Affirmed and Opinion filed March 15, 2001.

In The

Fourteenth Court of Appeals

NO. 14-99-00042-CR

PATRICIA WRIGHT, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 155th District Court
Austin County, Texas
Trial Court Cause No. 97R-111

O P I N I O N

Appellant was charged in a multi-paragraph indictment with three separate incidents of theft aggregated under the theory that they were part of one scheme and continuing course of conduct. *See* TEX. PEN. CODE ANN. §§ 31.03(e)(4)(A) and 31.09. The jury convicted appellant of the charged offense. The trial court assessed punishment at two years confinement in a state jail facility, suspended for a period of five years, and ordered restitution. *See* TEX. PEN. CODE ANN. § 12.35(a) and TEX. CODE CRIM. PROC. ANN. art. 44.12, § 15. Appellant raises twenty points of error. We affirm.

I. Sufficiency Challenges.

In nine separate points of error, appellant challenges the sufficiency of the evidence to support the jury's verdict. In order to effectively consider each of these points, we will begin with a detailed recount of the trial evidence and later discuss that evidence in light of each evidentiary challenge.

A. The Evidence.

The complainant, Janet Newbill, conceived the idea of transforming her rental property into a gift shop to be known as Timeless Treasures. Because Newbill was employed, she needed someone to oversee the transformation of the property from residential to commercial; Newbill recruited appellant for that purpose. Newbill envisioned a partnership whereby she would provide the funds for the renovation of the property and the merchandise, appellant would oversee the renovation and run the business when it became an ongoing concern, and the two would evenly divide any profits derived from the business. While this agreement was understood by both Newbill and appellant, it was never reduced to writing.[1]

On June 5, 1997, Newbill wrote a check from her separate account in the amount of $3,000, and gave that check to appellant who opened a bank account for the purpose of operating the business. Both Newbill and appellant had check writing privileges on this account. When the funds in the account were depleted, appellant would notify Newbill who would deposit more funds into the account. In total, Newbill deposited approximately $50,000 of her separate funds into the business account. On several occasions, Newbill requested an accounting for these funds, but appellant did not provide that accounting, nor

---

[1] Although the partnership agreement was not reduced to writing, Newbill and appellant submitted documentation to the State Comptroller reflecting a partnership and filed an assumed name request stating the business was a partnership. Also, when Newbill and appellant traveled to market to purchase inventory, Newbill provided information that appellant was part owner in the business.

did she provide bank statements, check stubs or receipts to explain how the funds were being expended. On August 11, appellant finally provided Newbill with the requested information. Upon examination of the checks and receipts, Newbill found legitimate expenditures, but found many checks and receipts that were apparently not related to legitimate business purposes. After making this discovery, Newbill scheduled a meeting where she asked appellant to account for approximately $9,200, which Newbill believed was inappropriately spent. Appellant, unable to provide Newbill with an explanation, gathered her property and left the business.

Newbill identified several checks written on the Timeless Treasures account. Each check was signed by appellant and made payable to, *inter alia*, appellant, her husband, her daughter, her bank and cash. Newbill testified appellant was authorized to write checks for business purposes only; appellant was not authorized to write any of the identified checks, nor was appellant authorized to use any of the Timeless Treasure funds for her personal affairs. Newbill further testified that any funds expended on behalf of the business would be authorized and would not constitute theft.

James Simmons, the president of appellant's bank, testified that several of the checks drawn on the Timeless Treasures account had been deposited directly into appellant's account. Simmons also testified that during the time of the Newbill-appellant partnership, several checks drawn on appellant's account had been returned "NSF" because there were not sufficient funds in appellant's account.

Brandt Glover, an employee with the tax division of the State Comptroller's office, testified that appellant and her husband had a partnership account with the Texas Comptroller. Glover stated that account was delinquent for nonpayment of sales taxes. This delinquency resulted in Glover putting a "freeze" on appellant's bank account.

