TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-15-00066-CR

Shawn Danene Harty, Appellant

v.

The State of Texas, Appellee

FROM THE DISTRICT COURT OF TRAVIS COUNTY, 147TH JUDICIAL DISTRICT
NO. D-1-DC-13-300338, HONORABLE CLIFFORD A. BROWN, JUDGE PRESIDING

M E M O R A N D U M O P I N I O N

A jury convicted Shawn Danene Harty of theft arising from her actions in an adoption hoax, *see* Tex. Penal Code § 31.03(e)(4)(a), and the district court assessed punishment at fourteen months in the state jail division of the Texas Department of Criminal Justice. In one issue, Harty complains that the evidence at trial was legally insufficient to support her conviction for theft as charged in the indictment. We will affirm the judgment.

BACKGROUND

Harty's indictment for theft alleged, in relevant part, that she unlawfully appropriated between $1,500 and $20,000 from Gilley Montague without his consent. The theft stemmed from Harty's representations to Montague that Harty had a foundation with guardianship of two little girls who were available for adoption by Montague, his wife, and their two sons. The girls did not exist. At trial, the jury heard testimony about Harty's false representations to the Montagues, resulting in

Montague providing $1,720 to Harty as partial payment for the opportunity to adopt the girls that he later learned did not exist.

Montague is introduced to Harty and prepares to adopt two girls

Montague testified that late one summer he and his wife were considering adopting children, and Mary Phillips, a family friend who had recently met Harty, told them that Harty might be able "to place children outside of the CPS [Child Protective Services] system." Montague stated that his wife received a call from Phillips shortly afterward about the possibility of adopting two girls. Montague testified that he asked Phillips if Harty could tell them the names of the girls so that he, his wife, and their two young sons could pray for them. Montague stated that he was told the girls were named Ashleigh and Morgan. He also stated that Phillips gave him Harty's contact information, and he began communicating with Harty.

Montague said that Harty told him she ran the "Truth, Family, Love, and Justice Foundation," which had guardianship of two girls, ages six and eight, who had been in CPS custody and might be split up for adoption. Montague stated that Harty told him she could facilitate the adoption of both girls together. Montague testified that Harty said the girls had been taken into CPS custody after their father murdered their mother while the girls were in a bedroom at home and that "the girls had to walk through the brutal crime scene." Montague also testified that Harty said she had authority to find a home for these children through her foundation. Montague recalled Harty saying that she had been involved in adoptions for twenty years, and he noted that Harty seemed to know people involved in the legal process for adoptions, including Dr. George Parker, a therapist in the criminal justice system that Harty said was evaluating the girls; Dr. James Maynard, a

counselor that Harty said was treating the girls; and Travis County Court at Law Judge Carlos Barrera, whom Harty said was handling this case in his court and had signed orders for Dr. Maynard's treatment of Ashleigh and Morgan. Harty told Montague that she had placed two adoptive children in Judge Barrera's home through her foundation. Montague also recalled her saying that she had visited with Judge Barrera about the Montague family and that he wanted the Montagues to speak on behalf of a local adoption group, Adoption Knowledge Affiliates, because Montague was also adopted as a child. Montague testified that he verified the existence of Harty's Truth, Family, Love, and Justice Foundation in the corporate records, that he ran a Google search on Dr. Parker and Dr. Maynard confirming their existence as mental-health providers, and that he knew Judge Barrera was an actual judge, all of which gave him some confidence in what Harty was telling him.

Montague wanted to see the girls, and he said that he asked Harty for pictures, which she was able to give him. The pictures of the girls were admitted into evidence. Montague recalled Harty commenting with regard to those pictures that "Ashleigh favored her mother." Montague said that he made several copies of the girls' pictures and placed them on the refrigerator, at work, and on the phone. He stated that he and his family were excited about the possibility of adopting these girls, who "were ours already in our hearts," and that on a summer trip to the Texas State Aquarium, his sons spent all their money on toys for their two little sisters: one of his sons bought a stuffed tortoise for Morgan and a stuffed dolphin for Ashleigh, while the other son bought a little glass dolphin for Morgan and a wooden dolphin for Ashleigh.

