NUMBER 13-15-00332-CR

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

DAVID BOLDING, **Appellant,**

v.

THE STATE OF TEXAS, **Appellee.**

On appeal from the 197th District Court
of Willacy County, Texas.

MEMORANDUM OPINION

Before Chief Justice Valdez and Justices Rodriguez and Garza
Memorandum Opinion by Justice Rodriguez

Appellant David Bolding was indicted on seventeen counts of theft and misapplication of trust funds in connection with a construction project on which he was general contractor. A jury convicted Bolding of two counts of theft of service and two counts of theft by deception from his suppliers—all state jail felonies. *See* TEX. PENAL

CODE ANN. §§ 31.01, .03–.04 (West, Westlaw through 2015 R.S.). The jury also convicted Bolding of one count of misapplication of trust funds without intent to defraud, a Class A misdemeanor. *See* TEX. PROP. CODE ANN. §§ 162.031–.032 (West, Westlaw through 2015 R.S.). On each of the theft convictions, the district court sentenced Bolding to six months in state jail with the sentence suspended for five years of community supervision. For misapplication of trust funds, the court sentenced Bolding to one month in state jail, with the sentence suspended for two years of community supervision. As a condition of community supervision, the court ordered that Bolding pay restitution in the amount of $31,306 and costs of $905, which included an assessment of $500 in attorney's fees.

By three issues, Bolding argues that there was insufficient evidence upon which to base a conviction for theft or misapplication of trust funds, and that the trial court erred in awarding attorney's fees to the State. We affirm, as modified, in part and reverse and render in part.

I. BACKGROUND

It is undisputed that in the fall of 2008, Bolding submitted a bid to build a facility in Raymondville, Texas for the Willacy County Emergency Medical Services (EMS). Bolding's bid of $827,206 was the lowest of three bids received. Even so, Bolding's bid exceeded EMS's budget for the project by over $175,000.

EMS's executive director, Frank Torres, testified that he arranged for his engineers and architects to meet with Bolding to redraw the plans at a lower cost. EMS and Bolding entered into a contract for $670,567. EMS was to make progress payments upon

completion of various stages of the project, whereupon Bolding—as general contractor—would pay his suppliers.[1] Construction began in January 2009. In the ensuing months, Bolding completed several stages of the project and submitted payment requests documenting the work completed. EMS fulfilled the requests.

Torres further testified that in July of 2009, EMS received a notice of lien from one of Bolding's suppliers, stating that payment had not been received for materials it had furnished. After being contacted by EMS, Bolding paid the amount owed on the lien and provided Torres with a verification of payment.

While continuing to work on the project, EMS contracted with Bolding to perform additional subprojects that were not contemplated in the original contract, such as installing additional circuitry in a garage, for which EMS paid Bolding an additional $21,608. According to Bolding, EMS paid this sum out of the money that it had budgeted for the main contract price.

EMS continued to make progress payments through October 9, 2009. However, on October 15, 2009, EMS received a notice of lien from another supplier for $11,110. After Bolding denied owing any money to the supplier, EMS refused to release further funds until Bolding provided documentation showing that no suppliers had outstanding balances. Torres testified that EMS had, at that point, begun receiving calls from other suppliers complaining of unpaid bills.

On October 19, 2009, EMS refused a payment request from Bolding for another phase of completion unless Bolding provided documentation showing that all of the

[1] For simplicity, this opinion will use the word "suppliers" to refer to both subcontractors and materialmen.

project's suppliers had been paid. Torres and various suppliers testified at trial that around this time, Bolding generally evaded their attempts to contact him.

On November 1, Bolding contacted Torres and arranged a meeting. At the meeting, Bolding explained that he had shut down his company the night before and that he would be unable to finish the project. He presented Torres with a list of twelve suppliers who had not been paid for their contributions to the EMS project and the amount owed to each supplier. These debts totaled approximately $290,000. Roughly $120,000 remained to be disbursed by EMS on the main contract price.[2] Torres testified that when he asked Bolding how the funds had been spent, Bolding replied that he had "other things to pay." Bolding contacted Torres again on November 3 and provided him with an updated summary, which showed that his total outstanding debt to suppliers was $240,685.69. Bolding estimated that 95% to 98% of the project was complete at this point.[3]

On December 8, Bolding mailed a letter to EMS's counsel which stated, "Enclosed you will find a CD with updated check and expense listing, all receipts for the project and paid checks. I think this should be enough information to get Mr. Torres to stop telling people that I stole $200,000.00. If further explanation is needed please let me know."