Appellant called her daughter, Lori Balusek, as a witness. Balusek explained she sold

an armoire to appellant, who planned to use it to display merchandise in Timeless Treasures. The armoire was purchased with a $500 check drawn on the Timeless Treasures account, which had been admitted into evidence during the State's case-in-chief.

Appellant's husband, Ron Wright, testified and explained several of the checks drawn on the Timeless Treasures account. He explained that he worked with appellant in converting Newbill's rental property into Timeless Treasures. Wright often ran errands and purchased items necessary to convert the property. The checks were written either to Wright directly to reimburse him for purchases he had made on behalf of the partnership, or the checks were written to cash to make out-of-town purchases from merchants who would not accept temporary checks. Wright would cash the check and then use the funds to purchase the items that were ultimately used to convert the property. Wright would verify the purchases by providing a receipt.

Appellant's testimony regarding the formulation of the partnership, and the respective duties and responsibilities of each party was consistent with Newbill's testimony. Appellant stated that she was not to be compensated in any way other than the sharing of profits from the partnership. Appellant further testified that her husband was not to be compensated for his efforts in converting the rental property into Timeless Treasures. Appellant identified the checks admitted in the State's case-in-chief through Newbill's testimony.

Appellant readily admitted writing the checks, but insisted they were for legitimate business expenses. For example, she stated that the checks written to herself, her husband or cash were for the purpose of obtaining funds to purchase supplies from out-of-town merchants. Appellant stated the $500 check written to her daughter was to purchase the armoire for use in the partnership. Appellant further testified that some of the checks were written to reimburse her for purchases she had made from her own checking account. Appellant testified that every check was utilized to make purchases to benefit the partnership. However, appellant admitted that occasionally she purchased non-business related items with

partnership checks, but explained she would deduct those items from her share of the profits. Appellant concluded her direct testimony by stating she never converted any of Newbill's funds for personal use nor did appellant ever intend to deprive Newbill of those funds.

Donna Bremmer, Cynthia Schroppel, Pat Britt and Frank Lucas testified as character witnesses and stated appellant was truthful and honest.

B. Partnership Determination.

Many of appellant's sufficiency challenges rest upon the proposition that a partner cannot steal from a partnership. The State counters the partnership was never consummated because the condition precedent, profits, had not occurred. Therefore, the threshold issue is whether the business relationship between Newbill and appellant was a partnership. "A partnership is an association of two or more persons to carry on as co-owners of a business for profit." TEX. REV. CIV. STAT. ANN. art. 6132b § 6(1) (Vernon 1970). This association must be based on an express or implied agreement. *See Grimmett v. Higginbotham*, 907 S.W.2d 1, 2 (Tex. App.—Tyler 1994, writ denied). Such an agreement has four essential elements: (1) a community of interest in the venture, (2) an agreement to share profits, (3) an agreement to share losses, and (4) a mutual right of control or management of the enterprise. *See Schlumberger Tech. Corp. v. Swanson*, 959 S.W.2d 171, 176 (Tex.1997). As a matter of law, a partnership does not exist if any one of these elements is not established. *See id.; Stephanz v. Laird*, 846 S.W.2d 895, 900 (Tex. App.—Houston [1st Dist.] 1993, writ denied); *State v. Houston Lighting & Power Co.*, 609 S.W.2d 263, 268 (Tex. Civ. App.—Corpus Christi 1980, writ ref'd n.r.e.). The burden of proof is on the party seeking to establish the partnership. *See Stephanz*, 846 S.W.2d at 899; *Ben Fitzgerald Realty Co. v. Muller*, 846 S.W.2d 110, 120 (Tex. App.—Tyler 1993, writ denied).

As these four elements relate to the instant case, we find the following: Newbill and appellant shared a community of interest in the venture. Both testified that the relationship

was a partnership and both undertook actions that held out the business as a partnership. *See* n. 1, *supra*. Further, both testified they had agreed to share the profits. We find there was a similar agreement as to the losses; while this was not explicit, it was certainly implicit. If the business was not profitable, appellant would suffer the loss of her time and energy in getting the business established and Newbill would suffer the loss of her funds directly contributed to the business. Finally, both Newbill and appellant enjoyed a mutual right of control or management of the enterprise. Therefore, we hold the relationship between Newbill and appellant was a partnership.