Harty told Montague that her attorney had been in contact with another family that was also interested in adopting the girls, but Harty said that she liked the Montagues, that the "power of the decision was in her hands," and that "in 20 years of placing kids in adoptive homes, I've never felt more comfortable about a placement than I have with your family." Harty said that the girls could be in the Montagues' home by October 1st, in just a couple of months. Montague testified that his family prepared for the girls' arrival by purchasing furniture for their bedroom, having a mural painted on their bedroom wall, filling the closet with clothing for them, and trading in his paid-off truck to buy a van that would accommodate all the children. Montague said that he informed Harty about all of these preparations.

Montague provides $1,720 to Harty for costs allegedly incurred in adoption

Montague testified that in addition to his frequent communication with Harty, he and his family met with Harty three times at different restaurants. At one of those meetings, Montague recalled that Harty gave him an adoption checklist, requiring him and all members of his household to provide her with, among other things, their social security numbers, dates of birth, driver's license numbers, and information about their employment, health conditions, and life insurance. The completed adoption checklist that Montague provided to Harty was admitted into evidence. Montague testified that Harty told him she had to do a thorough background check "through DPS and the FBI" which, along with Dr. Parker's fees, would cost some money.

Montague identified an e-mail that Harty sent to him at the end of August containing her $3,000 estimate of expenses for the adoption, and listing costs incurred to that point of $1,720,[1] consisting of background checks, Dr. Parker's "first" visit with the girls and his report to the court for the adoption.[2] Harty's e-mail, which was admitted into evidence, informs Montague, "I have paid for everything but the filing fees. They are later on. It would be great if you could work on getting that money together."

Five days later, Montague met with Harty at a restaurant and gave her a check for $1,720. A copy of the check, along with other bank records, was admitted into evidence. The bank records show that Harty deposited Montague's check the same day that Montague wrote it, less $200 cash. Montague testified that as he was writing the check to Harty that day, he mentioned how his sons had bought the tortoise and dolphin toys for the girls. He stated that Harty responded with a story of her own, telling him with tears in her eyes that she was able to obtain one thing from the girls' mother's possessions after she died, which was "a huge collection of dolphins of all sizes. I have boxes of dolphins." Montague testified that he was moved to tears by this story and took it as a kind of "sign."

Harty followed up that meeting with two e-mails to Montague the next week, also admitted into evidence, stating that Dr. Parker was making preparations and that she was "working hard to get the girls placed. Once we complete some things next week it should be a 'GO.' I am

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[1] Harty's e-mail itemizes the costs as $140 to CPS, $750 to the FBI, $430 to DPS, and $400 to Dr. Parker.

[2] Montague testified that he never saw any report facilitating the adoption or referencing his qualifications as an adoptive parent. However, Montague testified that Harty told him "that we passed with flying colors. We were ready to roll."

excited for all that you are doing for those two angels." Harty's other e-mails to Montague in evidence show her making excuses for why Dr. Parker's work was supposedly delayed several times.[3] Still other e-mails to Montague admitted into in evidence show Harty reporting on a camping trip she took with the girls and her handling of the girls' various needs—from buying a glitter kit that Morgan requested to planning a meeting with the school principal to address Ashleigh's complaints of bullying by a classmate. Montague testified that he asked to meet the girls but was told that Dr. Parker had to preapprove any such meeting. Montague said that he also asked if he could go to a restaurant where Harty and the girls were eating and "just sit to the side so I could look at them." He stated that Harty told him that was "impossible" and "would jeopardize the whole process."

Persistent delays cause Montague suspicion

Montague testified that "Thanksgiving was the next sure date that we were going to have the children in our home." Shortly before Thanksgiving, Montague testified that he got a late-night call advising that Dr. Parker had been summoned to a facility in Goldthwaite regarding a patient under his care. Montague said that "when the girls didn't come home on Thanksgiving . . . . something wasn't feeling right."

