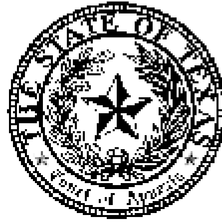
Affirmed and Opinion filed May 31, 2001.



In The

Fourteenth Court of Appeals

____

NO. 14-00-00046-CR

____

JOE ISAAC JOHNSON, JR., Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 10th District Court
Galveston County, Texas
Trial Court Cause No. 99CR0207

O P I N I O N

Appellant, Joe Isaac Johnson, Jr., appeals his conviction for unauthorized use of a motor vehicle, citing as grounds for reversal ineffective assistance of counsel and legal and factual insufficiency of the evidence. We affirm.

BACKGROUND

In December of 1998, appellant drove his girlfriend, Jacqueline Loraine Mack, to their new apartment in Galveston County. Pointing out a green Mustang automobile parked near or

under a tree in the apartment complex lot, appellant told Ms. Mack the new automobile was her Christmas present. Ms. Mack testified she saw the keys to the Mustang in appellant's hand. The Mustang had temporary, paper license plates. Knowing they could not afford the new car, Ms. Mack became suspicious about how appellant acquired it and asked appellant for the ownership papers. Appellant refused, telling Ms. Mack not to worry. Ms. Mack testified that appellant then drove the Mustang a few feet to move it away from the nearby tree.

Ms. Mack called the Galveston County vehicle task force to discuss her suspicions about how appellant had obtained the Mustang. Speaking to Officer Edward Hill, III, she learned that the car had been reported missing from a local dealership, Thornton Ford, Lincoln Mercury, Honda within a few days of Christmas.[1]

The police investigation that followed yielded no usable fingerprints from the Mustang. However, the State's handwriting expert, Dale Stoval, as well as Ms. Mack, identified the writing on the temporary license plate as appellant's. Mr. Stoval had over twenty-five years' experience in handwriting comparison. He made his handwriting identification by comparing a sample of appellant's writing, from inmate medical records, with handwriting on the paper license tag recovered from the Mustang.

The State charged appellant, by indictment, with the felony offense of unauthorized use of a motor vehicle. The indictment contained two enhancement paragraphs. Appellant entered a plea of not guilty to the charged offense and not true to the enhancements. After trial, the jury found appellant guilty as charged. Appellant elected to have the trial court assess punishment, and he changed his plea to the enhancements to true. The trial court sentenced appellant to ten years' confinement in the Institutional Division of the Texas Department of Criminal Justice.

---

[1] It is unclear from the testimony whether the Mustang was reported stolen from the Thornton Ford, Lincoln Mercury, Honda lot on December 24, 1998, or whether the car's absence from the lot was merely brought to the management's attention on that date.

ISSUES PRESENTED FOR REVIEW

In his first point of error, appellant asserts that he received ineffective assistance of counsel. In his second and third points of error, appellant asserts that the evidence adduced at trial was legally and factually insufficient to establish the "operation" element of the offense charged.

INEFFECTIVE ASSISTANCE OF COUNSEL

Appellant complains that his trial counsel was ineffective because she failed to request a continuance despite learning, during a pre-trial hearing, that the State intended to introduce expert testimony on handwriting analysis. Appellant contends that his trial counsel should have requested a continuance so that she could secure an expert to rebut the State's expert witness.

Both the United States and Texas Constitutions guarantee an accused the right to assistance of counsel. *See* U.S. CONST. amend. VI; TEX. CONST. art. I, § 10; TEX. CODE CRIM. PROC. ANN. art. 1.05 (Vernon 1977). This right to counsel includes the right to reasonably effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *see Ex parte Gonzales*, 945 S.W.2d 830, 835 (Tex. Crim. App. 1997). To prove ineffective assistance of counsel, appellant must show that (1) counsel's representation or advice fell below objective standards of reasonableness and (2) the result of the proceeding would have been different but for trial counsel's deficient performance. *Strickland*, 466 U.S. at 688–92. Moreover, the appellant bears the burden of proving his claims by a preponderance of the evidence. *Jackson*, 973 S.W.2d 954, 956 (Tex. Crim. App. 1998).

Any case analyzing effective assistance of counsel begins with the strong presumption that trial counsel was competent. *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999). We presume counsel's actions and decisions were reasonably professional and were motivated by sound trial strategy. *See Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim.

