**Affirmed and Opinion filed May 18, 2000.**

**In The**

# Fourteenth Court of Appeals

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**NO. 14-99-00415-CR**

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**ARVINDKUMAR D. MISTRY, Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

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**On Appeal from the 232nd District Court**
**Harris County, Texas**
**Trial Court Cause No. 783,310**

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## O P I N I O N

Appellant, Arvindkumard Mistry, was convicted of felony theft by the trial court and sentenced to three months in jail. On appeal, he claims that the evidence supporting his conviction was legally and factually insufficient in two respects. He first claims the State did not introduce sufficient evidence of value to sustain a conviction for felony theft. His second contention is that the possession element of the offense was not supported by sufficient evidence. Finding no merit in his points of error, we affirm the trial court's judgment.

## BACKGROUND FACTS

The testimony of the State's witnesses revealed that officers with the Houston Police Department became suspicious of appellant based on tips from a confidential informant that appellant was buying and selling stolen items. After the receipt of this information, officers arranged for a controlled sale to take place at the Motel King where appellant worked as a manager. On the day of the arrest, HPD officers borrowed three cases of cigarettes from Sam's Warehouse, transferred them from an unmarked police car into the car of the confidential informant, and the informant and HPD Officer Michael Walding went to the motel to make the sale. Officer Walding was wearing a concealed microphone.

Once they arrived at the motel, the confidential informant introduced Officer Walding to appellant and his wife. The informant told appellant that Officer Walding was a dock worker at Wal-Mart. Appellant told them to drive around to the back of the motel. Officer Walding and the informant complied, met appellant there, and Officer Walding told appellant that he had three cases of cigarettes that were stolen from the loading dock at Wal-Mart. When Officer Walding told appellant that he wanted $175.00 for the three cases, appellant gave that amount in cash to the officer. Officer Walding then brought the cases into the motel and placed them at a location designated by appellant.

Subsequent to the transaction, a discussion ensued regarding the brand of cigarettes. Appellant was disappointed that all three cases were the same brand and asked the officer if he could exchange them. Officer Walding told appellant that he would bring two different cases to him the next day, but appellant continued to hold all three cases. Appellant also asked Officer Walding if he could bring him more stolen merchandise, such as televisions, cameras, and fax machines.

Following the discussion, Officer Walding and the confidential informant left the motel. When Officer Walding gave the signal, other HPD officers arrived at the motel and arrested appellant and his wife.

Two HPD officers testified to the value of the cigarettes. Sergeant Frank Quinn testified that on the day of appellant's arrest he picked up the cigarettes from Sam's Warehouse as he had done a dozen times before. He testified the wholesale price per carton for the cigarettes was $18.75, basing this testimony on the price given to him by the manager, the price displayed at the store, and his past experience. He testified that each case contained thirty cartons of cigarettes, making each case worth

about $555.00 and yielding a price of about $1665.00 for all three cases. Officer Walding also testified that, though he did not remember if he picked up the cigarettes from Sam's on the day of the arrest, he had done so in the past. On those occasions, the price of the cigarettes was $18.50 per carton. No price per case was given and neither officer knew if Sam's sold cigarettes by the case.

## LEGAL SUFFICIENCY ANALYSIS

In reviewing legal sufficiency challenges, we view the evidence in the light most favorable to the prosecution and overturn the lower court's verdict only if a rational trier of fact could not have found all of the elements of the offense beyond a reasonable doubt. *See Santellan v. State*, 939 S.W.2d 155, 160 (Tex. Crim. App. 1997).

### Legal Sufficiency: Value

"Value," as the term applies to theft offenses, is defined in the Penal Code as either "the fair market value of the property at the time and place of the offense" or, if fair market value cannot be determined, "the cost of replacing the property within a reasonable time after the theft." TEX. PEN. CODE ANN. § 31.08(a)(1) & (2) (Vernon 1994). Value can be established by testimony from an owner or non-owner. *See Pichon v. State*, 756 S.W.2d 16, 19-20 (Tex. App.—Houston [14th Dist.] 1988, pet. ref'd). A non-owner can testify to the value of property if he can show that his testimony is based on personal knowledge and he gives explicit testimony about the value of the property. *See id.* Either retail or wholesale price will serve as an appropriate measure of fair market value. *See Keeton v. State*, 803 S.W.2d 304, 305 (Tex. Crim. App. 1991).

Viewing the evidence in the light most favorable to the prosecution, a rational fact-finder could have found that the collective value of the three cases of cigarettes exceeded $1500.00. Both Officer Walding and Sergeant Quinn testified explicitly that the cigarettes were sold at Sam's for $18.50 per carton. They also testified that this price was based on their personal knowledge. Sergeant Quinn testified that, based on the per carton price, each case of cigarettes was worth approximately $555.00, since each contained thirty cartons. Accordingly, a rational fact-finder could have found that the value of the stolen property received by appellant was in excess of $1,500.00. We overrule appellant's first point of error.

