NO. 12-15-00018-CR

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

TIMOTHY TANNER VIATOR, APPELLANT	***§***	***APPEAL FROM THE 3RD***
V.	***§***	***JUDICIAL DISTRICT COURT***
THE STATE OF TEXAS, APPELLEE	***§***	***ANDERSON COUNTY, TEXAS***

MEMORANDUM OPINION

Timothy Tanner Viator appeals his conviction for engaging in organized criminal activity. In one issue, Appellant challenges the legal sufficiency of the evidence to support the conviction.[1] We affirm.

BACKGROUND

Appellant was charged by indictment with four counts of forgery, third degree felonies, and one count of engaging in organized criminal activity, a second degree felony. Appellant pleaded "not guilty" to all the charges. At trial, the evidence showed that Appellant, Joshua Breaux, Colby Mitchell, and Troy Mouton drove from Lafayette, Louisiana, to Crockett, Texas. They all had counterfeit fifty dollar bills in their possession. During their trip, they stopped at numerous convenience stores to purchase a relatively inexpensive item with one of the counterfeit bills so that they would receive legitimate cash as change. They then drove from Crockett to Palestine, Texas, where they continued the same conduct at several local convenience stores. A convenience store clerk recognized that the men were passing counterfeit bills and called law enforcement.

[1] Appellant was also convicted for four counts of forgery, but does not allege any error with those relating to convictions.

Officers from the Palestine Police Department soon found Breaux, Mitchell, and Mouton at a convenience store and arrested them. Appellant was not with them because he had walked to another convenience store in an effort to pass another counterfeit bill. When Appellant saw that law enforcement had detained Breaux, Mitchell, and Mouton, he left the scene. Breaux, Mitchell, and Mouton told law enforcement about Appellant. The police began to search the area for Appellant. A few hours later, they received a tip that Appellant was at a movie theater in the area. Richard Johnson, a patrol sergeant with the Palestine Police Department, approached Appellant in the theater, but Appellant fled. After a chase and a scuffle, Johnson apprehended Appellant. After Johnson arrested and searched Appellant, he found five counterfeit fifty dollar bills in Appellant's wallet.

After a jury trial, the jury found Appellant guilty of all charges as alleged in the indictment. The trial court assessed Appellant's punishment at imprisonment for ten years for each of the four forgery convictions, and twelve years for the engaging in organized criminal activity conviction. The trial court also ordered that the sentences run concurrently. This appeal followed.

LEGAL SUFFICIENCY

In his sole issue, Appellant argues that the evidence is insufficient to support his conviction for engaging in organized criminal activity. Specifically, he contends that the evidence does not support that Appellant intended to participate in a continuing course of criminal activity with Breaux, Mitchell, and Mouton.

Standard of Review

In Texas, the ***Jackson v. Virginia*** legal sufficiency 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. ***Brooks v. State***, 323 S.W.3d 893, 912 (Tex. Crim. App. 2010). Legal sufficiency is the constitutional minimum required by the Due Process Clause of the Fourteenth Amendment to sustain a criminal conviction. *See* ***Jackson v. Virginia***, 443 U.S. 307, 316–17, 99 S. Ct. 2781, 2786–87, 61 L. Ed. 2d 560 (1979). The standard for reviewing a legal sufficiency challenge is whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *See* ***id.***, 443 U.S. at 319, 99 S. Ct. at 2789. The evidence is examined in the

light most favorable to the verdict. ***Id.*** A successful legal sufficiency challenge will result in rendition of an acquittal by the reviewing court. *See* ***Tibbs v. Florida***, 457 U.S. 31, 41–42, 102 S. Ct. 2211, 2217–18, 72 L. Ed. 2d 652 (1982). This familiar standard gives full play to the responsibility of the trier of fact to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from the basic facts to ultimate facts. *See* ***Jackson***, 443 U.S. at 319, 99 S. Ct. at 2789.

Under this standard, we may not sit as a thirteenth juror and substitute our judgment for that of the fact finder by reevaluating the weight and credibility of the evidence. *See* ***Dewberry v. State***, 4 S.W.3d 735, 740 (Tex. Crim. App. 1999); *see also* ***Brooks***, 323 S.W.3d at 899. Instead, we defer to the fact finder's resolution of conflicting evidence unless the resolution is not rational. *See* ***Brooks***, 323 S.W.3d at 899–900. When the record supports conflicting inferences, we presume that the factfinder resolved the conflicts in favor of the prosecution and therefore defer to that determination. ***Clayton v. State***, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007). Direct and circumstantial evidence are treated equally. ***Id.*** 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. ***Hooper v. State***, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007). The duty of a reviewing court is to ensure that the evidence presented actually supports a conclusion that the defendant committed the crime charged. *See* ***Williams v. State***, 235 S.W.3d 742, 750 (Tex. Crim. App. 2007).

