Reversed and Rendered and Majority and Dissenting Opinions filed June 29, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-99-00010-CR

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ROBERT WARD HART, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 351st District Court
Harris County, Texas
Trial Court Cause No. 768,706

M A J O R I T Y O P I N I O N

Appellant, Robert Ward Hart, was convicted by a jury of engaging in organized criminal activity. TEX. PEN. CODE ANN. § 71.02(a)(1) (Vernon 1994). The jury assessed nine years confinement and a fine of $1,000. Appellant contends the evidence was legally insufficient because his agreement to jointly commit a single crime is not sufficient to show that he was "carrying on criminal activities" under the charged offense. We reverse and render.

Facts

Between May 1996 and August 1997, a theft ring stole some 32 vehicles from Sterling McCall Toyota, a Houston dealership. The thefts were orchestrated by a core group of several current and former dealership employees. Some of these employees then recruited new people, usually non-employees, to effect the theft of a given vehicle from the lot.

In August 1997, appellant, who was not an employee, met with several men previously involved in the theft ring, and made plans to steal a new Toyota Land Cruiser from the dealership. Later, appellant drove two of the men to the dealership shortly before closing. One of them exited appellant's vehicle, entered the Land Cruiser, and drove away at a high rate of speed. By that time, the Houston Police Department had been alerted to the theft ring and police officers were on the scene. The officers observed appellant's role in the theft of the Land Cruiser and arrested him and the others shortly after it was driven out of the dealership.

Discussion

In a legal sufficiency review, we view the evidence in the light most favorable to the verdict and determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979); *Johnson v. State*, No. 1915-98, 2000 WL 140257, at *5 (Tex. Crim. App. February 9, 2000). Proof which amounts to only a strong suspicion or mere probability is insufficient. *See Skelton v. State*, 795 S.W.2d 162, 167 (Tex. Crim. App. 1989); *Grant v. State*, 989 S.W.2d 428, 433 (Tex. App.–Houston [14th Dist.] 1999, no pet.). The *Jackson* standard for legal sufficiency of the evidence is the minimum standard for sustaining a conviction under the Due Process Clause. U.S. CONST. amend. XIV, § 1; *Jackson*, 443 U.S. at 317-18, 99 S.Ct. at 2788; *Clewis v. State*, 922 S.W.2d 126, 132 (Tex. Crim. App. 1996).

Appellant contends the State failed to prove he participated in a "combination" because there was no evidence he was involved in more than a single crime. The Penal Code defines

"combination," in part, as "carrying on criminal activities." TEX. PEN. CODE ANN. § 71.02(a). The Texas Court of Criminal Appeals recently addressed this specific issue:

> [T]he term "carrying on criminal activities" . . . implies continuity--something more than a single, ad hoc effort. Therefore, we hold that the phrase "collaborate in carrying on criminal activities" cannot be understood to include an agreement to jointly commit a single crime; the State must prove more than that the appellant committed or conspired to commit one of the enumerated offenses with two or more other people.

Nguyen v. State, 1 S.W.3d 694, 697 (Tex. Crim. App.1999).

Nguyen's holding is clear and materially on point. The State has pointed us to no evidence that appellant participated or agreed to participate in any criminal activity other than the theft of the single Land Cruiser. Though appellant participated with persons who were themselves involved in the commission of organized crime, we cannot legally infer from this his agreement to be involved in any of their other criminal activities. *See Skelton,* 795 S.W.2d at 167. Therefore, we conclude that the evidence was legally insufficient to support appellant's conviction. Because the evidence was legally insufficient, we must render a judgment of acquittal. *See Tibbs v. Florida*, 457 U.S. 31, 42, 102 S.Ct. 2211, 2218, 72 L.Ed.2d 652 (1982); *Clewis*, 922 S.W.2d at 133.

We sustain appellant's first issue. Because this issue is dispositive of the appeal, we do not address appellant's remaining issues. The judgment of the trial court is reversed and

we render a judgment of acquittal for the indicted offense.

/s/ Don Wittig
Justice

Judgment rendered and Opinion filed June 29, 2000.

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

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

Reversed and Rendered; Majority and Dissenting Opinions filed June 29, 2000.

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D I S S E N T I N G O P I N I O N

The majority find the evidence is insufficient to convict appellant of organized criminal activity because the record does not show appellant "was involved in more than a single crime." However, the Court of Criminal Appeals has expressly held that there is no requirement that more than one criminal offense be proved to establish the elements of organized criminal activity. *See Nguyen v. State*, 1 S.W.3d 694, 697 (Tex. Crim. App. 1999).

The State was obliged to prove only that "appellant *intended* to 'establish, maintain, or participate in' a group of three or more, in which the members intend[ed] to work together in a continuing course of criminal activities." *Id.* (emphasis added). Intent is usually established

by circumstantial evidence, and is usually inferred from the accused's acts, words, and conduct. *See Slomba v. State*, 997 S.W.2d 781, 783 (Tex. App.–Texarkana 1999, pet. ref'd).

Here, the record shows appellant was invited to participate in, and did participate in, a large theft ring that had been stealing automobiles from a Houston car dealership for many months. To what degree, if any, he may have participated in previous thefts perpetrated by the combination is not known, but the State did establish that he participated in the final theft of a Toyota Land Cruiser in August of 1997. Moreover, he was present when the plans were formulated to steal the vehicle. While the record contains no direct evidence showing appellant intended to participate in future thefts, he had obviously joined an established, active enterprise that had a long history of criminal activity. Moreover, he had no reason to suspect that he and his companions were about to be captured by police or that this theft would be the last criminal act of the combination.

Thus, I believe the record contains sufficient circumstantial evidence to show appellant intended to participate in a combination that intended to engage in a continuing course of criminal activity. Accordingly, I respectfully dissent.

/s/ J. Harvey Hudson
Justice

Judgment rendered and Majority and Dissenting Opinions filed June 29, 2000.
Panel consists of Chief Justice Murphy and Justices Hudson and Wittig.
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