**Legal Sufficiency: Acquisition or Exercise of Control**

Likewise, we overrule appellant's third point of error because a rational fact-finder could have found beyond a reasonable doubt that appellant appropriated the property. The indictment alleged that appellant appropriated the property by "acquiring or otherwise exercising control over" the three cases of cigarettes—an acceptable definition of the term "appropriate." *See* TEX. PEN. CODE ANN. § 31.01(4)(B) (Vernon 1994).

Appellant claims that the evidence of appropriation was legally insufficient since the evidence showed that appellant did not want at least two of the cases of cigarettes. While he admits that the evidence allows the inference that he "acquired" the two unwanted cases, he claims the evidence also supports other possible inferences inconsistent with his acquisition of the cigarettes. Because of these other possible inferences, appellant argues, the evidence is legally insufficient to support his conviction. We disagree.

This argument smacks of the "outstanding reasonable hypothesis of innocence" construct appellate courts have applied to circumstantial evidence cases. This analytical tool, however, was overruled by the Court of Criminal Appeals in *Geesa v. State*. *See* 820 S.W.2d 154, 160-61 (Tex. Crim. App. 1991). This construct can only be used in cases tried before, or pending when, the *Geesa* decision was announced. *See Steward v. State*, 830 S.W.2d 771, 774-75 (Tex. App.—Houston [14th Dist.] 1992, no pet.). Because this case was decided long after *Geesa*, we utilize the legal sufficiency test outlined in *Santellan*. *See* 939 S.W.2d at 160.

Officer Walding testified that he left the cases with appellant in exchange for $175.00 and, though appellant wanted to exchange two cases for cases of different brands, the cases remained at the hotel where appellant worked. Further, appellant told the officer where to leave the three cases, another indication of appellant's control over the property. Viewing this testimony in the light most favorable to the verdict, we find that a rational trier of fact could have found that appellant exercised control over the cigarettes because he had the power to exchange them. Based on the evidence, we overrule appellant's third point of error.

**FACTUAL SUFFICIENCY ANALYSIS**

In reviewing factual sufficiency challenges, we must view all of the evidence without the prism of "in the light most favorable to the prosecution." *See Clewis v. State*, 922 S.W.2d 126, 129 (Tex. Crim. App. 1996). We accomplish this by examining all of the evidence presented at trial and applying just enough deference so that we do not substitute our own judgment for that of the trial court. Under this standard of review, we will set aside the verdict only if it is so contrary to the overwhelming weight of the evidence as to be manifestly unjust, shocking to the conscience, or a clear manifestation of bias. *See id.* at 135.

**Factual Sufficiency: Value**

We find a factually sufficient amount of valuation evidence in the record to sustain appellant's conviction. Appellant complains that, even though both officers testified to the value of the cigarettes on a per carton basis, the testimony is insufficient to allow for a clear determination of the value of the three cases. We disagree.

Appellant characterizes the officers' testimony as equivocal because: 1) Officer Walding could not remember whether he went to obtain the cigarettes from Sam's on the day of the arrest; 2) Sergeant Quinn did not know whether the price per carton of cigarettes varied by brand; 3) Sergeant Quinn did not know what the price of a case of cigarettes would cost HPD if it had to buy one; and 4) neither Sergeant Quinn nor Officer Walding could testify to Sam's price for a case of cigarettes. Appellant's argument ignores the fact that both officers testified to the value of a carton of cigarettes and that Sergeant Quinn testified that each case contained thirty cartons. Appellant presented no evidence to rebut this testimony.

The entire record reveals that a fact-finder could easily have computed the total value of the three cases of cigarettes and determined that the value exceeded $1,500.00. Based on our review, we do not find appellant's conviction based on this evidence unjust, shocking, or a result of bias. Appellant's second point of error is overruled.

**Factual Sufficiency: Acquisition or Exercise of Control**

Appellant finally argues that the evidence supporting the appropriation element of his theft conviction is factually insufficient. We disagree. Though there are several possible interpretations of

appellant's retention of the two cases of cigarettes, it was clear that appellant exercised control over the three cases of cigarettes. Based on all the evidence presented at trial, we do not find his conviction to be so unfair or shocking that we must send the case back to the trial court for a new trial on this issue.

Accordingly, we overrule appellant's fourth point of error and affirm his conviction.

/s/ Paul C. Murphy
Chief Justice

Judgment rendered and Opinion filed May 18, 2000.

Panel consists of Chief Justice Murphy and Justices Hudson and Wittig.

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