Montague testified that in early December he decided that the one person he should speak with about the status of the adoption was Judge Barrera. Montague stated that after meeting with the judge at the courthouse, he knew that something was wrong. Judge Barrera testified that he had a conversation with Montague in which the judge denied any involvement in the adoption

[3] Montague testified that Harty's excuses for Dr. Parker's unavailability included that Dr. Parker had pneumonia, that he was hospitalized, and that he had been called to Huntsville to evaluate some sex offenders.

matter. Judge Barrera also denied having ever adopted any children through the Truth, Family, Love, and Justice Foundation.

After leaving the meeting with Judge Barrera, Montague testified that he searched Travis County adoption records for "Shawn Harty" and her "Truth, Family, Love, and Justice Foundation" but did not find anything. The same day, Montague testified that he drove to the home of Dr. Parker. Dr. Parker's wife said he was not home, but she gave Montague her husband's cell phone number. After speaking by phone with Dr. Parker, Montague testified that he thought "at the very least she [Harty] was a liar, and at the very wors[t] that we'd been taken for a ride." Dr. Parker testified that he had no idea about the scenario described by Montague and denied ever working with the Truth, Family, Love, and Justice Foundation to place children in a home.

Montague testified that he next met with Investigator Cynthia Clark. Clark testified that she was in the family justice division of the Travis County District Attorney's Office and that she had been with the District Attorney's office for twenty-four years. She further testified that if CPS had removed children from a home following their father's murder of their mother, Clark would have worked on the case; however, Clark was unaware of any incident resembling the account that Harty described to Montague.

Montague testified that he reported the events to the Austin Police Department. APD Detective Alan Goodwin testified that he communicated with the Travis County Sheriff's Office, which confirmed there had been no homicide matching the facts as described by Harty. Detective Goodwin also testified that he spoke with CPS, which had no records of taking custody of the two girls. Detective Goodwin further testified that his review of the Texas Secretary of State's website

showed that the Truth, Family, Love, and Justice Foundation had ceased to exist six years earlier. Further, Detective Goodwin stated that he found the pictures purporting to be "Ashleigh" and "Morgan" online, and he concluded that they were images of a girl in Ohio and another girl at a Lego Land park in Holland or Denmark. Ultimately, Detective Goodwin testified that he was unable to verify any of Harty's representations to Montague about her ability to facilitate an adoption, and Detective Goodwin could not verify that Harty had taken any material steps to perform that service.

At the conclusion of the trial, the jury found Harty guilty of theft. During the punishment phase after the verdict, the State offered additional evidence showing that Harty had previously been convicted of felony theft. Further, Harty's former boyfriend testified about more than $33,000 of unauthorized withdrawals from his bank account that were made after he had given Harty access to his debit card on one occasion to help pay her electricity bill. Finally, Harty's cousin testified that Harty had used the cousin's personal identifying information to open lines of credit without the cousin's permission. However, neither the boyfriend's allegations nor the cousin's allegations against Harty had been prosecuted.

DISCUSSION

In her only appellate issue, Harty contends that the evidence at trial was legally insufficient to support her conviction for theft as charged in the indictment. Harty's indictment stated, in relevant part, that she:

> did then and there unlawfully appropriate, by acquiring or otherwise exercising control over, property, to-wit: United State[s] currency, of the value of $1,500 or more, but less than $20,000, from Gilley Montague, the owner thereof, without the

> owner's consent and with intent to deprive the owner of the property, against the peace and dignity of the State.

Harty contends that because the indictment alleged that she committed the theft "without the owner's consent," the State was bound to prove only that no consent in fact existed—i.e., it could not convict her based on evidence that she committed theft with consent that she secured by deception.