B. Sufficiency Challenges

Having determined a partnership existed, we now address appellant's arguments that contend the evidence is insufficient to establish several crucial elements of the offense of theft. In support of these arguments, appellant relies heavily on the case of *Hall v. State*, 103 Tex. Crim. 42, 279 S.W. 464 (1925) (opinion on rehearing). *Hall* involved a theft prosecution wherein the defendant was a partner in a partnership engaged in the purchase and sale of automobiles. The defendant contributed none of the capital, but was in charge of the business. Under the terms of the partnership, appellant was entitled to one-fourth of the profits and a monthly draw, which was to be charged against his share of the profits. The defendant received the funds from the sale of an automobile, but the funds were not deposited in the partnership account. Following his conviction for theft, the defendant appealed. The Court of Criminal Appeals found the evidence insufficient because there was no showing of the status of where the profits portion of the partnership stood. Without such a showing, there was no proof that the appropriate funds were not owned, at least in part, by the defendant.

Hall was decided under article 1336, Vernon's Texas Criminal Statute volume 1, which provided: "If the person accused of the theft be part owner of the property, the taking does not come within the definition of theft, unless the person from whom it is taken be

wholly entitled to the possession at the time." However, through various legislative revisions, there is no longer *per se* statutory protection for a part owner of the property.[2] The elements constituting an offense under Texas Penal Code section 31.03 are: a person, with the intent to deprive the owner of property, unlawfully appropriates that property, without the effective consent of the owner. *See Thomason v. State*, 892 S.W.2d 8, 10 (Tex. Crim. App. 1994). We will address appellant's arguments in light of these elements.

1. Ownership.

The ninth point of error advances two arguments related to ownership. To address these arguments it is best to start with the statutory definition of owner. Section 1.07 of the Texas Penal Code defines owner "as a person who has a title to the property, possession of the property, or a greater right of possession of the property than the person charged." TEX. PENAL CODE ANN. § 1.07(35)(A) (Vernon 1994).

Appellant first argues the State should have alleged the property was owned by Timeless Treasures rather than by Newbill. We disagree. The State followed the better practice, that where the stolen property is owned by a corporation or like entity, to allege the property was taken from the custody and control of a natural person. *See Eaton v. State*, 533 S.W.2d 33, 34 (Tex. Crim. App. 1976); *Castillo v. State*, 469 S.W.2d 572, 573 (Tex. Crim. App. 1971).

Next, appellant argues she, as a partner in Timeless Treasures, was an owner of the property. We disagree. The evidence is clear from both the testimony of Newbill and appellant that the funds deposited into the joint account were to be used solely for the purposes of establishing Timeless Treasures as an ongoing concern; appellant's access to,

---

[2] Our research reveals that *Hall* has been cited twice. *See Pittman v. State*, 115 Tex. Crim. 424, 426, 27 S.W.2d 240, 241 (1930); *Compton v. State,* 607 S.W.2d 246, 256 (Tex. Crim. App. 1979) (Clinton, J., concurring and dissenting). The reason for this infrequent citation is probably due to the revision of the theft statutes from *Hall* until the instant prosecution.

and permissible use of, those funds was limited to that purpose. Therefore, any funds converted for appellant's personal use were not authorized. Consequently, appellant neither possessed the funds, nor had "a greater right of possession" to the funds than Newbill because the funds were diverted to an improper use. The ninth point of error is overruled.

2. Appropriation.

Appellant contends there was no appropriation of property. Appropriate, in the context of this case, means "to acquire or otherwise exercise control over property other than real property." TEX. PENAL. CODE ANN. § 31.01(4)(B). Property includes money. *See* TEX. PEN. CODE ANN. § 31.01(5)(C). In the instant case, the evidence established that appellant wrote checks which were subsequently cashed or deposited directly into her own bank account. This is sufficient to prove appellant acquired or otherwise exercised control over that money. The second point of error is overruled.

