46, 71 (Tex. App.—Corpus Christi 2018), *aff'd*, 602 S.W.3d 573 (Tex. Crim. App. 2020).

As in the appellate court, the critical issue before the Court of Criminal Appeals was whether Stahmann concealed the pill bottle. The State argued that to conceal the bottle meant that it was "remov[ed] from sight or notice, even if only temporarily, and that the statute refers to concealing evidence from law enforcement." *Stahmann*, 602 S.W.3d at 580. "According to the State's argument, it does not matter that [the witnesses] never lost sight of the pill bottle, that they directed [the officer] to the bottle, that [the officer] could see it 'very clearly,' or that the bottle was easily retrieved, because Stahmann concealed it from [the officer] when he threw it

over the fence before [the officer] arrived to investigate." *Id.* at 579. The court wrote, "What the witnesses saw and told law enforcement informs whether the physical evidence was concealed from law enforcement." *Id.*

The State relied on *Lujan v. State*, No. 07-09-0036-CR, 2009 WL 2878092 (Tex. App.—Amarillo Sept. 9, 2009, no pet.) (mem. op., not designated for publication), for the proposition that "a defendant need not successfully conceal something to be guilty of tampering with evidence by concealment." *Stahmann*, 602 S.W.3d at 581. In *Lujan*, a police officer observed Lujan riding his bicycle in a location known for drug activity. *Lujan*, 2009 WL 28789092, at *1. Lujan was riding against traffic and looking over his shoulder at the officer. The officer parked his squad car, got out, and continued watching Lujan as he stopped in the parking lot of a club. *Id.* When Lujan engaged in what appeared to be drug-related activity, the officer approached him. *Id.* Lujan then made a motion "as if he was throwing something." *Id.* When the officer made contact with Lujan, he saw a crack pipe on the ground in the "area towards which Lujan made his throwing motion." *Id.* The court observed that, even though the crack pipe was both intact and visible, the jury could have lawfully inferred that Lujan attempted to prevent the pipe's discovery by throwing it away. *Id.* at *2.

The Texas Court of Criminal Appeals' rejection of *Lujan* was based not only on the fact that nothing was concealed, but also on the court's conflation of the elements of intent and concealment. Those are "two distinct elements of the offense," and "the *Lujan* Court erred if it concluded otherwise." *Stahmann*, 602 S.W.3d at 581. Having rejected *Lujan* as a basis for affirming Stahmann's conviction, the court determined that, "[w]hile a rational jury could have

reasonably inferred that Stahmann intended to conceal the pill bottle when he threw it over the wire fence, the evidence shows that he failed to conceal it as he intended because the bottle landed short of the bush in plain view on top of some grass." *Id.* "The evidence [was therefore] insufficient to prove that Stahmann concealed the pill bottle." *Id.*[2] In so concluding, the court stated, "The outcome of this case might be different had [the witnesses] not been there, had they lost sight of what Stahmann threw or where it landed, had they not spoken to [the officer] and directed him to the pill bottle when he arrived, or had [the officer] had a difficult time locating it." *Id.* at 579. We read this language to suggest that the determination of whether an item was actually concealed is one that is highly fact specific.

Here, McPherson argues that *Stahmann* supports his position that (1) he did not conceal the marihuana cigarillos because Townes saw him throw the cigarillos from the car window, (2) Townes saw the cigarillos hit the windshield of his patrol vehicle, and (3) Townes knew where they were discarded and easily retrieved them. McPherson claims that "nothing was hidden, removed from sight or notice, or kept from discovery or observation." Although this case is factually distinct from *Stahmann*, these cases have at least three commonalities: (1) in both cases, the item(s) were discarded in view of a police officer or witnesses who saw and told law enforcement what they knew, (2) in both cases, the discarded item(s) landed in an area in which the item(s) were not concealed from plain view, and (3) in both cases, the discarded item(s) were easily retrieved by law enforcement.

[2]The court did not grant review of the appellate court's holding reforming Stahmann's conviction.