The sufficiency of the evidence is measured against the elements of the offense as defined by a hypothetically correct jury charge. *See* ***Malik v. State***, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997). Such a charge would include 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.***

Applicable Law

As relevant to this case, a person engages in organized criminal activity if, with the intent to establish, maintain, or participate in a combination or in the profits of a combination, the person commits or conspires to commit forgery. *See* TEX. PENAL CODE ANN. § 71.02(a)(8)

(West Supp. 2015).[2] A "combination" is three or more persons who collaborate in carrying on criminal activities. ***Id.*** § 71.01(a) (West 2011). "Collaborate" means "[t]o work together, [especially] in a joint intellectual effort." THE AMERICAN HERITAGE COLLEGE DICTIONARY 273 (3d ed. 1993). Thus, the state must prove that the members of the combination "intend[ed] to work together in a continuing course of criminal activities." ***Nguyen v. State***, 1 S.W.3d 694, 697 (Tex. Crim. App. 1999).

Continuity of criminal activities means more than a single ad hoc effort. *See* ***id.*** Therefore, the state must present evidence of acts of the combination that demonstrate more than an agreement to jointly commit a single crime. *See* ***id.*** Noncriminal acts can be considered so long as they evidence that a continuing course of criminal activities was intended. ***Id.*** And while the members of the combination must intend a continuing course of criminal activities, the state is not required to prove the actual commission of more than one offense. ***Id.***

Application

Here, there is ample evidence of an intent to work together in a continuing course of criminal activities. *See* ***id.*** Breaux, Mitchell, Mouton, and Appellant brought counterfeit money from Louisiana to Texas, and stopped at numerous convenience stores along the way to spend the money. All of them had fifty dollar counterfeit bills in their possession when they were arrested. Breaux owned the vehicle the group used for the trip, and he gave consent for the vehicle to be searched. Law enforcement found a detector pen used to identify counterfeit money in the back seat of the vehicle.

James Heavner, a detective with the Palestine Police Department, interviewed Appellant, Breaux, Mitchell, and Mouton. During the recorded interview offered into evidence, Appellant claimed that Mitchell provided the counterfeit money, that he did not really know Breaux or Mouton, and that he did not know the money was counterfeit. Appellant admitted to Heavner that they stopped at a lot of convenience stores on their trip from Louisiana to Texas. He also claimed that Mitchell spent most of the money, but that everyone used counterfeit bills at convenience stores on the trip.

Bradley Schley, an agent with the United States Secret Service, testified that he inspected all of the fifty dollar bills that had been in the possession of the group members. He stated that all

[2] The legislature amended section 71.02 after the incidents made the basis of Appellant's conviction. Because those changes have no effect on the analysis in this case, we have cited to only the most current version of the statute.

of the bills were counterfeit and made from legitimate five dollar bills. He further opined that, to make a five dollar bill into a fifty dollar bill, the group invested a lot of work and time.

Mitchell's and Mouton's trial testimony and their recorded interviews admitted into evidence provided additional evidence of the combination's intent. Mitchell conceded in his trial testimony that he previously had been convicted of engaging in organized criminal activity and four counts of forgery. He stated that he had known Appellant, Breaux, and Mouton for several years. Mitchell admitted that he and Appellant had made several similar road trips in the past to New Orleans in the past, and that Appellant had provided the money for those trips.

Mitchell stated in his recorded interview that on this road trip, Appellant had a large stack of fifty dollar bills. He said he did not know that the money was counterfeit. He also said that Appellant gave everyone fifty dollar bills, and that they used the money at several different locations on the trip. Mitchell testified that at one point, Breaux ran out of a convenience store, and he believed it was because somebody wanted to fight Breaux. He said he did not realize until later that Breaux ran because he had tried to use counterfeit money. Mitchell was arrested with three counterfeit fifty dollar bills in his possession. Finally, Mitchell admitted that he and Appellant always had a printer with them, and that he and Appellant had purchased some printer items on two occasions. Mitchell also stated that Breaux and Mouton were his best friends.

Mouton testified that he previously had been convicted of engaging in organized criminal activity and four counts of forgery. He met Appellant shortly before they took the trip from Louisiana to Texas, but he had known Mitchell for some time. Mouton said that Breaux gave him the counterfeit money, and that he knew the money was counterfeit because Breaux told him so. In his recorded interview, Mouton stated that Appellant had all of the money and asked him to spend several of the counterfeit bills in Texas. He said that he did so. However, at trial, Mouton testified that he lied about Appellant's having all of the counterfeit bills because he was mad at Appellant. Mouton had eight counterfeit fifty dollar bills in his possession when he was arrested.

Viewing the evidence in the light most favorable to the prosecution, we conclude that a rational factfinder could have found, beyond a reasonable doubt, that Appellant intended to participate in a continuing course of criminal activity with Breaux, Mitchell, and Mouton. Because Appellant does not challenge the sufficiency of the evidence to support any other element of the offense, we hold that the evidence is legally sufficient to support Appellant's

conviction. *See* ***Brooks***, 323 S.W.3d at 899; ***Nguyen***, 1 S.W.3d at 697. We overrule Appellant's sole issue on appeal.

DISPOSITION

Having overruled Appellant's sole issue, we ***affirm*** the judgment of the trial court.

BRIAN HOYLE
Justice

Opinion delivered June 24, 2016, 2016.
Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.

(DO NOT PUBLISH)

COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT OF TEXAS

JUDGMENT

JUNE 24, 2016

NO. 12-15-00018-CR

TIMOTHY TANNER VIATOR,
Appellant
V.
THE STATE OF TEXAS,
Appellee

Appeal from the 3rd District Court
of Anderson County, Texas (Tr.Ct.No. 31699)

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.

Brian Hoyle, Justice.
Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.