Standard of review

Due process requires that the State prove every element of the crime charged beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 313 (1979); *Rabb v. State*, 434 S.W.3d 613, 616 (Tex. Crim. App. 2014). When reviewing the sufficiency of the evidence to support a conviction, we consider all the evidence in the light most favorable to the verdict and determine whether, based on that evidence and reasonable inferences from it, "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson*, 443 U.S. at 319; *see Temple v. State*, 390 S.W.3d 341, 360 (Tex. Crim. App. 2013). We may not substitute our judgment for that of the jury by reevaluating the weight or credibility of the evidence, but must defer to the jury's resolution of conflicts in the evidence, weighing of the testimony, and drawing of reasonable inferences from basic facts to ultimate facts. *Isassi v. State*, 330 S.W.3d 633, 638 (Tex. Crim. App. 2010). We apply the same standard to direct and circumstantial evidence. *Id*. Circumstantial evidence is as probative as direct evidence in establishing the guilt of a defendant, and circumstantial evidence alone can be sufficient to establish guilt. *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007). Each fact need not point directly and independently to a defendant's guilt, as long as the cumulative force of all the incriminating circumstances is sufficient to support the conviction. *Id*.

We use a hypothetically correct jury charge for measuring sufficiency of the evidence. *Taylor v. State*, 450 S.W.3d 528, 535 (Tex. Crim. App. 2014) (citing *Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997)). A hypothetically correct jury charge is one that sets out the law accurately, 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. *Jenkins v. State*, 493 S.W.3d 583, 599 (Tex. Crim. App. 2016). When, as here, an indictment alleges theft in general statutory terms, "the hypothetically correct jury charge embraces any and every statutorily defined alternative method of committing the offense that was fairly raised by the evidence." *Taylor*, 450 S.W.3d at 535.

Conviction for theft requires proof of an unlawful appropriation of property with the intent to deprive the owner of the property. Tex. Penal Code § 31.03(a); *Fernandez v. State*, 479 S.W.3d 835, 838 (Tex. Crim. App. 2016). A person's appropriation of property is unlawful if it is without the owner's effective consent. Tex. Penal Code § 31.03(b)(1); *Fernandez*, 479 S.W.3d at 838. Consent means "assent in fact, whether express or apparent." Tex. Penal Code § 1.07(a)(11); *Fernandez*, 479 S.W.3d at 838. Consent is not effective if it is induced by deception. Tex. Penal Code § 31.01(3)(A); *Fernandez*, 479 S.W.3d at 838.

Theft-by-deception theory was not contrary to indictment

Harty contends that because the indictment alleged that she committed theft "without the owner's consent," she could not be convicted based on evidence that she committed theft by deception. She contends that Montague willingly wrote and delivered the $1,720 check to her and

that the State's theory of the case set forth the elements of theft by deception, which in her view is contrary to the indictment and contingent on the presence of consent, not the absence of it.

Harty relies on two distinguishable cases as support for her contentions. *See Geick v. State*, 349 S.W.3d 542 (Tex. Crim. App. 2011); *Thomas v. State*, 753 S.W.2d 688 (Tex. Crim. App. 1988). In *Geick*, the Court of Criminal Appeals concluded that the evidence was insufficient to support a theft conviction because, unlike here, "the State unnecessarily pled that the theft was by deception but provided no proof of deception." *Geick*, 349 S.W.3d at 548. The Court noted that the State is not required to plead a more specific offense encompassed by the general theft statute, but if it does so—e.g., if it decides "to turn a theft charge into a more specific charge of theft by deception"—it must prove the more specific offense that it has pleaded. *Id*. at 547-48; *see Fernandez*, 479 S.W.3d at 838 (citing *Geick* and noting that "[w]hen the State charges theft by way of deception, it is bound to prove deception").

Similarly in *Thomas*, the State pleaded that the defendant committed theft by appropriating property without the owner's effective consent, but it further pleaded specifically that "such appropriation was without effective consent since no assent in fact was given by the owner or a person legally authorized to act for the owner." *Thomas*, 753 S.W.2d at 689. The Court of Criminal Appeals noted that "a charging instrument is sufficient if, in addition to other elements of the [theft] offense, it merely alleges that appropriation was accomplished 'without the owner's effective consent.'" *Id*. at 692. But in *Thomas*, the State chose to add to its allegation of the absence of effective consent by specifying that the defendant had no "assent in fact," which the State was then required to prove. *Id*. ("[B]ecause the State alleged and therefore was required to prove that

[defendant] appropriated the vehicle without the owner's assent in fact, the theory that he induced the owner's assent in fact by "deception" was effectively foreclosed by the pleadings.").