In our review of tampering by concealment cases, these factors are likewise present in cases in which evidence of concealment was found to be legally insufficient. *See Hollingsworth v. State*, 15 S.W.3d 586, 595 (Tex. App.—Austin 2000, no pet.) (finding no concealment where police officer saw Hollingsworth spit cocaine out of his mouth, thus exposing it to view); *Blanton v. State*, Nos. 05-05-01060-CR, 05-05-01061-CR, 2006 WL 2036615 (Tex. App.—Dallas July 21, 2006, pet. ref'd) (not designated for publication)[3] (finding no concealment where Blanton threw two plastic baggies containing cocaine from his car window in officer's view while being stopped for a traffic violation and officer later retrieved baggies); *Thornton v. State*, 377 S.W.3d 814 (Tex. App.—Amarillo 2012), *judgment vacated on other grounds by Thornton v. State*, No. PD-1517-12, 2013 WL 105874 (Tex. Crim. App. Jan. 9, 2013) (per curiam) (not designated for publication) (finding no concealment where Thornton took a crack pipe from his pocket and dropped it on the ground in view of officer and officer retrieved pipe); *Villarreal v. State*, No. 13-15-00014-CR, 2016 WL 8919852 (Tex. App.—Corpus Christi, Dec. 8, 2016, no pet.) (mem. op., not designated for publication) (finding no concealment where Walmart loss prevention officer saw Villarreal toss a pill bottle underneath a car, picked up the bottle, which had landed in plain view, and gave it to police officer); *Harper v. State*, No. 05-19-00323-CR, 2020 WL 4013145, at *4–5 (Tex. App.—Dallas July 16, 2020, no pet.) (mem. op., not designated for publication) (finding no concealment where Harper tossed a pill onto the roadway during a traffic stop, thus exposing it to view).

[3]"Although unpublished opinions have no precedential value, we may take guidance from them 'as an aid in developing reasoning that may be employed.'" *Rhymes v. State*, 536 S.W.3d 85, 99 n.9 (Tex. App.—Texarkana 2017, pet. ref'd) (quoting *Carrillo v. State*, 98 S.W.3d 789, 794 (Tex. App.—Amarillo 2003, pet. ref'd)).

In another line of cases, courts have found that evidence tossed from a moving vehicle was, in fact, concealed. *See Turner v. State*, No. 03-18-00266-CR, 2018 WL 3029057, at *3 (Tex. App.—Austin June 19, 2018, no pet.) (mem. op., not designated for publication) (finding sufficient evidence of concealment when officer stopped Turner on largely unlit rural road at night for speeding, found drugs in the car, and because he "suspected" Turner threw objects from window, instructed a second officer to search area where evidence was found in ditch); *Howell v. State*, Nos. 05-09-00342-CR, 05-09-00343-CR, 05-09-00344-CR, 2010 WL 3222412, at *2 (Tex. App.—Dallas Aug. 17, 2010, no pet.) (mem. op., not designated for publication) (finding sufficient evidence of concealment when officer, who never saw Howell throw anything from truck, arrested Howell for no license plate and returned to pursuit area the following day where he found a box he believed was thrown from Howell's truck); *Munsch v. State*, No. 02-12-00028-CR, 2014 WL 4105281 (Tex. App.—Fort Worth Aug. 21, 2014, no pet.) (mem. op., not designated for publication) (finding sufficient evidence of concealment where driver of car in which Munsch was a passenger, after Munsch was arrested, told officers Munsch had thrown baggie of methamphetamine out window, which officers located with assistance from driver); *Martin v. State*, Nos. 09-13-00180-CR, 09-13-00181-CR, 09-13-00182-CR, 09-13-00183-CR, 2014 WL 2152099, at *3 (Tex. App.—Beaumont May 21, 2014, pet. ref'd) (mem. op., not designated for publication) (finding sufficient evidence of concealment where officer, while pursuing Martin's vehicle, saw Martin throw spoon and syringes from window and syringes were later recovered; court stated that jury could infer that Martin tampered by "attempting to dispose of evidence"). These cases are easily distinguished from the present case because they either

involve items that were not discarded in view of officers or they fail to indicate whether the discarded items were in plain view and easily retrieved.

