

TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-15-00794-CR

John Bass, Appellant

v.

The State of Texas, Appellee

**FROM THE DISTRICT COURT OF COMAL COUNTY, 207TH JUDICIAL DISTRICT
NO. CR2013-158, HONORABLE DIB WALDRIP, JUDGE PRESIDING**

MEMORANDUM OPINION

A jury convicted appellant John Bass of the offense of theft.¹ The district court rendered judgment on the verdict and sentenced Bass to seven years' imprisonment. In a single issue on appeal, Bass asserts that the evidence is insufficient to support his conviction. We will affirm the judgment of conviction.

BACKGROUND

The jury heard evidence that in the early morning hours of November 4, 2012, at approximately 2:30 a.m., Officer Joe Thoemke of the Garden Ridge Police Department observed a pickup truck with its driver's side taillight out and decided to initiate a traffic stop on the vehicle. Thoemke testified that, prior to initiating the stop, he also noticed that the truck's "hatch was open

¹ See Tex. Penal Code § 31.03(b)(1).

and there was quite a bit of copper wire hanging out the back of it.” Thoemke recounted that there were five occupants in the vehicle: the driver, identified as Lawanda Brunk; Bass, who was seated in the front passenger seat; and three teenage boys who were seated in the back of the truck. Thoemke asked Brunk to exit the vehicle, directed her to the back of the truck where the copper wire was located, and inquired as to where she had obtained the wire. According to Thoemke, “Initially she told me that she had picked it up from a friend’s farm in Austin.” When Thoemke later asked Bass the same question, “He told me that they had picked it up from a plant in Austin—southwest of Austin. It was his friend’s plant that was going out of business.” However, when Thoemke asked Bass to provide the name of this friend, Bass “told me that his friend’s last name was Taylor, but he didn’t know the first [name],” which Thoemke found to be unusual. Officer Gabe Galan of the Garden Ridge Police Department, who had assisted Thoemke with the stop, also asked Brunk about the origin of the copper wire. Galan testified, “At first she was saying that she and her passenger had gotten the copper from a farmhouse somewhere just out of Austin. And then while speaking to her, she changed her story and said that they had gotten the copper from a job site that [Bass] was working at.” Galan then approached Bass and told him what Brunk had said. At that point, Galan recounted, Bass “changed his story and said that they, in fact, had gotten it from a construction site instead of a farmhouse or something.”

Thoemke further testified that because the construction site was located outside the city limits of Garden Ridge, they called the Comal County Sheriff’s Office to assist in the investigation. Thoemke recounted that as Brunk accompanied Comal County deputies to the construction site, he stayed at the scene of the stop with Bass and asked him who had given him

permission to take the wire. According to Thoemke, Bass told him that “if I were to call his boss, that he would not have had permission; but he had a coworker named Greg that told him he could take the copper.” Bass was subsequently arrested for theft of the wire.

Other evidence considered by the jury included the testimony of Brunk, who had been charged as a party to the offense; Deputies Christopher Koepp and Herman Medina of the Comal County Sheriff’s Office, who had assisted in the investigation at the construction site; J.T., one of the three teenagers who had been found in the back of the truck and who had assisted Bass in loading the wire into the truck; Kevin Delo, the “general superintendent” at the construction site from where the wire had been taken, who testified that Bass did not have permission to take the wire; and Jeremy Williams, a defense witness and former employee of the construction company, who testified as to his understanding of the company’s policies for taking certain materials from the construction site. Based on this and other evidence, which we discuss in more detail below, the jury found Bass guilty of the offense of theft as charged. The district court rendered judgment on the verdict and sentenced Bass to seven years’ imprisonment as noted above. This appeal followed.

STANDARD OF REVIEW

When reviewing the sufficiency of the evidence supporting a conviction, “the standard of review we apply is ‘whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.’”² “This standard tasks the factfinder with resolving conflicts in the testimony,

² *Murray v. State*, 457 S.W.3d 446, 448 (Tex. Crim. App. 2015) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

weighing the evidence, and drawing reasonable inferences from basic facts.”³ “[A]n inference is a conclusion reached by considering other facts and deducing a logical consequence from them.”⁴ “On appeal, reviewing courts ‘determine whether the necessary inferences are reasonable based upon the combined and cumulative force of all the evidence when viewed in the light most favorable to the verdict.’”⁵ “Thus, ‘[a]ppellate courts are not permitted to use a ‘divide and conquer’ strategy for evaluating sufficiency of the evidence’ because that approach does not consider the cumulative force of all the evidence.”⁶ “When the record supports conflicting inferences, we presume that the factfinder resolved the conflicts in favor of the verdict, and we defer to that determination.”⁷ Moreover, “[o]ur review of ‘all of the evidence’ includes evidence that was properly and improperly admitted.”⁸ Finally, “the same standard of review is used for both circumstantial and direct evidence cases.”⁹ “Circumstantial evidence is as probative as direct evidence in establishing guilt, and circumstantial evidence alone can be sufficient” to support a conviction.¹⁰

³ *Id.*

⁴ *Hooper v. State*, 214 S.W.3d 9, 16 (Tex. Crim. App. 2007).