By contrast, Harty's complaint here is that the State did *not* plead the more specific offense of theft by deception but alleged generally that she committed theft "without the owner's consent," and the State then presented proof at trial of Harty's deception of Montague in securing the check he gave her. This does not mean, as Harty contends, that she "was improperly and unfairly convicted." Rather, as the Court of Criminal Appeals has held, when an indictment alleges theft in general statutory terms, "the hypothetically correct jury charge embraces any and every statutorily defined alternative method of committing the offense that was fairly raised by the evidence." *Taylor*, 450 S.W.3d at 535; *see Gurrola v. State*, No. 08-01-00107-CR, 2003 Tex. App. LEXIS 8913, at *9-10, *14-16 (Tex. App.—El Paso Oct. 16, 2003, pet. ref'd) (not designated for publication) (defendant's indictment alleged theft in general statutory terms, and her conviction was affirmed based on theft-by-deception theory). Accordingly, the State's general allegation that Harty committed theft by unlawfully appropriating property "without the owner's consent" also included the alternative method of theft by deception if it was fairly raised by the evidence. *See Taylor*, 450 S.W.3d at 535. For the reasons that follow, we conclude that theft by deception was fairly raised by the evidence at trial.

Sufficient evidence supported Harty's conviction for theft

Viewing the evidence in this record in the light most favorable to the verdict, we must determine whether any rational trier of fact could have found the essential elements of the offense of theft, as defined in the statute, to a level of confidence beyond a reasonable doubt. *Id*. at 536.

After considering all the evidence in the light most favorable to the verdict, and deferring to the jury's assessment of witness credibility, its weighing of conflicting evidence, and its resolution of conflicting inferences, we conclude that a rational juror could have found beyond a reasonable doubt the essential elements of the theft offense under a hypothetically correct jury charge. *See Jackson*, 443 U.S. at 319; *Taylor*, 450 S.W.3d at 535-36; *Malik*, 953 S.W.2d at 240.

The hypothetically correct jury charge in this case would have stated that Harty: (1) unlawfully appropriated property, (2) which was United States currency valued at $1,500 or more, but less than $20,000, (3) from the owner Gilley Montague, (4) without his effective consent, and (5) with intent to deprive him of that property. *See Jenkins*, 493 S.W.3d at 599; *see also Taylor*, 450 S.W.3d at 535. The only element that Harty challenges in this appeal is the element of Montague's effective consent.

Under the theft statute, consent means "assent in fact, whether express or apparent," and consent is not effective—as the jury was instructed here—if it is induced by deception. *See* Tex. Penal Code §§ 1.07(a)(11), 31.01(3)(A); *Fernandez*, 479 S.W.3d at 838. Two ways that a person may commit theft through "deception" are by:

> (A) 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
>
> (E) 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.

Tex. Penal Code § 31.01(1)(A), (E); *Taylor*, 450 S.W.3d at 535-36; *see Thomas v. State*, No. 02-14-00441-CR, 2016 Tex. App. LEXIS 9811, at *3, *28 (Tex. App.—Fort Worth Aug. 31, 2016, no pet.) (mem. op., not designated for publication) (noting that defendant was indicted for theft by deception and ultimately confessed to securing financial support from her boyfriend, shortly before and during his military deployment overseas, by telling him "utter falsehood" that she was pregnant with his twins, sending him photos of his nonexistent "children," and faking death and burial of one "child").