[2] Torres testified that at the time of Bolding's departure, only $92,207 remained in EMS's budget. However, for reasons not apparent in the record, Torres appears to have based that figure on a lower amount of $666,000 rather than the main contract price of $670,567. Torres also did not factor in the extra $21,608.75 that EMS expended by contracting Bolding for the additional subprojects.

[3] EMS later arranged for various subcontractors to finish the remaining work and was able to complete the project for roughly $45,000—which again appears to have included expenses for subprojects not contemplated by the original contract, such as landscaping. In ensuing litigation over the outstanding debt, EMS deposited just over $57,500 into the registry of the court to divide up among the unpaid suppliers, and EMS's obligations were discharged.

The CD included an eighteen-page spreadsheet which, according to Bolding, showed all expenses for the project from January through October 31, 2009. The spreadsheet showed that when Bolding stopped work, he had expended $582,137—which was roughly $6,300 more than he had been paid by EMS. The CD also included records of several hundred checks which corresponded to the expenses listed on the spreadsheet.

On December 19, 2013, the State indicted Bolding on eleven counts of theft of property by deception, five counts of theft of service, and one count of misapplication of trust funds. The trial court granted a directed verdict on seven counts of theft. The jury acquitted Bolding on five counts of theft and returned a verdict of guilty on the following counts: theft of property by deception from Roman Avila, d/b/a Roman's Plumbing; theft of services from Avila; theft of services from Tejas Equipment Rental; theft of property by deception from SGS Industrial; and misapplication of trust funds. This appeal followed.

II. STANDARD OF REVIEW

To assess the sufficiency of the evidence, we view the evidence in the light most favorable to the verdict to determine whether any rational trier of fact could have found the elements of the offense beyond a reasonable doubt. *Dobbs v. State*, 434 S.W.3d 166, 170 (Tex. Crim. App. 2014); *see Jackson v. Virginia,* 443 U.S. 307, 318–19 (1979). The jury is the sole judge of credibility and weight to be attached to the testimony of witnesses. *Dobbs*, 434 S.W.3d at 170. When the record evidence supports valid conflicting inferences, we presume that the jury resolved the conflicts in favor of the verdict, and we defer to that determination. *Id.* However, juries are not permitted to come to conclusions based on mere speculation or factually unsupported inferences.

Hooper v. State, 214 S.W.3d 9, 15 (Tex. Crim. App. 2007). If, given all of the evidence, a rational jury would necessarily entertain a reasonable doubt as to the defendant's guilt, the due process guarantee requires that we reverse and order a judgment of acquittal. *Rabb v. State*, 434 S.W.3d 613, 616 (Tex. Crim. App. 2014); *Guevara v. State*, 152 S.W.3d 45, 49 (Tex. Crim. App. 2004); *see Hooper*, 214 S.W.3d at 16; *see also Kiffe v. State*, 361 S.W.3d 104, 107 (Tex. App.—Houston [1st Dist.] 2011, pet. ref'd) (requiring acquittal when the record contains a mere modicum of evidence probative of an element of the offense or the evidence conclusively establishes a reasonable doubt). In reviewing sufficiency of the evidence of this type of theft, the appellate court considers the events before, during, and after commission of the offense, as well as the defendant's actions which show an intent and common design to commit the offense. *Wirth v. State*, 361 S.W.3d 694, 697 (Tex. Crim. App. 2012).

