Majority Opinion of June 29, 2000, Withdrawn; Reversed and Rendered and Substitute Majority Opinion filed August 29, 2000.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

SUBSTITUTED MAJORITY OPINION

We withdraw our majority opinion of June 29, 2000 and substitute the following opinion in its place. 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. *See* 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 or intended to be 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 intended to establish, maintain, or participate in a combination, as discussed in *Nguyen*. The acts needed to prove appellant's intent to do so need not all be criminal offenses *Id*. However, in the context of the organized crime statute, appellant's acts should show his intent to do more than agree to commit one crime. *Id*. (citing *Barber v. State*, 764 S.W.2d 232 (Tex. Crim. App. 1988). Appellant was not shown to have participated in anything other than the theft of the single Land Cruiser, thus, there was no showing appellant intended to be "work together in a continuing course of criminal activities." *Id*. Though appellant participated with persons who were themselves involved in the commission of organized crime, one could surmise, but not legally infer from this his intent to be involved in any of their other criminal activities. *See Skelton*, 795 S.W.2d at 167. Indeed, the thrust of both the state's evidence and argument is the prior, unconnected criminal activity of others, not appellant.[1] 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.

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[1] The dissent points out that appellant participated in the "last theft" of the land cruiser–though nothing more. To infer past or future intent based solely on one act would argue as well that if George Washington lied once ergo he was a pathologic liar (or *intended* to destroy an entire cherry orchard!)

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.

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Don Wittig
Justice

Judgment rendered and Opinion filed August 29, 2000.

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

Do Not Publish — TEX.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