It would appear that, under the facts presented here, the evidence does not support concealment. McPherson's act of tossing the marihuana cigarillos from his window exposed them to Townes's view. The cigarillos landed on the shoulder of the road, were not concealed from plain view, and were easily retrieved by Townes. Yet, the State claims that the evidence proved that McPherson concealed the cigarillos because Townes did not maintain visual contact with the "brown objects" thrown from McPherson's window—one or more of which struck Townes's windshield—and instead had to return to the area where they were discarded and look for them.

In support of this argument, the State relies on *Benitez v. State*, No. 11-18-00181-CR, 2020 WL 4038850, at *3 (Tex. App.—Eastland July 16, 2020, pet. ref'd) (mem. op., not designated for publication). In *Benitez*, a narcotics agent stopped for failing to signal a turn a car in which Benitez was a passenger. *Id.* at *1. As he pursued the vehicle, the narcotics agent observed a hand emerge from the passenger window and discard some "clear bags." *Id.* Additional officers joined the pursuit while the narcotics agent returned to the location where the clear bags had been discarded. The agent recovered a bag containing a small amount of methamphetamine. *Id.*

On appeal, Benitez claimed that he did not conceal the methamphetamine, but instead "merely exposed that which was hidden from the officer's view in that vehicle." *Id.* at *2. The appellate court disagreed and observed that it had already concluded, in *Hines*, that "a dispositive

inquiry is whether law enforcement noticed the object before the defendant tried to hide it and maintained visual contact." *Id.*; *Hines v. State*, 535 S.W.3d 102, 110 (Tex. App.—Eastland 2017, pet. ref'd) (finding sufficient evidence of concealment after Hines "scattered the methamphetamine underneath his body in the backseat of the patrol car and . . . the police did not notice it until after he got out at the jail").[4] Using the *Stahmann* definition of "conceal," the court stated that a person can "conceal[] evidence if he removes the item from sight" and concluded that Benitez concealed evidence because the narcotics agent "did not maintain visual contact of the discarded bags . . . [because he] had to return to the area where [Benitez] dropped the bags." *Benitez*, 2020 WL 4038850, at *3. The court reasoned that "a rational jury could have inferred that [Benitez] concealed the methamphetamine because officers did not maintain visual contact with it but, rather, had to search for it after [Benitez] threw it out of the window of a car that was being pursued by the police." *Id.*

Because determinations regarding concealment are highly fact specific, and because the facts of *Benitez* were not described in detail, we do not necessarily disagree with the result. For example, the opinion does not state whether the bags were discarded in broad daylight or at night, it does not state whether the bags were discarded in an area in which they were concealed from plain view, and it does not state whether the bags were easily retrieved by law enforcement. But in this case, we decline to hold that Townes's failure to maintain visual contact with the cigarillos is outcome determinative because it ignores the fact-specific nature of our analysis.

[4]In contrast to *Blanton*, where the defendant threw a bag with cocaine from his car window exposing the bag to the officer's view, the evidence in *Hines* showed that the investigating officer did not immediately recognize or see the methamphetamine that Hines had discarded. *Hines*, 535 S.W.3d at 110–11.

As a part of the definition of "conceal," to "remove from sight or notice" implies that a defendant has taken action to remove the item from sight in order to conceal it. In this case, McPherson did not remove the cigarillos from Townes's sight. Instead, he revealed that which was previously concealed from Towne's view. Although Townes returned to the location where the cigarillos landed on the shoulder of the roadway, he had seen them thrown out of the window, he knew where they were located, and he quickly retrieved them from the shoulder of the road where they were in plain view. Townes could have immediately stopped at the spot where the cigarillos were discarded, but instead—rightfully so—chose to pursue McPherson. That is to say, had McPherson stopped at the location where the cigarillos were discarded at the moment they were discarded, in plain view, the State could not credibly argue that the cigarillos were removed from Townes's sight. We do not believe the result here should be different merely because Townes chose to pursue McPherson before retrieving the cigarillos. Townes easily retrieved the cigarillos, which were in plain view where Townes knew they had been discarded. Under these facts, we cannot say that the cigarillos were concealed.

As in *Stahmann*, we conclude that, although "a rational jury could have reasonably inferred that [McPherson] intended to conceal the [cigarillos] when he threw" them out of the window, "the evidence shows that he failed to conceal [them] as he intended because the [cigarillos] landed . . . in plain view" on the shoulder of the road. *See Stahmann*, 602 S.W.3d at 581.

