Affirmed and Opinion filed December 9, 1999.

In The

Fourteenth Court of Appeals

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NO. 14-98-00867-CR

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ALAN WILLIAM WHITELAW, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 337th District Court
Harris County, Texas
Trial Court Cause No. 785,647

O P I N I O N

A jury convicted Alan William Whitelaw of theft over $200,000 for his part in a complicated scheme involving identity theft, check theft and forgery. *See* TEX. PEN. CODE ANN. § 31.03(e)(7) (Vernon 1994). The trial court sentenced him to 60 years' imprisonment. In ten points of error appellant challenges the sufficiency of the evidence, the constitutionality of his sentence, the effectiveness of his trial counsel, the voluntariness of his sentencing election, and the trial court's decisions denying him a presentence investigation and in admitting certain evidence against him. We affirm.

FACTS AND PROCEDURAL HISTORY

Because Whitelaw challenges the legal sufficiency of the evidence to support his conviction, we will set out the facts in detail.

Donald B. Boethel was the lead investigator for the Harris County district attorney's office. He said he was called in by the Harris County clerk's office to investigate fraudulent assumed-name certificates which had been used to open business checking accounts with three banks.[1] His investigation showed that the certificates in question were forged, and that the serial numbers on these forged certificates were traced to genuine documents filed by appellant. The person who opened the bank accounts in question used the name of "John William." This false identity was obtained by using another person's birth certificate. Boethel identified appellant as the person pictured on the photo ID card used to open the accounts. Boethel also collected signature cards and items deposited into the bank accounts in question; he said six of the items had appellant's fingerprints on them.

Karen Jones was a vice president at First Prosperity Bank when appellant, who identified himself to her as "John William," opened an account. She said a suspicious pattern of activity associated with the account caused her to investigate. She pulled a $33,200 check, deposited to the account and made out to Expert Credit from TwinStar Semiconductor, and found that it was fraudulently altered. Jones called Boethel and gave him the check, signature card and other items from the account. She then called "William" and told him the bank was closing the account. She also told "William" he had to come down in person to sign an affidavit in order to get the $40,000 in the account. "William" sent a letter seeking the funds in the account, but did not appear.

Walter L. "Lucky" Stairhime, a Houston Police Department fingerprint expert, said he found appellant's thumbprint on the letter written by "John William" seeking to close the First Prosperity account. He said he was able to identify appellant's fingerprints on six checks written by "John William" on the various accounts involved in this case.

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[1] Banks require an assumed-name certificate bearing the name of a business before opening a bank account in the name of that business.

The real John Williams testified he was the owner of the Social Security number used by appellant to secure a false Texas identification card and open bank accounts under the name "John William." He said he never gave appellant permission to take any of those actions in his name.

William Schouten, the chief deputy for the Harris County clerk's office, said he contacted the district attorney's office concerning the forged assumed name certificates. He said some serial numbers on the certificate were traced to a bond and assumed name certificate taken out by appellant.

Richard Carr, a vice president with Bank United, said "John Williams" presented an assumed name certificate and opened an account in the name of "Putnam Investments" at one of his bank's branches. On the same day, a check for $184,575 was deposited into the account. Some time later, he was contacted by Boethel about the account. The bank then examined its records and discovered that some of the transactions involving the account were filmed by surveillance cameras. Carr said the man in the resulting photographs, who he knew as "John Williams," was appellant.

Laura Boulay, a fraud investigator with State Street Bank and Trust of Boston, said she was contacted by Boethel about a suspicious check drawn on her bank. Her investigation showed that the $184,575 check, written by Pension Reserve Investment Management Board of Massachusetts, was mailed to Putnam Investments in Boston. Boulay said Putnam did not have a Houston office.

Richard Kircher, an official with Putnam Investments in Boston, said his company never received the check in question.

Bradford Wakeman, an investigator for the Pension Reserve Investment Management Board of Massachusetts, confirmed that a check for $184,575 which was intended to pay his fund's management fees to Putnam Investments had been fraudulently cashed.

Doreen Weiss, a fraud investigator with Advanta Corp., said her company paid out $14,900 on two forged credit card courtesy checks.

Robert Jelnick, an officer with TwinStar Semiconductor in Richardson, testified that three checks involved in the case were issued, on the same day, by his company to pay suppliers. The checks cleared but the suppliers complained about not being paid. Jelnick said his investigation showed one of the checks,

for $33,200, was made out to JSR Microelectronics but was actually paid to "Expert Credit." Another check, for $39,191.62, was intended for Kintet U.S. World Express but was paid to a Merrill Lynch account, as was a third check for $55,600 and intended for Attach Chemical Co. Jelnick said all three checks had been altered.