App. 1994). Appellant has the burden to rebut this presumption by presenting evidence illustrating why trial counsel did what she did. *See id.* An appellant cannot meet this burden if the record does not specifically focus on the reasons for trial counsel's conduct. *Osorio v. State*, 994 S.W.2d 249, 253 (Tex. App.—Houston [14th Dist.] 1999, pet. ref'd). This kind of record is best developed in a hearing on an application for a writ of habeas corpus or through a motion for new trial. *Kemp v. State*, 892 S.W.2d 112, 115 (Tex. App.—Houston [1st Dist.] 1994, pet. ref'd); *see Jackson*, 973 S.W.2d at 957 (reiterating that when counsel is allegedly ineffective because of errors of omission, collateral attack is the better vehicle for developing an ineffectiveness claim). When the record is silent as to counsel's reasons for her conduct, finding counsel ineffective would cause the court to engage in mere, and unnecessary, speculation. *McCoy v. State*, 996 S.W.2d 896, 900 (Tex. App.—Houston [14th Dist.] 1999, pet. ref'd) (citing *Jackson*, 877 S.W.2d at 771–72)). Because our inquiry in this case focuses on counsel's reasoning, we need not address whether (1) appellant would have been entitled to an appointed handwriting expert; (2) whether appellant was entitled to a continuance; or (3) whether the trial court's failure to grant a continuance, if requested, would have been harmful error.

It is undisputed that trial counsel did not request a continuance to secure a handwriting expert for the defense. To demonstrate that this failure rendered trial counsel's representation deficient, appellant directs us to counsel's closing argument. There, trial counsel made a statement, which began with a comment that if she "had had the opportunity at the time to get an expert . . . [she] might have gotten an expert," before being interrupted by the prosecutor. Appellant characterizes this statement as trial counsel's acknowledgment of "her error . . . by discussing how she wished she had retained her own expert." This interrupted statement[2] is not a discussion of how or why trial counsel wished she had retained an expert, as appellant claims.

[2] Counsel did not finish her statement; the State objected before trial counsel finished her statement, the trial court sustained the objection, and trial counsel moved on without completing her statement. We cannot speculate as to what she would have said had she been able to complete the statement.

Nor is it an explanation of the reasons why trial counsel decided not to request a continuance. Instead, it is an incomplete thought about whether trial counsel might have retained an expert, given the opportunity. This statement does not provide any insight as to *why* counsel decided not to request the continuance which *may* have given her the opportunity to retain a handwriting expert nor does it indicate whether a possible continuance was the "opportunity" to which counsel referred. Moreover, the record is otherwise silent as to the *reasons* trial counsel decided not to request a continuance to retain a defense handwriting expert. Appellant did not file a motion for new trial or a habeas corpus petition and, therefore, failed to develop evidence of trial counsel's strategy for this decision. Accordingly, we find that appellant has failed to overcome the presumption that counsel's trial strategy was sound. Thus, we must conclude that counsel's conduct did not fall below an objective standard of reasonableness and was not deficient. Because appellant has failed to establish the first prong in the *Strickland* analysis, we need not address the second, prejudice prong of *Strickland*.

Accordingly, we overrule appellant's first point of error.

LEGAL INSUFFICIENCY

In his second point of error, appellant contends the evidence is legally insufficient to show the "operation" element of the offense of unauthorized use of a motor vehicle. This element was established through the testimony of Ms. Mack. To support his argument, appellant points to the testimony of the apartment manager, Heather Vance, who stated that from the time she first noticed the car, on or after Christmas morning, until the time it was towed, it had not been moved. Ms. Vance further testified that the car could have been moved without her seeing it but that she never saw appellant drive it. Appellant complains that Ms. Vance's testimony was more credible than Ms. Mack's testimony, because Ms. Mack "had an interest in the case" and was a convicted forger.

In reviewing the legal sufficiency of the evidence, we view the evidence in the light

most favorable to the verdict and decide whether a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Wilson v. State*, 7 S.W.3d 136, 141 (Tex. Crim. App. 1999) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). We accord great deference "'to the responsibility of the trier of fact [to fairly] resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.'" *Clewis*, 922 S.W.2d 126, 133 (Tex. Crim. App. 1996) (quoting *Jackson*, 443 U.S. at 319). We presume that any conflicting inferences from the evidence were resolved by the jury in favor of the prosecution, and we defer to that resolution. *Id.* n.13 (citing *Jackson*, 443 U.S. at 326). In our review, we determine only whether "'*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *King v. State*, 29 S.W.3d 556, 562 (Tex. Crim. App. 2000) (citing *Jackson*, 443 U.S. at 319).

