NO. 12-11-00289-CR

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

PHYLIS PAULETTE HAYES, APPELLANT	***§***	***APPEAL FROM THE 114TH***
V.	***§***	***JUDICIAL DISTRICT COURT OF***
THE STATE OF TEXAS, APPELLEE	***§***	***SMITH COUNTY, TEXAS***

MEMORANDUM OPINION

Phylis Paulette Hayes appeals her conviction for theft of the value of less than $1,500.00. In three issues, Appellant contends the evidence is legally insufficient to support her conviction. We affirm.

BACKGROUND

Appellant was charged by indictment with unlawfully appropriating, "by acquiring or otherwise exercising control over, property, to-wit: electronics and bedding, of the value of less than $1,500, from Ray Arreguin the owner thereof, without the effective consent of the owner, and with intent to deprive the owner of the property." The indictment also included a jurisdictional paragraph alleging that, before the commission of this offense, Appellant had been twice convicted of theft, which enhanced the offense to a state jail felony.[1] Appellant pleaded "not guilty."

At the bench trial, Ray Arreguin, an asset protection associate for Wal-Mart, testified that he was patrolling the seasonal area of a Wal-Mart store when he noticed Appellant "stuffing"

[1] *See* TEX. PENAL CODE ANN. § 31.03(a), (e)(4)(D) (West Supp. 2012).

merchandise from her basket onto a shelf. When she walked away, Arreguin discovered that one of the items was an empty box of Christmas lights. According to Arreguin, this behavior was one of the four elements he looks for in a theft including selection, concealment, disposition, and passing the last point of sale with concealed merchandise. At that point, he began following Appellant. He stated that she walked to the electronics area of the store where she met her nephew, Gregory Hayes. He testified that Gregory selected a cellular telephone and that Appellant and Gregory walked to the furniture department.

According to Arreguin, Gregory acted as a "lookout" and picked up a foldable table set in a box. Arreguin contacted his partner, Gideon Lee Hines, to assist him with surveillance. Then, he observed Appellant use scissors to cut open the package containing the cellular telephone, take the cellular telephone apart, and slip part of the telephone into her bra and the other part into her purse. The associates stated that Appellant and Gregory passed the last registers and stopped at a McDonald's at the entrance of the store to buy drinks. Arreguin testified that he and Hines stopped Appellant and Gregory as they exited the store after passing the last point of sale without making any attempt to purchase the merchandise. According to Arreguin, Appellant and Gregory were taken to the asset protection office. He testified that the merchandise Appellant had not paid for that was recovered included a cellular telephone, a toaster, a George Foreman grill, a 400 thread count sheet set, a comforter set, and a five piece pop-up table set. The State entered an invoice into evidence showing that the total value of this merchandise was $394.88.

At the conclusion of the trial, the trial court found Appellant guilty of the offense of theft of the value of less than $1,500.00. The trial court found the jurisdictional paragraph to be 'true," and assessed her punishment at fifteen months of confinement in a state jail facility.[2] This appeal followed.

LEGAL SUFFICIENCY OF THE EVIDENCE

In her first issue, Appellant argues that the evidence is legally insufficient to support her conviction for theft. In her second issue, she contends that the trial court erred by denying her

[2] An individual adjudged guilty of a state jail felony shall be punished by confinement in a state jail for any term of not more than two years or less than 180 days and, in addition, a fine not to exceed $10,000. *See* TEX. PENAL CODE ANN. § 12.35(a), (b) (West Supp. 2012).

motion for a directed verdict because the State failed to present legally sufficient evidence to convict her of theft. On appeal, Appellant argues these two issues together, and we will consider them together.

Standard of Review

The ***Jackson v. Virginia***[3] standard is the only standard that a reviewing court should apply in determining whether the evidence is sufficient to support each element of a criminal offense that the state is required to prove beyond a reasonable doubt. *See* ***Brooks v. State***, 323 S.W.3d 893, 912 (Tex. Crim. App. 2010). Under ***Jackson***, when reviewing the sufficiency of the evidence, we view all the evidence in the light most favorable to the verdict to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *See* ***Jackson***, 443 U.S. 318-19, 99 S. Ct. at 2789; ***Isassi v. State***, 330 S.W.3d 633, 638 (Tex. Crim. App. 2010). We may not reevaluate the weight and credibility of the record evidence and thereby substitute our judgment for that of the factfinder. ***Isassi***, 330 S.W.3d at 638. Rather, we defer to the responsibility of the trier of fact to fairly resolve conflicts in testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. ***Id***.