3. Deprive.

Appellant next contends the evidence is insufficient to establish appellant intended to deprive Newbill of the property. Deprive means "to withhold property from the owner permanently or for so long extended a period of time that a major portion of the value or enjoyment of the property is lost to the owner." TEX. PENAL CODE ANN. § 31.01 (2)(A). Relying on *Griffin v. State*, 614 S.W.2d 155, 158 (Tex. Crim. App. [Panel Op.] 1981), appellant argues depositing the funds into her own account was only temporary. Theft cannot be sustained on proof of intent to temporarily withhold. *See id.*, at 160.

We believe this argument is flawed in two respects. First, we are mindful of appellant's admission that she occasionally purchased non-business related items with Timeless Treasure funds and explained that she would deduct those items from her share of the profits. From our reading of the record, we conclude the opening of Timeless Treasures for business was several weeks, if not months, away from the time appellant departed the

premises. Clearly, it would be even a further period of time before any profits were realized from the business. Therefore, we hold the evidence is sufficient to prove the deprivation was more than temporary.

Second, when we are asked to determine whether the evidence is legally sufficient to sustain a conviction we employ the standard of *Jackson v. Virginia* and ask "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." 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed .2d 560 (1979). Under this review, the jury, as trier of fact, is the sole judge of the witnesses' credibility and the weight to be given their testimony. *See Adelman v. State*, 828 S.W.2d 418, 421 (Tex. Crim. App. 1992). As such, the jury may choose to believe or disbelieve all or any part of any witness's testimony. *See Sharp v. State*, 707 S.W.2d 611, 614 (Tex. Crim. App. 1986), *cert. denied,* 488 U.S. 872 (1988). In the instant case, it is clear the jury chose to disbelieve appellant. Therefore, we cannot say the evidence is insufficient to establish deprivation. The fifth point of error is overruled.

4. Effective Consent.

Appellant next contends the evidence is insufficient to prove she acted without the effective consent of Newbill. Consent is not effective if induced by deception or coercion. *See* TEX. PENAL CODE ANN. § 31.01(3)(A). In support of this argument, appellant cites *Enduro Oil Co. v. Parish & Ellison*, 834 S.W.2d 547 (Tex. App.—Houston [14th Dist.] 1992, writ denied), for the proposition that "there can be no conversion where one takes only what he is entitled to receive." Assuming arguendo this statement applies to criminal jurisprudence, we nevertheless find the evidence is sufficient because, by her own admission, appellant was not "entitled to receive" any funds from Timeless Treasure unless and until there was a profit. In the instant case, no profits had been generated when appellant wrote the complained of checks. The sixteenth point of error is overruled.

5. Contractual Not Criminal.

In several points of error, appellant argues the relationship between appellant and Newbill was contractual, not criminal and, therefore, no offense was committed. In support of each of these points, appellant relies, to some extent, on *O'Marrow v. State*, 66 Tex.Crim. 416, 147 S.W. 252 (1912), where the defendant was charged with embezzlement. The complainant and the defendant opened a business dialogue in which the complainant agreed the defendant would receive twenty per cent of the profits. To get the business started, the complainant gave the defendant $150 to purchase certain goods. The defendant never returned and had never repaid the complainant the money. The *O'Marrow* Court affirmed the conviction because there was no partnership. Appellant contends that since there was a partnership in the instant case, *O'Marrow* prohibits a criminal prosecution. For the reasons discussed below, we are not so persuaded.