No effective consent because of Harty's deception by false impression

Consent is not effective if it is induced by deception involving a false impression—i.e., "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." Tex. Penal Code § 31.01(1)(A). Here, the record shows that Harty made a host of false representations inducing Montague to give her $1,720 as partial payment for adoption of the nonexistent girls. Harty's deception included the following words and conduct:

- that she had authority to place two particular little girls in homes for adoption;
- that she had handled adoptions through her Truth, Family, Love, and Justice Foundation for twenty years;
- that her attorney contacted another family that was also interested in adopting the girls;
- that the Montague family was her preferred placement for those girls;
- that the Montague family had "passed with flying colors" and were "ready to roll" with the adoption;

- that she was diligently working to facilitate the girls' adoption;
- that she was involved in the girls' everyday lives, as reported in e-mails to Montague;
- that Dr. Parker, Dr. Maynard, and Judge Barrera were involved in the girls' adoption process;
- that money was necessary for the adoption expenses itemized in her e-mail;
- that she had paid $1,720 for expenses incurred in the adoption process; and
- telling Montague—as he wrote the $1,720 check to her—that the girls' mother collected dolphins, and that Harty was able to recover a "huge collection of collection of dolphins of all sizes" from the mother's possessions after she died.

None of Harty's representations to Montague were true. Montague discovered the falsity of Harty's representations after he became suspicious and personally visited the various individuals identified in Harty's story, beginning with Judge Barrera. As Detective Goodwin testified, there was "nothing to show that [Harty] had the ability to facilitate an adoption or took any material steps to facilitate an adoption." The jury could have reasonably found that no basis existed for Harty to believe any aspect of her hoax to be true, and that her misrepresentations were not merely likely to affect Montague's judgment in the adoption transaction, but purposefully designed to do so. We conclude that there was sufficient evidence meeting the definition of deception by false impression under the Texas Penal Code to render ineffective any consent from Montague in giving Harty his $1,720. *See id*.

No effective consent because of Harty's deception by false promises of performance

Additionally, consent is not effective is if it is induced by deception involving a false promise of performance—i.e., "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." *Id*. § 31.01(1)(E). Here, there was evidence that Harty made false promises of performance inducing Montague to give her $1,720 as partial payment for adoption of the nonexistent girls. Harty's deception included the following false promises of performance:

- to facilitate the Montague family's adoption of "Ashleigh" and "Morgan";
- to coordinate the services of certain professionals in furtherance of the girls' adoption;
- to use the requested $1,720 for background checks and for Dr. Parker's fees for his first visit with the girls and his report to the court; and
- that she had paid costs incurred in the adoption, such that she was being reimbursed for work performed.

The evidence at trial, viewed in the light most favorable to the jury's verdict, showed that "Ashleigh" and "Morgan" did not exist; that Dr. Parker was never paid for, or engaged to render, his professional services to "Ashleigh" and "Morgan"; that Montague never saw any report facilitating the adoption or referencing his qualifications as an adoptive parent; that the background checks were never performed; and that Harty deposited Montague's entire check into her bank account, except for the $200 portion she kept in cash. Detective Goodwin specifically testified that there was nothing to show that Harty "took any material steps to facilitate an adoption." The jury could have rationally inferred from the evidence at trial that Harty never intended to perform her promises to Montague and that she knew she would not complete performance of any of her promises. Further, the jury

could have reasonably found that all of Harty's false promises of performance were likely to affect, and designed to affect, Montague's judgment in the adoption transaction. We conclude that there was sufficient evidence meeting the definition of deception by false promise of performance under the Texas Penal Code to render ineffective any consent from Montague in giving Harty his $1,720. *See id*.

Accordingly, although Montague gave Harty a check for $1,720, he did so in reliance on her deception that those funds were furthering the process of the Montague family's adoption of "Morgan" and "Ashleigh." After that financial transaction was completed, Harty continued to provide detailed information to Montague to perpetuate her hoax. The evidence in this record, viewed in the light most favorable to the verdict, was sufficient to allow a rational jury to find beyond a reasonable doubt that Harty committed the offense of theft. *See Temple*, 390 S.W.3d at 360. We overrule Harty's complaint about the sufficiency of the evidence supporting her theft conviction.

CONCLUSION

We affirm the district court's judgment of conviction.

Jeff Rose, Chief Justice

Before Chief Justice Rose, Justices Pemberton and Goodwin

Affirmed

Filed: August 23, 2017

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