The trial judge, being the trier of fact and judge of the credibility of the witnesses, may choose to believe or not believe the witnesses, or any portion of their testimony. ***Sharp v. State***, 707 S.W.2d 611, 614 (Tex. Crim. App. 1986). Further, a witness may be believed even though some of his testimony may be contradicted and part of his testimony recorded, accepted, and the rest rejected. ***Id***. Each fact need not point directly and independently to the guilt of the appellant, as long as the cumulative force of all the incriminating circumstances is sufficient to support the conviction. ***Hooper v. State***, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007). Circumstantial evidence is as probative as direct evidence in establishing the guilt of an actor, and circumstantial evidence alone can be sufficient to establish guilt. ***Id***. Our role on appeal is restricted to guarding against the rare occurrence when a factfinder does not act rationally. ***Laster v. State***, 275 S.W.3d 512, 517 (Tex. Crim. App. 2009).

[3] 443 U.S. 307, 318-19, 99 S. Ct. 2781, 2789, 61 L. Ed. 2d 560 (1979).

Applicable Law

A person commits the offense of theft if she unlawfully appropriates property with intent to deprive the owner of property. *See* TEX. PENAL CODE ANN. § 31.03(a) (West Supp. 2012). Theft has three elements: (1) an appropriation of property (2) that is unlawful (3) and is committed with the intent to deprive the owner of the property. *See* ***id***.; *see also* ***Hawkins v. State***, 214 S.W.3d 668, 670 (Tex. App.–Waco 2007, no pet.). "Appropriate" means to acquire or otherwise exercise control over property other than real property. *See* TEX. PENAL CODE ANN. § 31.01(4)(B) (West Supp. 2012). Appropriation of property is unlawful if it is without the owner's effective consent. *See* ***id.*** § 31.03(b)(1) (West Supp. 2012).

Analysis

At trial, Arreguin testified that he saw Appellant exit the store after passing the last point of sale without making any attempt to purchase the merchandise she had selected, including a cellular telephone, a toaster, a George Foreman grill, a 400 thread count sheet set, a comforter set, and a five piece pop-up table set. He stated that the photograph introduced into evidence showed all of these items, except the cellular telephone. Instead, according to Arreguin, the photograph showed the cellular telephone package. He testified that the cellular telephone was not with the packaging because it was taken back to the claims office.

Hines, an asset protection associate for Wal-Mart, testified that he retrieved the empty package that contained the cellular telephone after Appellant and Gregory left the furniture area of the store. Hines stated that when Appellant was taken to the asset protection office, she removed a cellular telephone from her bra when she was requested to give them all of the unpurchased merchandise. Hines admitted that a cellular telephone Appellant removed from her bra was returned because it was hers. However, he testified that he saw Appellant cut open the package of a cellular telephone and put the telephone in her bra. Hines believed that Appellant had two cellular telephones. He also said that he took the photograph of the stolen merchandise. Jordan Hill, a City of Tyler police officer, stated that he arrived after Appellant and Gregory had been stopped from leaving the store premises. He testified that he observed all of the stolen merchandise in the photograph, including a cellular telephone.

On appeal, Appellant argues that the record shows Hill testified that he did not see a cellular telephone in the photograph. We agree with Appellant's characterization of Hill's

testimony. However, Hill also testified that he observed the stolen cellular telephone after it had been retrieved from Appellant. Further, Appellant contends that the evidence does not show that she stole a cellular telephone and that no testimony links her to the other stolen property. Rather, she argues, the evidence shows that the cellular telephone Appellant removed from her bra was her own telephone and was returned to her. Arreguin and Hines testified that the cellular telephone Appellant removed from its package was placed in her bra. Even though Hines testified that a cellular telephone removed from Appellant's bra was returned to her, he also stated that he believed Appellant had two cellular telephones. The logical inference from this evidence is that Appellant removed both a stolen cellular telephone and her own cellular telephone from her bra. *See* ***Issassi***, 330 S.W.3d at 638.

Having examined the evidence in the light most favorable to the verdict, we conclude that the trial court could have determined beyond a reasonable doubt that Appellant, without Wal-Mart's effective consent, placed a cellular telephone in her bra with the intent to deprive Wal-Mart of the property. *See* TEX. PENAL CODE ANN. § 31.03(a), (b)(1); ***Jackson***, 443 U.S. 318-19, 99 S. Ct. at 2789; ***Hawkins***, 214 S.W.3d at 670. Therefore, we hold that the evidence is legally sufficient to support the trial court's judgment. We overrule Appellant's first and second issues.