Appellant also directs us to the more recent case of case of *Baker v. State*, 986 S.W.2d 271, 274-275 (Tex. App.—Texarkana 1998, pet. ref'd). In a thoughtful discussion, the *Baker* Court cited a line of cases dating back to *Hesbrook v. State*, 149 Tex. Crim. 310, 194 S.W.2d 260 (1946), for the proposition that a claim of theft 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. If no more than intent and appropriation is shown in a contract claim, nothing illegal is apparent, because under the terms of the contract individuals typically have the right to "deprive the owner of property," albeit in return for consideration. A claim based upon malfeasance in connection with a contract requires proof of false pretext or fraud in order to become a viable criminal prosecution. *See Roper v. State*, 917 S.W.2d 128, 132 (Tex. App.—Fort Worth 1996, pet. ref'd). Without such proof, the case is nothing more than a civil claim in contract and is not appropriate for criminal prosecution. In short, the question is whether the defendant's proof that the funds were misdirected away from their agreed-upon use to further the purpose of the contract

constitutes theft. Further, the fact that one fails to return or pay back money after failing to perform a contract, when money was paid in advance for that performance, does not constitute theft. *See Hesbrook*, 149 Tex. Crim. 310, 194 S.W.2d 260; *Cox v. State*, 658 S.W.2d 668, 671 (Tex. App.—Dallas 1983, pet. ref'd).

While we are in agreement with these long-stated principles, we cannot agree that the instant case presents such a situation where a criminal prosecution should not be permitted. Just because Newbill and appellant were partners, it does not necessarily follow that this was a matter totally left to the civil courts. Here, the agreement between Newbill and appellant was to divide the proceeds only after Timeless Treasures became profitable. That had not occurred at the time of the dates alleged in the indictment. Therefore, any appropriation of Timeless Treasures' funds by appellant for her personal use would be more than a simple breach of contact. In the instant case, the evidence establishes malfeasance in that appellant appropriated the funds under the false pretext that they were being used for the partnership when, as the jury found, the funds were being converted for appellant's personal use. Therefore, we hold the evidence is sufficient to prove that appellant knew she was not entitled to the Timeless Treasures funds at the time of their appropriation. *See Phillips v. State*, 640 S.W.2d 293, 294 (Tex. Crim. App. [Panel Op.] 1982); *Reed v. State*, 717 S.W.2d 643, 646 (Tex. App.—Amarillo 1986, no pet.). The fourth, seventh, eighth, twelfth and twentieth points of error are overruled.

II. Jury Charge Issues

Appellant raises three challenges involving the jury charge. At the close of the evidence, appellant was given an opportunity to examine the proposed charge. *See* TEX. CODE CRIM. PROC. ANN. art. 36.14. When the trial court called upon appellant for objections, appellant objected to the inclusion of the definition of knowingly. The objection was sustained and the definition removed. Appellant did not request any special charges. *See* TEX. CODE CRIM. PROC. ANN. art. 36.15.

We will begin with appellant's contentions that the trial court erred in failing to include an instruction on the law of partnership. Appellant argues such an instruction would have negated the required culpable mental state. However, a defendant is not entitled to a separate jury instruction that does nothing more than negate an essential element of the State's burden of proof. *See Geisberg v. State*, 984 S.W.2d 245, 250 (Tex. Crim. App. 1998).

Appellant next contends the trial court erred in failing to instruct the jury on the defense of mistake of fact. A defendant is entitled to have the jury instructed on that defense if there was some evidence before the jury that, through mistake, he formed a reasonable belief about a matter of fact and his belief negated the kind of culpability essential to the State's case. *See* TEX. PENAL CODE ANN. § 8.02; *Hill v. State*, 765 S.W.2d 794, 797 (Tex. Crim. App. 1989). Appellant argues that because of the steps described in footnote one, *supra*, she formed the reasonable belief that she had full title to ownership of all property in the partnership. We disagree. While the actions described in footnote one were no doubt undertaken to facilitate the partnership, there is no record evidence from which appellant could have reasonably believed she was entitled to convert the funds in the Timeless Treasures account to her personal use.

For these reasons, the first, third and sixth points of error are overruled.