Where a jury rejects an affirmative defense, we review the sufficiency of the pertinent evidence in a two-step process. *Matlock v. State*, 392 S.W.3d 662, 670 (Tex. Crim. App. 2013). First, we determine whether no more than a mere scintilla of evidence (i.e., no evidence) supports the jury's rejection of the defense. *Id.* If no evidence supports the jury's finding, we search the record to determine whether the defendant had established the affirmative defense as a matter of law. *Id.* Only if the appealing party establishes that the evidence conclusively proves his affirmative defense—and that no reasonable jury was free to think otherwise—may the reviewing court conclude that the evidence is legally insufficient. *Id.*

III. THEFT BY DECEPTION

By his first issue, Bolding contends that the State failed to introduce evidence of a quality sufficient to convince any rational factfinder beyond a reasonable doubt that he was guilty of theft. Bolding argues that the State's case fell short on three elements necessary to prove both theft of service and theft of property by deception: proof of intent to deceive, proof of a deceptive act, and proof that the suppliers relied on the deceptive act. In the trial court, the State's theory was that intent and a deceptive act were shown by Bolding remaining silent despite the fact that he should have known he would be unable to honor his agreements to pay his suppliers. The State argued that the suppliers relied on his silence in providing services or property.

A. Applicable Law

Under Texas Penal Code section 31.04(a), the theft-of-services statute, the State is required to prove the following: (1) the defendant had the intent to avoid payment for a service that he knows is provided only for compensation, and (2) acting with that intent, he intentionally or knowingly (3) secured the other person's performance of a service (4) by deception. *Daugherty v. State*, 387 S.W.3d 654, 657 (Tex. Crim. App. 2013); *see* TEX. PENAL CODE ANN. § 31.04(a).

A person commits an offense of theft of property by deception if he appropriates property with intent to deprive the owner of the property without the effective consent of the owner. *See* TEX. PENAL CODE ANN. § 31.03(a)–(b). Consent is not effective if it is induced by deception. *See id.* § 31.01(3)(A). As relevant under the facts of this case, "deception" is defined as:

> (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;
>
> (B) failing to correct a false impression of law or fact that is likely to affect the judgment of another in the transaction, that the actor previously created or confirmed by words or conduct, and that the actor does not now believe to be true;
>
> . . . .
>
> (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).

When the charged theft concerns a matter for which the alleged victim and the accused had a contractual relationship, certain concerns arise. *Higginbotham v. State*, 356 S.W.3d 584, 588 (Tex. App.—Texarkana 2011, pet. ref'd); *Ehrhardt v. State*, 334 S.W.3d 849, 853 (Tex. App.—Texarkana 2011, pet. ref'd). The mere failure to perform a contract is insufficient to establish guilt of theft. *Higginbotham*, 356 S.W.3d at 588. A claim of theft by deception 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; it requires proof that appropriation of the property was a result of false pretext or fraud. *Merryman v. State*, 391 S.W.3d 261, 271 (Tex. App.—San Antonio 2012, pet. ref'd); *see Jacobs v. State*, 230 S.W.3d 225, 229 (Tex. App.—Houston [14th Dist.] 2006, no pet.); *Baker v. State*, 986 S.W.2d 271, 274 (Tex. App.—Texarkana 1998, pet. ref'd). Theft by deception requires that the defendant intend to defraud the provider before that person provides the service or property, and the defendant must commit some act of deception—

lying about his bank account, giving the provider a bad check, promising to pay on a contract when the defendant has no intent to do so, etc.—that is likely to affect the judgment of the provider. *See Daugherty*, 387 S.W.3d at 659. The provider must have actually relied upon that deceptive act in providing the service or property. *See id.* In certain circumstances, silence may serve as the deceptive act. *See Fernandez v. State*, 479 S.W.3d 835, 839 (Tex. Crim. App. 2016); *see also* TEX. PENAL CODE ANN. § 31.01(1).

B. Discussion

We first consider the sufficiency of the evidence showing the intent element of Bolding's theft-by-deception convictions. At trial, the State acknowledged that Bolding had initially intended to pay his suppliers and that he did in fact pay his suppliers for the first several months of the project. However, the State emphasized Bolding's conversation with EMS leadership in July concerning the notice of lien that EMS had received from a supplier. The State's theory of theft was that, after this July conversation, Bolding should have reviewed his balance sheets, should have known that he could not afford to pay his suppliers the full amount owed, and should have notified his suppliers that he could no longer pay them and ceased the project. According to the State, Bolding committed theft by remaining silent while accepting any property or services from his suppliers after the July conversation.

