Affirmed and Opinion filed July 13, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-99-00532-CR

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LARRY WAYNE DAVENPORT, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 351st District Court
Harris County, Texas
Trial Court Cause No. 807,960

O P I N I O N

Larry Wayne Davenport appeals his conviction by a jury for the offense of felony theft of two vehicles. The jury found two enhancement paragraphs true and assessed sixty years confinement. Appellant claims the evidence was legally and factually insufficient to show he stole the vehicles. He also brings an ineffective assistance of counsel issue. We affirm.

Facts

Houston Police Sergeant Mike Murname opened an undercover "chop shop." The operation was designed to attract persons responsible for auto thefts in the area. Through informants, Murname put out the word that he was buying stolen vehicles. On April 16, 1998, a 1997 Isuzu Rodeo was stolen from Joe Myers Toyota. No one witnessed the theft. On April 23, appellant called Murname and asked if he would be interested in purchasing that vehicle. According to Murname, appellant represented that the vehicle had not been lawfully purchased. Murname asked if the vehicle had been reported stolen, to which appellant replied it had not because the owner was out of town. Murname paid appellant $1,000 for the Rodeo. Murname testified the vehicle was worth approximately $21,000.

On May 18, 1998, a 1993 Chevrolet S-10 pickup was stolen from the premises of Muffler Depot. Again, no one witnessed the theft. According to a muffler shop employee, appellant was there that day and had access to the keys in the truck. The same day, appellant drove the truck to the chop shop and sold it to Murname for $400. Murname testified the truck was worth between $3,000 and $4,000.

Legal Sufficiency

Appellant first claims the evidence was legally insufficient to prove the offense of theft for either vehicle. In reviewing legal sufficiency, we view the evidence in the light most favorable to the verdict. *See Narvaiz v. State*, 840 S.W.2d 415, 423 (Tex. Crim. App.1992) The critical inquiry is whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *See McDuff v. State*, 939 S.W.2d 607, 614 (Tex. Crim. App. 1997). This same standard of review applies to cases involving both direct and circumstantial evidence. *See King v. State*, 895 S.W.2d 701, 703 (Tex. Crim. App. 1995). On appeal, this court does not re-evaluate the weight and credibility of the evidence; we consider only whether the jury reached a rational decision. *See Muniz v. State*, 851 S.W.2d 238, 246 (Tex. Crim. App. 1993).

Appellant argues that the evidence is insufficient to prove felony theft because it did not show that: (1) appellant stole the vehicles, (2) appellant knew that the vehicles were stolen, or (3) the fair market value for the vehicles proven stolen was over $20,000.[1] We disagree.

As to the Isuzu, Officer Murname provided direct evidence that appellant asserted, and thus knew, the vehicle was not lawfully purchased. Appellant's misrepresentation that the vehicle had not yet been reported stolen because the owner was out of town was also circumstantial evidence he stole the vehicle or knew it was stolen. Further, there was circumstantial evidence that appellant stole the vehicle or knew it was stolen by his taking it to a chop shop and selling it for approximately 5% of its value. Finally, Murname's testimony of the vehicle's value of $21,000 was sufficient evidence for the jury to find the vehicle was worth over $20,000.

As to the Chevy, appellant was on the premises and had access to the keys when it was stolen. That same day he sold the truck for approximately 10% of its value to a chop shop which had purchased another stolen vehicle from him less than a month earlier.

We further observe that appellant's possession of the vehicles under these facts gave rise to an inference of appellant's guilt. Normally, recent, unexplained possession of stolen property is a sufficient circumstance, in and of itself, to convict a possessor of stolen property of the theft of such property. *See Sutherlin v. State*, 682 S.W.2d 546, 549 (Tex. Crim. App.

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[1] Texas' theft statute states, in pertinent part:

(a) A person commits an offense if he unlawfully appropriates property with intent to deprive the owner of property.

(b) Appropriation of property is unlawful if:

(1) it is without the owner's effective consent; [or]

(2) the property is stolen and the actor appropriates the property knowing it was stolen by another. ....

(e) [A]n offense under this section is:

(5) a felony of the third degree if the value of the property stolen is $20,000 or more but less than $100,000.

TEX. PEN. CODE ANN. § 31.03.

1984). To warrant an inference of guilt from the circumstance of possession alone, the possession must be personal, recent, unexplained, and involve a distinct and conscious assertion of right to the property. *Id.* In our case, the evidence was sufficient to prove each element required to warrant an inference of guilt. Recent: The State proved appellant tried to sell the pickup the same day and the Rodeo six days after each were stolen. *See Smith v. State*, 518 S.W.2d 823, 825 (Tex. Crim. App. 1975) (twenty-eight days held recent). Personal: Appellant alone went to the chop shop alone to sell the vehicles. *Id*. at 824. Distinct and conscious assertion: Appellant took money in exchange for the vehicles. *See Todd v. State*, 601 S.W.2d 718, 720 (Tex. Crim. App. 1980). Unexplained: Appellant did not offer any plausible explanation to show he had legitimate possession of the vehicles.

Our review of the record yields more than sufficient evidence to permit a rational jury to find beyond a reasonable doubt that appellant was guilty of theft of the two vehicles. We therefore overrule this issue.

Factual Sufficiency

In reviewing factual sufficiency, we must view all the evidence without the prism of "in the light most favorable to the prosecution," and set aside the verdict only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *See Johnson v. State*, No. 1915-98, 2000 WL 140257 at *4 (Tex. Crim. App. February 9, 2000). *Cain v. State*, 958 S.W.2d 404, 407 (Tex. Crim. App. 1997); *Clewis v. State*, 922 S.W.2d 126, 129 (Tex. Crim. App.1996). When conducting a factual sufficiency review, we must observe the principle of deference to jury findings. *Id.; Cain*, 958 S.W.2d at 407. The jury is the judge of the facts, and an appellate court should only exercise its fact jurisdiction to prevent a manifestly unjust result. *Id; Clewis*, 922 S.W.2d at 135.

Appellant fares no better under this standard. The verdict is not contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Rather, the evidence, viewed in its entirety, clearly supports the conclusion that appellant stole the two vehicles. This issue is overruled.

Ineffective Assistance of Counsel

Next, appellant contends he was denied effective assistance of counsel because trial counsel did not: (1) seek out and interview potential witnesses, (2) discuss with appellant the risks of being tried as a habitual offender, or (3) call any witnesses at trial. We note that appellant's counsel provides no support whatsoever for the first two contentions.

The standard of review for evaluating claims of ineffective assistance of counsel is set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). *See Hernandez v. State*, 726 S.W.2d 53 (Tex. Crim. App. 1986). It is the appellant's burden to prove ineffective assistance of counsel. *Strickland*, 466 U.S. at 687. In meeting his burden, he must overcome the strong presumption that, under the circumstances, the challenged action might be considered sound trial strategy. *Strickland*, 466 U.S. at 689.

Although appellant filed a motion for new trial alleging ineffective assistance of counsel, he failed to develop a record that would have supported his claim. Thus, to find that trial counsel was ineffective based on appellant's asserted ground would call for speculation, which we will not do. *See Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App.1994).

In the absence of a record supporting his claim, appellant has failed to overcome the strong presumption that trial counsel's strategy was reasonable from counsel's perspective at trial. This issue is overruled.

The judgment of the trial court is affirmed.

/s/ Don Wittig
Justice

Judgment rendered and Opinion filed July 13, 2000.
Panel consists of Chief Justice Murphy and Justices Hudson and Wittig.
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