⁵ *Murray*, 457 S.W.3d at 448 (quoting *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007)).

⁶ *Id.* (quoting *Hacker v. State*, 389 S.W.3d 860, 873 (Tex. Crim. App. 2013)).

⁷ *Id.* at 448-49 (citing *Hooper*, 214 S.W.3d at 12).

⁸ *Jenkins v. State*, 493 S.W.3d 583, 599 (Tex. Crim. App. 2016) (citing *Clayton*, 235 S.W.3d at 778).

⁹ *Id.* (citing *Hooper*, 214 S.W.3d at 13).

¹⁰ *Id.* (citing *Guevara v. State*, 152 S.W.3d 45, 49 (Tex. Crim. App. 2004)).

ANALYSIS

A person commits the offense of theft if he “unlawfully appropriates property with intent to deprive the owner of property.”¹¹ “Appropriation of property is unlawful if it is without the owner’s effective consent.”¹² In his sole issue on appeal, Bass asserts that the evidence is insufficient to prove that he appropriated the wire without the owner’s effective consent.

The State’s evidence on the issue of consent consisted primarily of the testimony of Kevin Delo, a construction manager for ASI Constructors, the company that operated the construction site from which the copper wire had been taken. Delo testified that he was the “general superintendent” for the site, which he explained meant that he “was in charge basically of the job site totally,” “had people that worked under [him,]” and was “focused in on schedule, safety, and . . . production.” Delo recounted that the company was constructing a dam, which required concrete to build, and the concrete was mixed on site using “batch plants,” mechanical devices that were made of “a lot of steel” and “a lot of conveyors.” According to Delo, “pretty much everything” that is electronic within the device “is wired using copper wire.” After a project is completed, Delo added, the devices are disassembled and their component parts, including the copper wire, are transported to another construction site and reassembled there. Delo testified that the company “never” throws away the copper wire or treats it as “scrap” material. Delo explained, “We don’t have wire that we throw away. If we do have anything that’s bad, we’ll take it—send it back to either our yard, let our electrician look at it. We usually don’t have much of that stuff.”

¹¹ Tex. Penal Code § 31.03(a).

¹² *Id.* § 31.03(b)(1).

Delo further testified that the company had a policy that allowed workers to remove certain scrap materials from a job site for personal use under certain circumstances. Delo explained,

At the end of a job if there's plywood left over, two by fours, materials that's been used and—some people like to use it to burn and others build temporary buildings out of them, I guess. We do allow them to take them home at the end of a job. We get everything cleaned up. They ask for it. And after they load it up, they've got to sign a piece of paper saying that ASI is no longer liable for the material so when they leave the job site, we don't get ourselves into any kind of a mess. They take the actual sheet with them. So if they get pulled over, they'd have that.

However, Delo added that workers were not allowed to remove copper wire from the site. Delo testified that “[w]e don't give away any wire” because “[i]t's very expensive to replace.” Delo also testified that he had the final say on what materials could be removed from the job site and that only one other person, assistant superintendent David Johns, could approve the removal of materials from the site. Delo testified that he had never received any requests from Bass or any other employee to remove copper wire from the construction site. Also, when asked if employees who had permission to take items home with them were permitted to “come into the site in the middle of the night, use a front loader and take those materials away,” Delo testified, “No.”

Bass asserts that Delo's testimony is insufficient to prove lack of consent because, according to Bass, Delo had “no personal knowledge of what was on the site and went on prior to the items being taken.”¹³ Bass's theory at trial was that David Johns, the assistant superintendent,

¹³ Although Bass presents this argument in the context of a challenge to the sufficiency of the evidence, he uses language in his brief indicating that he may also be complaining of the district court's decision to admit Delo's testimony over Bass's objection that Delo lacked personal knowledge of the matters to which he was testifying. *See* Tex. R. Evid. 602. To the extent that this complaint has been adequately briefed on appeal, *see* Tex. R. App. P. 38.1(f), (i), we could not

had given Bass permission to take the copper wire, and that Delo was not in a position to know whether Johns had done so. However, Delo testified that even though Johns had the authority to approve requests for removal of material, Johns “would call me on it. If I wasn’t on the site at the time, he would ask me about it and I would say yes or no and he would sign for it.” On cross-examination, Delo added, “David got permission from me when somebody asked for materials. He would usually call me.” Delo testified that he had received no requests to remove copper wire and that it was against company policy to do so. Delo also testified that “David has worked [at the company for] 20 years and he wouldn’t give away the wire.” The jury could have reasonably inferred from this and other testimony that neither Johns nor Delo had given Bass permission to remove the wire from the site.

