Affirmed and Opinion filed November 9, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-99-00020-CR

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FRANK XAVIER RAGAN III, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 184th District Court
Harris County, Texas
Trial Court Cause No. 751,105

O P I N I O N

Appellant, Frank Ragan, appeals his conviction by a jury of the offense of aggregate theft. *See* TEX. PEN. CODE ANN. § 31.09 (Vernon 1994). The jury assessed appellant's punishment at ten years' confinement and a fine of $10,000. We affirm.

F A C T U A L S U M M A R Y

Appellant and his co-defendant at trial, Mr. C.L. King, formed a company named Investors Portfolio International Corporation (IPIC). Appellant served as president of this company. Through IPIC, appellant and King proposed to find investors for clients who needed capitalization for start-up businesses.

To entice clients, appellant told them that for a substantial fee, IPIC would prepare a bound portfolio which would be used to present its clients' start-up business ideas to wealthy investors. The complaining clients paid the following fees:

Michael Mounce:	$93,475.
Paul Buske:	$10,000.
David Heermans and Dr. Sami El Hage:	$164,780.
James Nielson:	$116,225.

None of these clients ever saw any return on their fees. Moreover, IPIC never fulfilled its promise to create bound portfolios, and neither appellant nor King repaid the money. Instead they used the $384,480 for appellant's salary and for King's personal expenses, such as dental work, expensive suits and boots, and credit card bills.

DISCUSSION AND HOLDINGS

On appeal to this court, appellant presents five issues for review, contending he is entitled to a judgment of acquittal or a new trial. In his first, third and fifth issues, appellant complains that the trial court abused its discretion in failing to deem the defensive issue of limitations to be an adjudicative fact raised by the evidence. In his second issue, appellant complains that the trial court erred in entering a judgment of guilty against appellant because the evidence at trial was factually insufficient to establish that appellant had the requisite intent to deprive the complainants of their money in a felony theft charge. In his fourth issue, appellant complains that the trial court erred in denying appellant's motion to quash the indictment for failure to give adequate notice of the thefts aggregated under article 31.09 of the Texas Penal Code.

I. STATUTE OF LIMITATIONS

Appellant, as did King in his appeal to this court,[1] contends that evidence adduced at trial raised the issue of whether the statute of limitations had expired before the State obtained an indictment against him. Appellant therefore argues that the trial court abused its discretion (1) when time restrictions on the voir dire examination prevented appellant from examining the venire about limitations, (2) when the trial

[1] *See King v. State*, 17 S.W.3d 7 (Tex. App.—Houston [14th Dist.] 2000, pet.).

court refused a requested instruction in the charge on the statute of limitations, and (3) when the trial court, after judicially noticing the date of the indictment, refused to give the statutory instruction for judicial notice.

The thrust of appellant's argument regarding the statute of limitations is that, in the first three transactions, King ran the company, but by the fourth transaction, appellant bought the company and King acted as his consultant. Appellant argues that this is evidence that there was not a continuing course of conduct between the first three transactions and the fourth one. We note at the outset that all four transactions involved the same pitch to obtain the complainants' money. All four transactions occurred with King behind the scenes and appellant acting as the front man soliciting the money from prospective clients. Most importantly, all four transactions involved King and appellant taking money from complainants without any cognizable effort towards performing under the contract. The roles that King and appellant bestowed upon each other did not change the basic design of their scheme.

A. Restrictions on Voir Dire Examination

A trial judge may impose reasonable restrictions on the exercise of voir dire examinations. *See McCarter v. State*, 837 S.W.2d 117, 119 (Tex. Crim. App. 1992). We review a trial judge's decision to limit voir dire under an abuse of discretion standard. *See Dinkins v. State*, 894 S.W.2d 330, 345 (Tex. Crim. App. 1995). A trial judge abuses his discretion when he limits a proper question concerning a proper area of inquiry. *See id*. Voir dire examination may be limited where a question commits a venire member to a specific answer given a specific set of facts, where the questions are duplicative, where the venire member has already stated his position clearly and unequivocally, and where the questions are in improper form. *See id*. No abuse of discretion occurs when a trial judge limits the voir dire examination because the issues the defendant seeks to explore are improper voir dire questions. *See McCarter*, 837 S.W.2d at 121-22. When a question goes to issues that are not applicable to the case, that question is improper. *See id*.

Appellant contends that the trial court abused its discretion by prohibiting him from questioning the venire members concerning the statute of limitations. The record shows that following the conclusion of voir dire, counsel for appellant asked the trial court for additional time to question the prospective jurors

about their ability to follow the law concerning the statute of limitations. The trial court denied this request. Appellant contends that the issue of limitations was relevant to the case. We disagree.

Merely raising an issue before the trial court in a pre-trial proceeding does not make it relevant to the case. *See King*, 17 S.W.3d at 13. Before voir dire commenced, the trial court determined in its ruling on appellant's pre-trial motion to quash that no evidence supported appellant's theory that the statute of limitations barred the State's prosecution.