In *Daugherty*, the Texas Court of Criminal Appeals dealt with a similar theory of criminal liability. *See* 387 S.W.3d at 661. There, a business owner engaged a contractor to build out a storefront. *Id.* at 655–56. It was undisputed that the business owner did have the ability and intent to pay the contractor when the contract was entered.

See id. at 660. However, the project was "significantly delayed." *Id.* at 656. During the delay, the business owner spent the funds that were initially set aside for construction on basic living expenses. *Id.* The State's theory was that:

> the jury could have found that [the business owner] failed to correct a false impression—that she still had the money to pay for the contract—during the time [the contractor] performed his part of the contract. . . . [A]ccording to this theory, she committed theft by (1) failing to tell [the contractor] to stop work on the contract because she had already spent the funds allocated for his contract on personal living expenses . . . .

Id. at 660–61. The court remarked that this theory of liability "is like holding the homeowner criminally liable for failing to tell the electric company that he lost his job and won't be able to pay the electric bill when it is due next month, so the electric company can turn off the electricity before the bill is due." *Id.* at 661 n.24.

Here, the State's theory of liability is analogous to *Daugherty*. The State argues that Bolding is criminally liable because, at the mid-way point of the project, he should have anticipatorily breached his contract with EMS, brought construction to a halt, and explained to his suppliers that he could not pay them when his financing came into some doubt.[4] According to the State, Bolding was required to take these actions because at

[4] On this point, we are guided by the reasoning of the Delaware chancery court in a civil suit concerning a corporation's insolvency:

> Delaware law imposes no absolute obligation on the board of a company that is unable to pay its bills to cease operations and to liquidate. Even when the company is insolvent, the board may pursue, in good faith, strategies to maximize the value of the firm. . . . Chapter 11 of the Bankruptcy Code expresses a societal recognition that an insolvent corporation's creditors (and society as a whole) may benefit if the corporation continues to conduct operations in the hope of turning things around. If the board of an insolvent corporation, acting with due diligence and good faith, pursues a business strategy that it believes will increase the corporation's value, but that also involves the incurrence of additional debt, it does not become a guarantor of that strategy's success.

Trenwick Am. Litig. Trust v. Ernst & Young, L.L.P., 906 A.2d 168, 204–05 (Del. Ch. 2006), *aff'd sub nom. Trenwick Am. Litig. Trust v. Billett*, 931 A.2d 438 (Del. 2007).

some point he "should have known" that he could not pay his suppliers—a phrase which indicates negligence rather than the required mental state in this case, which is knowledge or intent. *See* TEX. PENAL CODE ANN. § 6.03(d) (West, Westlaw through 2015 R.S.); *Daugherty*, 387 S.W.3d at 659. However, we assume for the sake of argument that the State's theory of liability is a valid one, and we evaluate the sufficiency of the State's evidence of deception under this theory.

At trial, the State primarily attempted to show deceptive intent by pointing to alleged inconsistencies between Bolding's spreadsheet of project expenses and the corresponding checks which related to those expenses, implying that Bolding misappropriated funds and later lied about the nature of these expenses in an effort to deceive and steal from his suppliers. For instance, the State questioned multiple expense-listings with the memo designation "cash." Bolding explained that he had used these cash withdrawals for minor expenses related to the project, giving his project foreman the discretion and the funds to buy supplies such as fuel and water for his workers. The State offered no evidence beyond mere speculation to suggest any deceptive impropriety surrounding these expenses. *See Hooper*, 214 S.W.3d at 15.

The State also pointed to six checks from the project as potential evidence of criminal intent. Two of the checks from the early months of the project were listed on the spreadsheet as having gone to an employee named Alejandro Nieto, but the checks were in fact made out in the names of two women. Bolding testified that these women were likely Nieto's family members and that it was common practice in South Texas to make checks out in the names of an employee's family members. Moreover, Bolding

testified—and the memos on other checks showed—that Nieto had performed "block work" for the EMS project, a term referring to the laying of concrete. One of the checks in question likewise bore a memo designation of "block work." The State also noted that four other checks bore the memo designation "Lyford"—a construction project that Bolding had handled in 2008. Bolding testified that this was a clerical error and that these checks had been used to pay for EMS-related expenses. Bolding testified that before he shut down his business, his daughter-in-law had been in charge of his bookkeeping and had often made errors of that sort.