conclude that it has merit. The standard of review for rulings admitting evidence is abuse of discretion, and we are to sustain a district court’s evidentiary ruling unless it “falls outside the zone of reasonable disagreement.” *See Johnson v. State*, 490 S.W.3d 895, 908 (Tex. Crim. App. 2016). Rule 602 provides that “[a] witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.” Tex. R. Evid. 602. Here, Delo testified that he believed that he had been working at the construction site for “the full week” when the theft occurred and that he had been contacted by the authorities the day of the theft, “went into the job site” that morning, and observed that wire was missing from the site. Delo also testified that he had been working for the construction company for 20 years and was the “general superintendent” of the site where the theft had occurred. As discussed above, Delo explained that as general superintendent, he was “in charge basically of the job site totally,” “had people that worked under [him], “was focused in on schedule, safety, and . . . production,” and that “[m]ost of that job [he] was on the job site full time.” It would not be outside the zone of reasonable disagreement for the district court to conclude that this and other evidence was “sufficient to support a finding” that Delo had personal knowledge of the matters to which he was testifying, including his knowledge of the materials at the construction site and the policies of his company governing removal of those materials from the site. *See* Tex. R. Evid. 602. Accordingly, on this record, we could not conclude that the district court would have abused its discretion in admitting Delo’s testimony.

Moreover, in addition to Delo's testimony, there is other evidence in the record from which the jury could have reasonably inferred that Bass lacked consent to appropriate the wire. Officers Thoemke and Galan testified that Bass had initially claimed that he had obtained the wire from a friend in Austin, which the officers later determined was not true. The jury could have reasonably inferred that Bass had initially lied about the location where he had obtained the wire and that he would not have done so had he had permission to take it. Thoemke also testified that Bass had subsequently admitted to him that if Thoemke "were to call his boss, that he would not have had permission" to take the wire. Instead, according to Thoemke, Bass claimed that "he had a coworker named Greg that told him he could take the copper." There was no evidence presented that "Greg," who was later identified as Gregory Cleveland, a truck driver for the company, had any authority to give Bass permission to take the wire. On the contrary, Delo testified that Cleveland had no such authority. Also, as the investigation continued, Deputy Christopher Koepp of the Comal County Sheriff's Office asked Bass to provide him with the name of the supervisor who had given him permission to take the wire. According to Koepp, Bass did not provide a name and instead became "very defensive when I started asking more questions about, you know, what's your supervisor's name, what's his phone, and he couldn't answer that."

There was also evidence presented that the construction site was locked at the time Bass had removed the wire. Deputy Herman Medina of the Comal County Sheriff's Office testified that when they had arrived at the construction site to investigate, the dirt road to the site was closed with "a large cable wire, two posts on each side, large posts, large cable wire going across and it was double locked." Deputy Koepp similarly characterized the site as being secured by "two poles to the

right and the left of the caliche road with a heavy-duty chain going across it.” J.T., one of the teenagers who had assisted Bass in loading the wire into the truck, testified that the entrance to the site was further secured by “a gated fence,” which he and the others had “hopped over” to get inside. J.T. also testified that as they were loading the wire into the truck, not all of it would fit, and Bass had instructed him to hide the extra wire “[i]n a bush like in the corner away from the gate.” J.T. explained that he found these instructions to be unusual, “because if the boss gave us permission to move the wire, why would it need to be hidden in a bush?” From this and other evidence, the jury could have reasonably inferred that Bass did not have permission to be at the construction site to remove the wire.

Finally, the defense witness, Jeremy Williams, testified that when he had worked at the construction site, he was aware of workers receiving permission to take scrap aluminum and scrap iron from the site. However, on cross-examination, Williams acknowledged that at no time while he worked there did he ever hear anyone give Bass or any other worker permission to take copper wire from the site.

We conclude that the above and other evidence, when viewed in the light most favorable to the verdict, supports the jury’s finding that Bass did not have effective consent to appropriate the copper wire. Accordingly, the evidence is sufficient to support Bass’s conviction for the offense of theft.

We overrule Bass’s sole issue.

CONCLUSION

We affirm the judgment of the district court.

Bob Pemberton, Justice

Before Justices Puryear, Pemberton, and Field

Affirmed

Filed: August 16, 2017

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