VARIANCE

In her third issue, Appellant argues there is a fatal variance between the charging instrument and the proof at trial regarding the owner of the stolen property. The indictment alleges that the owner of the stolen property is "Ray Arreguin," while the trial record shows that "Ray Erguin," an asset protection associate for Wal-Mart, testified that Appellant stole property from Wal-Mart. Appellant contends that because these names cannot be reconciled, this is a material variance resulting in legally insufficient evidence to support her conviction.

Applicable Law

A "variance" occurs when there is a discrepancy between the allegations in the charging instrument and the proof at trial. ***Gollihar v. State***, 46 S.W.3d 243, 246 (Tex. Crim. App. 2001). The issue of a variance relates to the legal sufficiency of the evidence. ***Id***. at 247. We must conduct a materiality inquiry in all cases that involve a "sufficiency of the evidence claim based upon a variance between the indictment and the proof," and only a "material" variance will

render the evidence insufficient. ***Fuller v. State***, 73 S.W.3d 250, 253 (Tex. Crim. App. 2002) (quoting ***Gollihar***, 46 S.W.3d at 257). This "materiality" inquiry requires a determination of whether the variance deprived the defendant of notice of the charges or whether the variance subjects the defendant to the risk of later being prosecuted for the same offense. ***Id***.

The state is required to allege the name of the owner of property in its charging instrument. ***Byrd v. State***, 336 S.W.3d 242, 251 (Tex. Crim. App. 2011) (citing TEX. CODE CRIM. PROC. ANN. art. 21.08 (West 2009)). When an entity, such as a corporation, owns property, the traditionally preferable practice has been to allege ownership in a natural person acting for the corporation. ***Id.*** at 252. Although the name of the owner is not a substantial element of theft, the state is required to prove, beyond a reasonable doubt, that the person (or entity) alleged in the indictment as the owner is the same person (or entity)—regardless of the name—as shown by the evidence. ***Id***. In sum, it is the identity of the person, not his formal name, that controls and guides the sufficiency of the evidence review. ***Id***. at 258.

Analysis

Here, the record shows that the Ray Arreguin identified as the owner of the property in the indictment is the same person who testified at Appellant's trial. At trial, Arreguin and Hill testified that Arreguin made a statement to the police against Appellant regarding the theft of property from Wal-Mart. Appellant identified Arreguin as one of the two individuals who stopped her and Gregory as they attempted to leave the store with the merchandise. Thus, Arreguin is the same person who confronted Appellant at the store and whose name was in the indictment as the owner of the property. Further, misspelling of a name by a court reporter is not a failure of proof. *See* ***Byrd***, 336 S.W.3d at 257-58. The record shows that Arreguin was not asked to spell his name before testifying and, apparently, the court reporter did not check the spelling of Arreguin's name when he appeared in court, or during the four months that elapsed between the date the bench trial was held (August 15, 2011) and the date the reporter's record was filed in this court (December 22, 2011).

Appellant's challenge to the legal sufficiency of the evidence based upon a variance fails because the record shows that Arreguin, the person identified as the owner of the property in the indictment, is the same person who testified at Appellant's trial. The misspelling of Arreguin's name by the court reporter is not a material variance. *See* ***id***. at 253, 258. Appellant's third issue

is overruled.

DISPOSITION

Having overruled all three of Appellant's issues on appeal, we ***affirm*** the judgment of the trial court.

JAMES T. WORTHEN
Chief Justice

Opinion delivered August 15, 2012.
Panel consisted of Worthen, C.J., Griffith, J., and Hoyle, J.

(DO NOT PUBLISH)

COURT OF APPEALS
TWELFTH COURT OF APPEALS DISTRICT OF TEXAS
JUDGMENT

AUGUST 15, 2012

NO. 12-11-00289-CR

PHYLIS PAULETTE HAYES,
Appellant
V.
THE STATE OF TEXAS,
Appellee

Appeal from the 114th Judicial District Court
of Smith County, Texas. (Tr.Ct.No. 114-0590-11)

THIS CAUSE came to be heard on the appellate record and briefs filed herein, and the same being considered, it is the opinion of this court that there was no error in the judgment.

It is therefore ORDERED, ADJUDGED and DECREED that the judgment of the court below **be in all things affirmed**, and that this decision be certified to the court below for observance.

James T. Worthen, Chief Justice.
Panel consisted of Worthen, C.J., Griffith, J., and Hoyle, J.