NUMBER 13-16-00311-CR

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

DANIEL LOPEZ, **Appellant,**

v.

THE STATE OF TEXAS, **Appellee.**

On appeal from the 347th District Court of Nueces County, Texas.

MEMORANDUM OPINION

Before Chief Justice Valdez and Justices Contreras and Hinojosa
Memorandum Opinion by Justice Hinojosa

Appellant Daniel Lopez appeals his conviction for theft of property valued at greater than $1,500, but less than $20,000. *See* Act of May 29, 2011, 82d Leg., R.S., ch. 1234, § 21, 2011 Tex. Gen. Laws 3302, 3310 (amended 2015) (current version at TEX. PENAL CODE ANN. § 31.03(e)(4) (West, Westlaw through 2017 R.S.)). The offense was enhanced to a second-degree felony by appellant's status as a habitual felony

offender. *See* TEX. PENAL CODE ANN. § 12.425(b) (West, Westlaw through 2017 R.S.). A jury returned a guilty verdict, and the trial court sentenced appellant to fifteen years' confinement in the Texas Department of Criminal Justice–Institutional Division.[1] By one issue, appellant argues the evidence is legally insufficient to support his conviction.

I. BACKGROUND[2]

Appellant was indicted for theft of a diamond ring from a jewelry store in Corpus Christi, Texas. The evidence at trial showed that appellant entered Aman's Jewelers in La Palmera Mall, where he was assisted by Velma Zamora, the store manager. According to Zamora, appellant said he just won the lottery and wanted to purchase a special gift for his wife. Zamora showed appellant rings with smaller diamonds, but appellant stated he wanted "something bigger." Zamora then showed him a two-carat diamond ring. Zamora stated that appellant would handle the rings with one hand while clenching his other hand in a fist. Appellant requested a loupe—a magnifying glass used by jewelers—so he could inspect the diamonds. After looking at the rings, appellant then pushed the rings toward Zamora, stating that they were not what he was looking for. Appellant then asked to look at watches. At this time, Zamora noticed that appellant's hand was no longer clenched and was now in his pocket. Appellant told Zamora he wanted to talk to his wife. He then left the store without purchasing anything. Later,

[1] In appellate cause number 13-16-0310-CR, appellant appeals a separate conviction for theft, which resulted in a ten-year prison sentence. The trial court ordered the respective sentences to be served consecutively.

[2] Because this is a memorandum opinion and the parties are familiar with the facts, we will not recite them here except as necessary to advise the parties of the Court's decision and the basic reasons for it. *See* TEX. R. APP. P. 47.4.

Zamora learned that a two-carat diamond ring was missing from the showcase and had been replaced with a "dummy ring," which had a different tag than those used by the store.

Sometime after appellant left the store, Zubair Ullah, part owner of Aman's Jewelers, discovered that a two-carat diamond ring was missing. Ullah testified that he noticed a "cubic zirconia" ring in the showcase which did not have the proper store tag. Ullah stated that his store only carries gold and diamond in that particular showcase. Ullah stated that a cubic zirconia is worth $20 to $50, while a two-carat diamond is worth up to $20,000. Ullah later viewed surveillance footage showing appellant looking at the missing two-carat diamond ring. The surveillance footage was admitted into evidence and published to the jury.

Three days after visiting Aman's Jewelers, appellant entered Modern Pawn and Guns in Corpus Christi and attempted to sell a diamond ring. Joseph Malik Afram, the owner of the store, assisted appellant. Appellant told Afram he wanted "at least $4,000." Afram examined the ring and confirmed it was a two-carat diamond ring, before offering to purchase the ring for $2,200. Appellant declined the offer and left the store. Appellant later returned with his wife and a young child. At this time, appellant agreed to sell the diamond stone if he could keep the ring setting itself because of its "sentimental value." Afram agreed and purchased the stone.

With the assistance of law enforcement, a representative of Aman's Jewelers identified the diamond stone sold by appellant as belonging to their store. Afram agreed that it was the same stone and returned it. The parties identified the diamond by

reviewing a "gemological lab report" which noted distinct markings in the stone, as well as the stone's weight and dimensions.