Charles Martin, an official with Merrill Lynch in New York, said someone named "Jeffery Mitchell" opened an account with his company by mail. Two counterfeit checks from TwinStar were deposited by mail; before the forgeries were discovered, the company paid out more than $37,000 on the account.

The real Jeffrey Mitchell testified he did not open the Merrill Lynch account in question, although it bore his Social Security number. Mitchell said he did not give appellant permission to use his name or credentials.

The defense rested without calling any witnesses.

LEGAL SUFFICIENCY

In his first point of error Whitelaw contends the evidence is legally insufficient to support his conviction for theft over $200,000. We disagree.

Legal sufficiency is the constitutional minimum required by the Due Process Clause of the Fourteenth Amendment to sustain a criminal conviction. *See Jackson v. Virginia*, 443 U.S. 307, 315-16, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). The standard for reviewing a legal sufficiency challenge is whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Jackson*, 443 U.S. at 320, 99 S.Ct. at 2789; *Johnson v. State*, 871 S.W.2d 183, 186 (Tex. Crim. App. 1993), *cert. denied*, 511 U.S. 1046, 114 S.Ct. 1579, 128 L.Ed.2d 222 (1994). The evidence is examined in the light most favorable to the jury's verdict. *Jackson*, 443 U.S. at 320, 99 S.Ct. 2781; *Johnson*, 871 S.W.2d at 186. The standard is the same in both direct and circumstantial evidence cases. *Geesa v. State*, 820 S.W.2d 154, 162 (Tex. Crim. App. 1991). All of the evidence is considered by the reviewing court, regardless of whether it was properly admitted. *Johnson*, 871 S.W.2d at 186; *Chambers v. State*, 805 S.W.2d 459, 460 (Tex. Crim. App. 1991).

Appellant's specific complaint is that the jury should have been charged on the law of parties, because one witness testified that a teller at one of the banks in question was aiding appellant. We do not need to reach this question, however. It is only necessary for the state to prove that appellant deprived the lawful owners of property in excess of $200,000. *See Lehman v. State*, 792 S.W.2d 82, 84-85 (Tex. Crim. App. 1990). Here Weiss, Wakeman and Martin testified that their institutions were deprived of more than $200,000 by the fraudulent acts of appellant. The alleged aid from the teller came when appellant sought to deprive a fourth institution — Bank United — of $58,000 by causing cashier's checks to be issued.

Finding the evidence legally sufficient to sustain appellant's conviction, we overrule his first point of error.

CRUEL AND UNUSUAL PUNISHMENT

In his second point of error Whitelaw contends his sentence of sixty years constitutes cruel and unusual punishment under the Texas and federal constitutions. Upon being convicted of a first-degree felony, appellant was eligible for a sentence ranging from five to ninety-nine years and up to a $10,000 fine. TEX. PEN. CODE ANN. § 12.32 (Vernon 1994). Texas courts have consistently held that sentences falling within the limits prescribed by statute are not "cruel and unusual." *See Samuel v. State*, 477 S.W.2d 611, 615-616 (Tex. Crim. App. 1972) and cases cited therein.

Appellant argues that his sentence was greater than any other reported case in which violence was not a factor and in which a habitual offender statute was not implicated. However, appellant conveniently omits part of the story. Evidence at the punishment phase of the trial showed that appellant had previously been convicted of burglary of a motor vehicle. Furthermore, while awaiting trial in this cause, Whitelaw was indicted twice for new offenses. The first indictment was for tampering with a governmental record and related to appellant presenting a Texas identification card in the name of Michael Roberts at a crime scene. The second indictment, for theft over $20,000 was for his involvement in yet another bank fraud scheme. It was this conduct which caused the trial court to remark that "[i]f you gave me any reason for showing leniency, I haven't heard a word."

The legislature authorized this trial judge to assess this sentence; finding no special circumstances which could take this case outside the rule of *Samuel*, we overrule appellant's second point of error.

PRESENTENCE INVESTIGATION

In his third point of error appellant contends the trial court erred in not ordering a presentence investigation. He properly points out that prior precedent from this court dooms his argument, but urges us to overrule that prior precedent. *See Stancliff v. State*, 852 S.W.2d 639, 640 (Tex. App.–Houston [14th Dist.] 1993, pet. ref'd); *Turcio v. State*, 791 S.W.2d 188, 191 (Tex. App.–Houston [14th Dist.] 1990, pet. ref'd). We decline his invitation and overrule his third point of error.

INEFFECTIVE ASSISTANCE OF COUNSEL

In his fourth point of error appellant contends his trial counsel was ineffective because he failed to present a motion for directed verdict at the conclusion of the case.