III. Alleged Prosecutorial Misconduct

Appellant raises several points of error alleging prosecutorial misconduct. Underlying each point is appellant's contention that the State withheld the receipts appellant provided to Newbill, which explained how the funds had been expended. We read these points as claiming the State failed to disclose exculpatory evidence as required by *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

During the course of the trial, the State offered receipts into evidence to establish that

certain items purchased by appellant were not related to the partnership. For example, State's exhibit 27 was a Walmart receipt reflecting the purchase of pet food. There were undoubtedly more receipts that were not admitted into evidence. Appellant argues these receipts would have proved the remaining purchases were not for personal use.

The State has an affirmative duty to disclose evidence favorable and material to a defendant's guilt or punishment under the Due Process Clause of the Fourteenth Amendment. *See Thomas v. State*, 841 S.W.2d 399, 407 (Tex. Crim. App. 1992). Once such information comes into its possession, the State's duty under *Brady* attaches, with or without a request from the defense for such evidence. *See Thomas*, 841 S.W.2d at 407. A violation of that duty occurs when a prosecutor (1) fails to disclose evidence (2) which is favorable to the accused, and which (3) creates a probability sufficient to undermine confidence in the outcome of the proceeding. *See id.* at 404.

These points of error fail for three specific reasons. First, there is no showing that any exculpatory evidence existed. The record is clear that some of the checks written by appellant were for legitimate purchases. Appellant was not prosecuted for any of those purchases. There is no evidence that other receipts exist that would establish the checks used to prosecute appellant were written for legitimate purposes. Second, assuming there were such receipts, there is no showing that they were ever in possession of the State or the prosecution team. *See and compare Ex parte Castellano*, 863 S.W.2d 476 (Tex. Crim. App. 1993). Third, assuming such receipts existed and that they were in possession of the State, there is no showing the receipts were not disclosed to appellant. Points of error ten, thirteen, fourteen and fifteen are overruled.

IV. Extraneous Matters

Appellant raises two points of error contending the trial court erred in admitting evidence of the extraneous matters of appellant not having filed an income tax return for

some period of years and appellant having written "hot" checks.

We begin with the income tax matter. In support of this argument appellant directs us to seven record citations where this subject was broached by the State. On six of those occasions there was no objection. Therefore, those areas of concern are not preserved for our review. *See In re G.A.T.*, 16 S.W.3d 818, 828 (Tex. App.—Houston [14th Dist.] 2000, pet. denied). We now turn to the remaining incident where the record reveals the following testimony by appellant on cross-examination:

> Q. Okay. Did you file income tax returns?
>
> DEFENSE COUNSEL: Your Honor, object. Totally irrelevant to this, prejudicial, has nothing to do with this.
>
> THE COURT: Overruled.
>
> Q. Did you file income tax returns?
>
> A. We were below the poverty level so, no, we didn't. Now I am working with the IRS right now.
>
> Q. How are you working with the IRS?
>
> A. We are working out a payment schedule not because we made so much money but because there were penalties because when I realized that I should have filed even though we were below that poverty level then I panicked and got scared because the IRS scares people. And then I called them and said I – my brother-in-law told me to call and be on the late-filer's program. So we worked – we are working that out.
>
> Q. What years are you paying back for to the IRS?

A. We don't know yet.

Q. You don't know how many years it's been since you filed income tax returns?

A. I filed income tax returns through '91, '92.

Q. So since '92 you have not filed any income tax returns?

A. Right.

Q. Did money that you cashed, did you report that in any kind of way to the IRS.

A. Well, if I didn't file income tax return evidently.

In summation the prosecutor argued this testimony established motive for appellant to commit the charged theft.

Rule 404(b) of the Texas Rules of Evidence, in relevant part, provides:

> Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident[.]

In the instant case, appellant offered the explanation that all of the checks written by her on the Timeless Treasures account were for the benefit of the partnership. She relied upon this explanation even when confronted with checks written to herself, her husband, her daughter, her bank and cash. Therefore, appellant's motive in writing the checks was an issue. The decision to admit extraneous matters into a criminal trial is left to the sound discretion of the

trial judge. *See Werner v. State*, 711 S.W.2d 639, 643 (Tex. Crim. App.1986). An appellate court may reverse the decision only if admission of such evidence was so arbitrary or unreasonable as to constitute a clear abuse of discretion. *See Montgomery v. State*, 810 S.W.2d 372, 380 (Tex. Crim. App.1990). In the instant case, we do not find an abuse of discretion in the admission of the evidence regarding appellant's failure to file income tax returns.