Finally, the State introduced testimony that Bolding evaded phone calls at some point in October 2009, though the witnesses did not specify whether he was evasive either before or after EMS refused his final payment request.

This was the sum of the State's case on deception: six checks and intermittent cash draws—all explainable—and avoiding phone calls at some point in October 2009. Nonetheless, the jury was free to disbelieve Bolding's explanations and to instead believe that Bolding spent a portion of EMS funds on an outstanding debt from a past project. *See id.*; *Dobbs*, 434 S.W.3d at 170. Even assuming this to be the case, we cannot say that it is deceptive per se to expend funds from one project on minor outstanding debts from a past project, so long as Bolding's intent to replenish the funds remained intact. *See Daugherty*, 387 S.W.3d at 661 n.23. Here, each of the challenged checks was issued in January or February 2009. This was six months before the State asserted that Bolding should have realized that the project was in financial jeopardy.[5] The State

[5] And as we discuss below, Bolding testified that this was nearly ten months before his last hope of arranging alternate financing fell through. This testimony was not disputed by the State.

introduced no evidence that Bolding had reason to suspect, at this early juncture, that any attempt to honor past debts would put the EMS project and its suppliers in financial jeopardy, or that he would be unable to replenish these funds with the proceeds of other ongoing projects.

By contrast, the evidence suggesting that Bolding did intend to pay his suppliers was strong, given (1) Bolding's attested goal of obtaining additional financing, (2) the evidence that he did in fact continue to pay his suppliers to the extent possible, and (3) the evidence that he took a personal loss in order to continue paying the suppliers. First, Bolding testified that he realized that this project was over-budget, but that cost overruns are common in the construction industry, and EMS was one of many projects that his business handled. Bolding testified that he intended to pay for the outstanding debts with the profits of other projects, but that these projects fell through. He testified that one project in Rio Hondo, Texas was put on hold in August 2009, and he learned a project for the Port of Brownsville had fallen through in mid-October 2009. The State's witnesses did not refute this testimony, but instead corroborated it. At trial, several of the suppliers agreed that cost overruns are common in the construction industry. One of Bolding's principal accusers, Mr. Torres, testified that he knew Bolding was working on at least two other sizeable projects during the relevant time period: the Rio Hondo and Port of Brownsville projects.

Second, the extent of a contractor's performance may help negate any criminal intent. *See Ehrhardt*, 334 S.W.3d at 855; *Baker*, 986 S.W.2d at 275; *see also Phares v. State*, 301 S.W.3d 348, 352 (Tex. App.—Beaumont 2009, pet. ref'd) (holding that the

"complainant's admission that appellant performed numerous services as promised" helped show the absence of intent to deceive); *Cox v. State*, 658 S.W.2d 668, 670–71 (Tex. App.—Dallas 1983, pet. ref'd) (same). The jury convicted Bolding of theft from Roman Avila, SGS Industrial, and Tejas Equipment. However, Bolding substantially performed his obligations to these suppliers, making payments that belie an intent to deceive. Undisputed testimony and financial records showed that Bolding paid SGS Industrial a total of $12,939 over the span of eight payments, dating from the beginning of the project to mid-August 2009. Likewise, Bolding made three sizeable payments to Roman Avila during the project: $8,775 in March 2009, $7,125 in July—which the State asserts is the month that Bolding formed the intent to steal from Avila and others—and $6,469 on September 4, 2009. Finally, Bolding paid Tejas Equipment the sum of $5,693 as late as September 22, 2009. More generally, early in the month of October, Bolding paid over $15,000 in expenses to his workers and suppliers. After EMS declined his payment request on October 19, Bolding paid over $10,000 to suppliers and workers in the period up until he closed his business on November 1, 2009. Undisputed evidence of Bolding's continued effort to pay the suppliers suggests that Bolding did intend to pay his suppliers and did not intend to steal from them by deception. *See Ehrhardt*, 334 S.W.3d at 855; *Baker*, 986 S.W.2d at 274.