The Supreme Court set forth the test for ineffective assistance of counsel analysis in *Strickland v. Washington*, 466 U.S. 668 (1984). The *Strickland* test focuses on reasonableness, measuring the assistance received against the prevailing norms of the legal profession. *Id*. at 690, 104 S.Ct. at 2066. Counsel is presumed to have rendered adequate assistance, and it is incumbent on the defendant to identify those acts or omissions which do not amount to reasonable professional judgment and are outside the "range of professionally competent assistance." *Id*. To show prejudice, the defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068.

Whether the *Strickland* standard has been met is to be judged by the "totality of the representation" rather than by isolated acts or omissions of the trial counsel, and the test is applied at the time of the trial, not through hindsight. *Wilkerson*, 726 S.W.2d at 548; see also *Ex parte Welborn*, 785 S.W.2d 391, 393 (Tex. Crim. App.1990). The constitutional right to counsel, whether appointed or retained, does not mean errorless counsel. *Castoreno v. State*, 932 S.W.2d at 604.

In certain rare circumstances a single error can suffice to constitute ineffective assistance of counsel. *See May v. State*, 722 S.W.2d 699 (Tex. Crim. App. 1984). This is not one of those cases.

A motion for directed verdict is generally appropriate where the State fails to present any evidence in support of the charged offense. *Guidry v. State*, 896 S.W.2d 381, 386 (Tex. App.–Texarkana 1995, pet. ref'd). The crux of appellant's contention is that the state had to plead and prove that other parties participated in the offense. We have already held that the State need not plead and prove the

involvement of other parties to this offense, and we have already found the evidence legally sufficient to support the conviction. Therefore appellant can point to no harm resulting from his counsel's failure to move for a directed verdict. Absent prejudice, appellant's claim to ineffective assistance of counsel fails. We therefore overrule appellant's fourth point of error.

PUNISHMENT ELECTION

In his fifth point of error appellant claims he was denied an informed election as to punishment because a different trial judge was brought in to try the case after appellant elected to go to the trial court for punishment. Appellant fails to cite any authority that supports his position.

Here, the same trial judge heard both guilt-innocence and punishment phases of the trial. We overrule appellant's fifth point of error.

EVIDENTIARY OBJECTIONS

In his sixth through tenth points of error appellant contends the trial court erred in admitting irrelevant evidence. We first note that the items covered by his points of error eight and nine (apartment records) were not objected to on the basis of relevancy in the trial court. Because the objection at trial does not comport with the complaint on appeal, nothing is presented for review. *See Butler v. State*, 872 S.W.2d 227, 236 (Tex. Crim. App. 1994), *cert. denied*, 513 U.S.1157, 115 S.Ct. 1115 130L.ed. 2d 1079 (1995).

Relevant evidence is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would without the evidence." TEX. R. EVID. 401. Irrelevant evidence is inadmissible. TEX. R. EVID. 402. With these parameters in mind, we examine each contention in turn.

A. The DBA for Warehouse Beepers & Jewelry

Appellant complains an unnecessary assumed name certificate, using the name "Warehouse Beepers & Jewelry," should not have been admitted. However, because an identical copy of the certificate was admitted as a part of another exhibit, any error in admission of this certificate is deemed waived. *See Hudson v. State*, 675 S.W.2d 507, 511 (Tex. Crim. App. 1984). His sixth point of error is therefore overruled.

B. The Drop Box Records

appellant complains next that the trial court erroneously permitted the State to introduce records showing he had rented a particular drop mailbox. The evidence showed appellant opened the Merrill Lynch account in the name of "Jeffery Mitchell" and used this mailbox as an address. Furthermore, on the application form appellant listed another rented mailbox as his address. Texas law has long held that an "attempt at concealment" is a material element of proof of the instant offense. *See Herber v. State*, 7 Tex. 69, 71 (1851). Evidence of this mailbox was relevant to show the skein of false identities and fraudulent actions woven by appellant to further his felonious purpose. We overrule point of error nine.

C. The Mortgage Records

In his tenth point of error appellant complains that the trial court admitted records of his mortgage application to buy a house. The records were relevant in that they showed that appellant paid his earnest money contract with a money order, a transaction which is usually accomplished with a personal check. The implication was that appellant used the other accounts under his control when he needed the services of a bank. Also, later testimony showed that people involved in bank fraud often do not have bank accounts of their own. We overrule appellant's tenth point of error and affirm the judgment of the trial court.

/s/ Ross A. Sears
Justice

Judgment rendered and Opinion filed December 9, 1999.

Panel consists of Justices Sears, Cannon, and Draughn.*

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

* Senior Justices Ross A. Sears, Bill Cannon, and Joe L. Draughn sitting by assignment.