III. The Evidence Was Sufficient to Prove Attempted Tampering with Evidence

"If an appellate court concludes that the evidence was legally insufficient to support a conviction, it must determine whether the judgment should be reformed to reflect a conviction for a lesser-included offense." *Stahmann*, 548 S.W.3d at 59 (citing *Canida v. State*, 434 S.W.3d 163, 166 (Tex. Crim. App. 2014)). Reformation of the judgment is required if we answer yes to two questions:

> 1) in the course of convicting the appellant of the greater offense, must the jury have necessarily found every element necessary to convict the appellant for the lesser-included offense; and 2) conducting an evidentiary sufficiency analysis as though the appellant had been convicted of the lesser-included offense at trial, is there sufficient evidence to support a conviction for that offense?

Thornton v. State, 425 S.W.3d 289, 300 (Tex. Crim. App. 2014).

We must first determine whether the jury necessarily found every element of attempted tampering with evidence by concealment, which are: (1) knowing that an investigation or official proceeding was pending or in progress, (2) with specific intent to conceal the cigarillos, and (3) with specific intent to impair the availability of the cigarillos as evidence in the investigation or official proceeding, McPherson (4) did an act amounting to more than mere preparation that (5) tended, but failed, to result in concealment of the cigarillos. *See* TEX. PENAL CODE ANN. §§ 15.01(a), 37.09(a)(1); *Rabb v. State*, 483 S.W.3d 16, 21 (Tex. Crim. App. 2016) (citing *Thornton*, 425 S.W.3d at 300–01). "[T]he jury explicitly found" the first three elements of attempted concealment "when it found [McPherson] guilty of actual concealment." *Thornton*, 425 S.W.3d at 301. "Similarly, with respect to the fourth element, we have no difficulty in concluding that the jury must have found this predicate . . . element to attempted tampering—an

act amounting to more than mere preparation—to have been proven, since it found that [McPherson's] intentional conduct succeeded in concealing the [cigarillos]." *Id.* at 301–02. With respect to the fifth and final element, "by operation of Section 15.01(c)[5] [of the Penal Code], the jury's finding of actual commission subsumes a finding that [McPherson's] conduct 'tend[ed] but fail[ed]' to effect the commission of tampering with evidence." *Id.* at 302. As a result, "the jury must necessarily have found that [McPherson's] actions 'tend[ed] but fail[ed].'" *Id.* We, therefore, find that the first prong of *Thornton* has been satisfied because the jury, in finding McPherson guilty of tampering by concealment, "necessarily found every element necessary to convict the appellant for the lesser-included offense." *Id.* at 300.

We further have no difficulty concluding that McPherson's conduct as outlined above, and in (1) failing to stop when he saw Towne's overhead lights, (2) rolling all four of the truck's windows down when they had previously been rolled up, and (3) throwing the cigarillos from his car window as he was being stopped by Townes, is legally sufficient evidence to support the offense of attempted tampering with physical evidence. As a result, the second *Thornton* prong is satisfied, and the judgment must be reformed to reflect a conviction for the lesser-included offense of attempted tampering with evidence.[6]

IV. Conclusion

We reverse the trial court's judgment convicting McPherson of tampering with evidence. We remand this cause to the trial court with instructions to reform the judgment to reflect a

[5]Section 15.01(c) of the Penal Code states, in relevant part, that "[i]t is no defense to prosecution for criminal attempt that the offense attempted was actually committed." TEX. PENAL CODE ANN. § 15.01(c).

[6]Reformation is required "to avoid the 'unjust' result of an outright acquittal." *Thornton*, 425 S.W.3d at 300.

conviction of the offense of attempted tampering with evidence, a state-jail felony, and to conduct a new punishment hearing attendant to the post-reformation conviction. *See* TEX. PENAL CODE ANN. § 15.01, § 37.09 (Supp.); *Thornton*, 425 S.W.3d at 307.

Charles van Cleef
Justice

Date Submitted: September 8, 2022
Date Decided: September 29, 2022

Publish