The jury returned a guilty verdict. This appeal followed.

II. LEGAL SUFFICIENCY

A. Standard of Review and Applicable Law

"The standard for determining whether the evidence is legally sufficient to support a conviction 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.'" *Johnson v. State*, 364 S.W.3d 292, 293–94 (Tex. Crim. App. 2012) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)) (emphasis in *Jackson*); *see Brooks v. State*, 323 S.W.3d 893, 898–99 (Tex. Crim. App. 2010) (plurality op.). The fact-finder is the exclusive judge of the credibility of witnesses and of the weight to be given to their testimony. *Brooks*, 323 S.W.3d at 899; *Lancon v. State*, 253 S.W.3d 699, 707 (Tex. Crim. App. 2008). Reconciliation of conflicts in the evidence is within the fact-finder's exclusive province. *Wyatt v. State*, 23 S.W.3d 18, 30 (Tex. Crim. App. 2000). We resolve any inconsistencies in the testimony in favor of the verdict. *Bynum v. State*, 767 S.W.2d 769, 776 (Tex. Crim. App. 1989) (en banc).

We measure the sufficiency of the evidence by the elements of the offense as defined by a hypothetically correct jury charge. *Cada v. State*, 334 S.W.3d 766, 773 (Tex. Crim. App. 2011) (citing *Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997)). Such a 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*.

Under a hypothetically correct charge, the State was required to prove beyond a reasonable doubt that appellant unlawfully appropriated property of $1,500 or more but less than $20,000 with the intent to deprive the owner of the property. *See* Act of May 29, 2011, 82d Leg., R.S., ch. 1234, § 21, 2011 Tex. Gen. Laws 3302, 3310 (amended 2015).

"Appropriate" includes "to acquire or otherwise exercise control over property other than real property." TEX. PENAL CODE ANN. § 31.01(4)(B) (West, Westlaw through 2017 R.S.). "Deprive" includes "to withhold property from the owner permanently or for so extended a period of time that a major portion of the value or enjoyment of the property is lost to the owner." *Id*. § 31.01(2)(A). "Appropriation of property is unlawful if . . . it is without the owner's effective consent." *Id*. § 31.03(b)(1). An owner is "a person who . . . has title to the property, possession of the property, whether lawful or not, or a greater right to possession of the property than the actor[.]" *Id*. § 1.07(a)(35)(A) (West, Westlaw through 2017 R.S.).

B. Analysis

Appellant argues the evidence fails to establish that he "appropriated the ring from the owner with intent to deprive the owner of its use[.]" Rather, according to appellant, the evidence established only that he "assisted in the sale of the ring in question, but not that he ever took the ring." We disagree.

The evidence reflects that appellant viewed a two-carat diamond ring days before offering to sell to a pawn store a two-carat diamond ring, and ultimately selling the two-

carat diamond stone attached to the ring. A defendant's unexplained possession of recently stolen property permits an inference that the defendant is the one who committed the theft. *See Rollerson v. State*, 227 S.W.3d 718, 725 (Tex. Crim. App. 2007); *Chavez v. State*, 843 S.W.2d 586, 589 (Tex. Crim. App. 1992). Appellant offered no explanation for how he came into possession of the stolen ring. In addition, as described by witnesses and depicted by video evidence, appellant viewed a two-carat diamond ring at Aman's Jewelers shortly before a "dummy ring" was discovered in its place. The diamond stone later sold by appellant was positively identified as the same stone missing from Aman's Jewelers. The jury could have reasonably inferred from this evidence that appellant switched the diamond ring with a far less valuable cubic-zirconia ring. Viewing the evidence in the light most favorable to the prosecution, we conclude that a rational trier of fact could have found beyond a reasonable doubt that appellant appropriated the diamond ring with the intent to deprive the owner of the property. *See Johnson*, 364 S.W.3d at 293–94.

We overrule appellant's sole issue.

III. CONCLUSION

We affirm the trial court's judgment.

LETICIA HINOJOSA
Justice

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

Delivered and filed the
28th day of September, 2017.