We now address the matter of hot checks. On this issue, appellant directs us to six record citations where this subject was broached by the State. On two of those occasions there was no objection. Therefore, they are not preserved for our review. *See G.A.T.*, 16 S.W.3d at 828.

On three of the remaining occasions, each objection was sustained and at one point the trial court instructed the jury as to the difference between a "hot"check versus a check returned for non-sufficient funds. To preserve error for appellate review, the objecting party must object to the trial court's ruling continuously until receiving an adverse ruling. The proper method to pursue an adverse ruling is to: (1) object, (2) request an instruction to disregard, and (3) move for a mistrial. *See Jones v. State*, 825 S.W.2d 470, 471 (Tex. App.—Corpus Christi 1991, pet. ref'd). In these three instances, appellant did not seek any further relief after receiving the favorable ruling from the trial court. Therefore, these areas are not preserved for appellate review.

In the final instance, appellant objected not to the admission of the "hot" check evidence but because there was no time frame. The trial court ordered the State to rephrase the question providing a time frame. The State complied with that order and there was no objection to the rephrased question. Therefore, for the reasons stated above, the issue is not preserved for our review. *See Jones*, 825 S.W.2d at 471.

For these reasons, points of error eleven and seventeen are overruled.

V. Constitutionality of Theft Statute

Appellant raises two points of error that challenge the theft statute as unconstitutionally vague facially and as applied in the instant case. We will address the facial challenge first.

A statute that forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law. *See Adley v. State*, 718 S.W.2d 682, 685 (Tex. Crim. App.1985), *cert. denied,* 479 U.S. 815 (1986). Under this rule of law, a statute is unconstitutionally vague on either of two grounds: first, if it "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute," or, second, if it "encourages arbitrary and erratic arrests and convictions." *See Papachristou v. City of Jacksonville*, 405 U.S. 156, 163, 92 S.Ct. 839, 843 (1972). In the instant case, appellant raises the first argument. A statute is vested with a presumption of validity; the presumption obtains until the contrary is shown beyond a reasonable doubt. *See Ex parte Granviel*, 561 S.W.2d 503, 515 (Tex. Crim. App. 1978). Appellant argues the vagueness results from appellant's status as a partner in Timeless Treasures. However, her argument does not persuade us that section 32.02 of the Texas Penal Code "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute," as required under *Papachristou.* Therefore, we hold section 31.03 is not facially unconstitutional. *See Tovar v. State*, 685 S.W.2d 707 (Tex. App.—Dallas 1984, pet. ref'd.).

Regarding appellant's contention that section 31.03 is unconstitutionally vague as applied to her, we note that this issue was not raised in the trial court. An allegation of unconstitutional application of a statute cannot be raised for the first time on appeal; it must first be made to the trial court. *See Medina v. State*, 986 S.W.2d 733, 735 (Tex. App.—Amarillo 1999, pet. ref'd); *McGowan v. State*, 938 S.W.2d 732, 742 (Tex. App.—Houston [14th Dist.]1996) *aff'd,* 975 S.W.2d 621 (Tex. Crim. App. 1998); *Webb v.*

State, 899 S.W.2d 814, 817-18 (Tex. App.—Waco 1995, pet. ref'd).

For these reasons, points of error eighteen and nineteen are overruled.

The judgment of the trial court is affirmed.

/s/ Charles F. Baird
Justice

Judgment rendered and Opinion filed March 15, 2001.

Panel consists of Justices Wittig, Frost and Baird.[3]

Do Not Publish — TEX. R. APP. P. 47.3(b).

[3] Former Judge Charles F. Baird sitting by assignment.