Third, though personal gain is not an element of theft, it is normally considered in determining whether a person has the requisite intent to commit theft. *Ehrhardt*, 334 S.W.3d at 856; *see Christensen v. State*, 240 S.W.3d 25, 32 (Tex. App.—Houston [1st Dist.] 2007, pet. ref'd). Here, undisputed evidence showed that Bolding spent $6,000 of

his own funds for the benefit of EMS and the suppliers.

All of the above—Bolding's voluntary disclosure of expenses and outstanding debts, *see Kirschner v. State*, 997 S.W.2d 335, 342 (Tex. App.—Austin 1999, pet. ref'd); the absence of any evidence within these expenses showing misappropriation or an intent to deceive beyond mere speculation, *see Hooper*, 214 S.W.3d at 15; his substantial performance of the contracts*, see Ehrhardt*, 334 S.W.3d at 855; his out-of-pocket costs, *see Christensen*, 240 S.W.3d at 32; the logical explanation of his hope to obtain additional financing, which was verified by Torres—suggests that Bolding intended to pay his suppliers rather than deceive them.

After the close of the State's case, the trial judge commented outside the presence of the jury:

> I find the evidence weak. I find the evidence very weak as to deception. I find the evidence very weak as to the amounts that were devoted to labor and materials in various counts. I find the evidence very weak as to whether the defendant intended to deceive.

Later, during the charge conference, the trial judge asked, "And I'm wondering, should any charge be included on the mens rea issue? Is there any—is there an intent to deceive involved here?" The trial judge reiterated these thoughts a third time at sentencing, noting that, "It looks like it's just primarily that he underbid the job and then, upon discovering he underbid the job, that he went to the client and told them what the situation was and so forth. . . . I find that the evidence is very weak as to the intent to deceive."

We agree with the trial judge's assessment of the State's evidence on deception. This "is a simple case of a civil contract dispute. . . . Theft convictions resulting from

otherwise civil contractual disputes may warrant reversal for insufficient evidence where there is no evidence supporting the requisite criminal intent." *Roper v. State*, 917 S.W.2d 128, 132 (Tex. App.—Fort Worth 1996, pet. ref'd) (citing *Debrook v. State*, 744 S.W.2d 357, 360 (Tex. App.—Corpus Christi 1988, pet. ref'd)). We find this to be such a case. Given all of the evidence, a rational jury would necessarily entertain a reasonable doubt as to Bolding's intent to deceive. *See Rabb*, 434 S.W.3d at 616; *Guevara*, 152 S.W.3d at 49. As such, we find the evidence insufficient to support Bolding's four convictions for theft. *See Dobbs*, 434 S.W.3d at 170.

We sustain Bolding's first issue.

IV. MISAPPLICATION OF TRUST FUNDS

By his second issue, Bolding challenges the sufficiency of the evidence to support his conviction for the offense of misapplication of trust funds. Within this issue, Bolding argues that even assuming he spent funds on other projects besides EMS, the State failed to introduce sufficient tracing evidence to show that he expended EMS funds on these other projects, rather than funds derived from other sources. Bolding next argues that the State failed to introduce any time-specific evidence to show that when he spent money on other projects, a supplier's bill was already due and payable within thirty days so as to violate the trust. Lastly, Bolding argues that the jury was required to accept his affirmative defense: that all contested payments were expenses that were directly related to the construction project.

A. Applicable Law

The Texas Construction Trust Act (TCTA) provides protection for subcontractors

and materialmen when contractors refuse to pay for labor and materials. *Direct Value, L.L.C. v. Stock Bldg. Supply, L.L.C.*, 388 S.W.3d 386, 391 (Tex. App.—Amarillo 2012, no pet.); *see generally* TEX. PROP. CODE ANN. ch. 162 (West, Westlaw through 2015 R.S.). As applicable to this case, TCTA provides that construction payments made to contractors are trust funds, to be held in trust for the benefit of any laborer, subcontractor, or materialman who furnishes labor or material for the construction or repair of an improvement on specific real property. *See* TEX. PROP. CODE ANN. §§ 162.001–.003; *Morelli v. State*, 9 S.W.3d 909, 910 (Tex. App.—Austin 2000, pet. ref'd). Under this scheme, construction payments are the trust fund; the contractor who receives the trust funds is the trustee; and the laborer, subcontractor, or materialman is the beneficiary of the trust. *See* TEX. PROP. CODE ANN. §§ 162.001–.003.