The essential elements of unauthorized use of a motor vehicle are outlined in Texas Penal Code section 31.07. A person commits an offense "if he intentionally or knowingly operates another's . . . motor-propelled vehicle without the effective consent of the owner." TEX. PEN. CODE ANN. § 31.07(a) (Vernon 1994). The *corpus delicti* of unauthorized use of a motor vehicle is the fact that a motor vehicle was *driven* without the owner's consent. *In re C.P.,* 998 S.W.2d 703, 710 (Tex. App.— Waco 1999, no pet.). Ms. Mack testified that she saw appellant drive the Mustang, albeit a short distance, in relocating it to a different spot in the apartment complex parking lot.

Moreover, there exist inconsistencies between Ms. Vance's and Ms. Mack's testimony regarding positioning of the Mustang and whether it appeared to have been moved.[3] The jury is the trier of fact, and is the ultimate authority on the credibility of witnesses and the weight

---

[3] Ms. Vance testified the Mustang had not been moved between the time she first saw the car and when it was towed. Ms. Mack's testimony, however, indicates that *after* appellant told Ms. Vance he would move the car so neighborhood children would not tamper with it, she saw appellant move the car out from under a tree. Ms. Vance testified that the car had never moved from its position near, not under, the tree.

to be given to their testimony. *See* TEX. CODE CRIM. PROC. ANN. art. 38.04 (Vernon 1979); *Burks v. State*, 876 S.W.2d 877, 909 (Tex. Crim. App. 1994). For this reason, any inconsistencies in the testimony should be resolved in favor of the jury's verdict in a legal sufficiency review. *Johnson v. State*, 815 S.W.2d 707, 712–13 (Tex. Crim. App. 1991) (citing *Moreno v. State*, 755 S.W.2d 866, 867 (Tex. Crim. App. 1988)). Viewing the evidence under this deferential standard, we conclude that a rational trier of fact could have found, beyond a reasonable doubt, that appellant operated the motor vehicle.

Appellant's second point of error is overruled.

FACTUAL SUFFICIENCY OF THE EVIDENCE

In his third point of error, appellant asserts that the evidence is factually insufficient to prove appellant's operation of the Mustang. In arguing this point, appellant incorporates the same arguments and authorities cited for his legal insufficiency claim.

In reviewing evidence for factual sufficiency, we do not view the evidence in the light most favorable to the prosecution. *Clewis*, 922 S.W.2d 126, 134 (Tex. Crim. App. 1996). Instead, we consider all the evidence 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." *Id.* However, appellate courts "are not free to reweigh the evidence and set aside a jury verdict merely because the judges feel that a different result is more reasonable." *Id.* at 135 (citations omitted). In other words, we will not substitute our judgment for that of the jury. *Id.* at 133. To find the evidence factually insufficient to support a verdict, we must conclude that the jury's finding is manifestly unjust, shocks the conscience, or clearly demonstrates bias. *Id.* at 135.

To demonstrate factual insufficiency, appellant cites lack of witness credibility and "contradictions" between Ms. Mack's and Ms. Vance's testimony. Specifically, appellant complains that Ms. Mack did not like appellant. These complaints go to the jury's evaluation of the witnesses' credibility. The jury was entitled to believe or disbelieve all or any part of

the witnesses' testimony. *Sharp v. State*, 707 S.W.2d 611, 614 (Tex. Crim. App. 1986). Although appellant has pointed out discrepancies with some testimony, those discrepancies are insufficient to demonstrate that the jury's finding is "manifestly unjust," a shock to the conscience, or a clear demonstration of bias. *Clewis*, 922 S.W.2d at 135. Further, mere contradiction of testimony made by a witness at trial will not suffice to overturn a conviction for factual sufficiency. *Turner v. State*, 4 S.W.3d 74, 83(Tex. App.— Waco 1999, no pet.). If the members of the jury believed Ms. Mack over Ms. Vance, they merely exercised their proper function. *See id*. We must give due deference to the jury's assessment of the credibility of the witnesses and the weight to be given their testimony. *Wesbrook v. State*, 29 S.W.3d 103, 111 (Tex. Crim. App. 2000).

Viewed as a whole, the evidence is factually sufficient to show appellant drove the Mustang, thereby establishing the "operation" element of the offense charged. Appellant's third and final point of error is overruled.

The judgment of the trial court is affirmed.[4]

/s/ Kem Thompson Frost
Justice

Judgment rendered and Opinion filed May 31, 2001.

Panel consists of Justices Edelman, Frost, and Senior Chief Justice Murphy.[**]

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

---

[4] Appellant does not contest the jury's finding of the other essential elements of the offense.

[**] Senior Chief Justice Paul C. Murphy sitting by assignment.