A trustee commits an offense if he intentionally or knowingly retains, uses, disburses, or otherwise diverts trust funds of the value of more than $500 without first fully paying all current or past due obligations incurred by the trustee to the beneficiaries of the trust funds. *Morelli*, 9 S.W.3d at 911–12; *see* TEX. PROP. CODE ANN. § 162.031(a). "Current or past due obligations" are those obligations incurred or owed by the trustee for labor or materials furnished in the direct prosecution of the work under the construction contract prior to the receipt of the trust funds and which are due and payable by the trustee no later than 30 days following receipt of the trust funds. TEX. PROP. CODE ANN. § 162.005(2).

It is an affirmative defense to prosecution under the TCTA that the contractor used the trust funds to pay for actual expenses directly related to the project. *See id.* §

162.031(b).

B. Discussion

Bolding does not dispute that he was a trustee, that the suppliers were beneficiaries, that the EMS project involved the improvement of real property, or that EMS's progress payments were trust funds within the meaning of the act. *See Morelli*, 9 S.W.3d at 910. Rather, Bolding first argues that there was insufficient evidence to show that any funds he used or diverted away from suppliers could be specifically traced to EMS payments. At trial, the State introduced financial records showing that Bolding deposited all EMS funds into a single account and that Bolding drew on this account for reasons other than paying his suppliers. However, it is undisputed that Bolding also deposited thousands of dollars from unrelated projects into the account where the EMS funds were held. Bolding argues, and we agree, that such comingling of funds is completely legal. *See Boyle v. Abilene Lumber Inc.*, 819 F.2d 583, 586 (5th Cir. 1987). Bolding argues that the State introduced no tracing evidence to show that any contested expenses were made with trust funds as opposed to unrelated, commingled funds.

In *Kirschner*, the Austin Court of Appeals faced a similar situation where TCTA trust funds were routinely comingled with other unrelated funds, which frustrated the State's attempt to trace a contractor's expenses to the trust funds. 997 S.W.2d at 342. The court applied a useful form of analysis which we adopt here: the court relied exclusively upon expenses that were documented in the contractor's own accounting statement. *Id.* Here, Bolding's own accounting of how he spent EMS funds shows that, in October alone, draws of $2,523 were taken directly from EMS funds with the memo of

"cash." *See id*. Unlike a theft offense, the TCTA does not require a deceptive act to show misapplication of trust funds; it requires only a knowing retention, use, disbursal, or diversion of the funds. *See* TEX. PROP. CODE ANN. § 162.031(a); *Morelli*, 9 S.W.3d at 911. It is undisputed that these cash draws were not payments to the beneficiaries of the construction-fund trust. *See* TEX. PROP. CODE ANN. § 162.031(a). This evidence supports a conclusion that EMS funds were not strictly used to pay EMS suppliers, but were instead knowingly used or diverted in a prohibited sense.

Bolding next argues that the State failed to introduce evidence of when the relevant services or materials were provided. Bolding contends that without this evidence, the State failed to prove there was a "current or past due obligation" at the time of the use, retention, or diversion. *See Kirschner*, 997 S.W.2d at 341 ("Absent [evidence of when vendors furnished the labor or materials], the State failed to prove that there was a current or past due obligation owed . . . ."). Contrary to Bolding's assertion, the State introduced evidence of several unpaid invoices that were past due at the time of the cash draws. For instance, invoices from Tejas Equipment showed that the company had provided and billed over $1,000 of services to Bolding before his first cash-draw of October. This amount alone was sufficient to meet the $500 threshold described in the property code. *See* TEX. PROP. CODE ANN. § 162.032(a).

Taken together, this evidence was sufficient to establish beyond a reasonable doubt the only elements of a misapplication offense which Bolding contests: a past-due obligation and a knowing use or diversion. *See Morelli*, 9 S.W.3d at 910.

Bolding next argues these cash draws were "actual expenses" directly related to

the project, which is an affirmative defense under the TCTA. *See* TEX. PROP. CODE ANN. § 162.031(b). The jury rejected Bolding's affirmative defense. We presume that the jury, as the ultimate judge of credibility, resolved this question in favor of the verdict, *see id.*, and we will not disturb the jury's conclusion given that more than a mere scintilla of evidence supports a rejection. *See Matlock*, 392 S.W.3d at 670.

Since the evidence was sufficient to find the elements of the misapplication offense and to reject Bolding's affirmative defense, we conclude that sufficient evidence supports Bolding's conviction on the offense of misapplication of trust funds. *See Dobbs*, 434 S.W.3d at 170; *Matlock*, 392 S.W.3d at 670. We overrule Bolding's second issue.

V. ATTORNEY'S FEES

By his third issue, Bolding asks this Court to determine that he does not owe the State attorney's fees. Bolding points out that when the trial court orally pronounced its sentence, it stated "I will not order [Bolding] to pay attorney's fees." Bolding argues that this oral pronouncement conflicts with the bill of costs that was part of the written judgment, which assessed Bolding with $500 of attorney's fees. In response, the State notes that earlier at the sentencing hearing, the trial court appeared to make a different pronouncement. The State's attorney asked the trial court, "Will the Court order him to pay court costs and attorney's fees as well?" To this, the trial court responded, "Yes, as part of that he'll have to pay court costs and attorney's fees."

When the oral pronouncement of the sentence and the written judgment vary, the oral pronouncement controls. *State v. Davis*, 349 S.W.3d 535, 538 (Tex. Crim. App. 2011). The written sentence or order simply memorializes the oral pronouncement. *Id.*

Where the pronouncement of the sentence is ambiguous, we read the verdict, the court's pronouncement, and the written judgment together in an effort to resolve the ambiguity. *Aguilar v. State*, 202 S.W.3d 840, 843 (Tex. App.—Waco 2006, pet. ref'd).

Here, the context of the trial court's pronouncement makes clear that the trial court did not include an assessment of $500 attorney's fees as part of Bolding's sentence. The trial court's earlier response to the State's question—"Yes, as part of that he'll have to pay court costs and attorney's fees"—was stated informally as part of an explanation of the aspects of Bolding's sentence that *would* be pronounced. By contrast, the trial court's later statement had a finality, formality, and comprehensiveness which suggests that it *was* the pronouncement of the sentence:

> *I have got the whole list of them here*. . . . Okay. I'm going to order punishment assessed for six months in a state jail. I'm going to suspend the sentence to five years. Require him to pay court costs within 60 days. I'll require him to pay probation fees $50 per month. Restitution, $31,306.41, to be paid within five years. *I will not order him to pay attorney's fees, nor pay a fine, nor pay a PSI fee*. I'll order him to pay a $50 Crime Stoppers fee. He will not have to submit to drug/alcohol abuse counseling or anything like that. I believe that's all. Is there anything else?

(Emphasis added). The sentencing proceedings concluded immediately thereafter. Given the context of these statements, we conclude that the trial court's oral pronouncement controls, not the written judgment, and that the trial court did not order Bolding to pay attorney's fees. *See Davis*, 349 S.W.3d at 538; *Aguilar*, 202 S.W.3d at 843. We modify the judgment of the trial court to the extent that it appears to state otherwise.

We sustain Bolding's third issue.

VI. CONCLUSION

We reverse Bolding's convictions for theft of property by deception and theft of services by deception and render an acquittal on these convictions. We modify the judgment to delete the assessment of $500 in attorney's fees from the bill of costs calculation. We affirm, as modified, Bolding's conviction for misapplication of trust funds. *See* TEX. R. APP. P. 43.2(b)–(c).

NELDA V. RODRIGUEZ
Justice

Do not publish.
TEX. R. APP. P. 47.2(b).

Delivered and filed the
30th day of June, 2016.