Nothing in evidence supports appellant's contention that the last transaction with Nielson was not within a continuing course of conduct, making it a separate transaction. The fact that appellant and King transferred ownership between themselves at the time of the Nielson transaction is no evidence that the Nielson transaction was not part of the continuing course of conduct. To deem this to be evidence would be to instruct criminals on how to evade an aggregate theft charge, yet allowing them to achieve the same result proscribed by the law.

Moreover, in his co-defendant's appeal to this court, we determined that this last incident of theft did arise from the single scheme or continuing course of conduct and that it occurred in 1993. *See id*. In aggregate theft cases, "the statute of limitations does not begin to run until the date of the commission of the final incident of theft." *Id*. The record shows that the State presented the indictment against appellant within the statute of limitations from the date of the last theft. Therefore, the issue of limitations was not applicable to appellant's case, no evidence of limitations was raised at trial, so the trial court did not abuse its discretion in refusing to allow appellant additional time to examine the prospective jurors. Appellant's first issue is overruled.

B. Statute of Limitations Instruction

In his third issue for review, appellant contends that the trial court erred in denying a requested instruction on the defense of limitations. In King's appeal to this court, we ruled that the trial court did not err in denying an instruction to the jury on the defense of limitations. *See King*, 17 S.W.3d at 21. The State presented this indictment against appellant within the five-year limitations period applicable to aggregate theft. *See id*. As in *King*, no evidence at trial supported the submission of such a charge. Appellant's third issue presented for review is overruled.

C. Instruction on Judicially Noticed Facts

In his fifth issue, appellant contests the trial court's refusal, during the guilt stage, to submit the statutory instruction regarding judicially noticed facts in the jury charge. Texas Rule of Evidence 201 permits the trial court to take judicial notice of certain facts. *See* Tex. R. Evid. 201. However, if this is done in the criminal setting, the rule provides that "the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed." *Id*. at (g). This rule applies only to adjudicative facts. *See id*. at (a). The Court of Criminal Appeals, has defined adjudicative facts as those "'facts about the particular event which gave rise to the lawsuit and, like all adjudicative facts, . . . [help] explain who did what, when, where, how, and with what motive and intent.'" *Emerson v. State*, 880 S.W.2d 759, 765 (Tex. Crim. App. 1994) (quoting McCormick on Evidence at § 328).

As set out above, no evidence was adduced at trial that the prosecution was time-barred. Although the judge took judicial notice of the date of indictment in the jury's presence, limitations never became an adjudicative fact, therefore Rule 201(g) did not apply. *See Decker v. State*, 894 S.W.2d 475, 480 (Tex. App.—Austin 1995, pet. ref'd). Thus, the judge's refusal to instruct the jury under Rule 201 (g) was not error. We overrule appellant's fifth issue presented for review.

II. FACTUAL SUFFICIENCY

In his second issue, appellant contends that the trial court erred in entering a judgment of guilty against appellant because the evidence at trial was factually insufficient to establish an element of felony theft, namely that appellant had the requisite intent to deprive the complainants of their money. *See* TEX. PEN. CODE ANN. § 31.03 (Vernon 1994). Appellant points out that in the first three instances of theft the money was deposited into an IPIC account controlled by his co-defendant, King, and that he only received from that a bi-monthly stipend; he argues that this shows he did not have the intent required for the felony of aggregate theft.

In reviewing the factual sufficiency of the evidence, courts must determine "whether a neutral review of all the evidence, both for and against the finding, demonstrates that the proof of guilt is so obviously weak as to undermine confidence in the jury's determination, or the proof of guilt, although adequate if taken alone, is greatly outweighed by contrary proof." *Johnson v. State*, 23 S.W.3d 1, 11 (Tex. Crip. App.

2000). Since the burden to prove the elements of a criminal offense at trial rests with the State, an appellant can challenge an adverse finding claiming the evidence used against him was "so weak as to be factually insufficient." *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." *Clewis v. State*, 922 S.W.2d 126, 135 (Tex. Crim. App. 1996). In other words, we will not substitute our judgment for that of the jury. *See Johnson*, 23 S.W.3d at 7; *Clewis*, 922 S.W.2d at 133. To do so would violate a defendant's right to trial by jury. *See Clewis*, 922 S.W.2d at 133. In order 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. *See id*. at 135.

We begin our factual sufficiency review by noting that the State charged appellant with theft under the law of parties. *See* TEX. PEN. CODE ANN. § 7.02 (Vernon 1994). Under the law of parties, "a person is criminally responsible for an offense committed by the conduct of another if . . . he act[s] with intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense." *Id*. Circumstantial evidence may be sufficient to show that a person is a party to an offense. *See King*, 17 S.W.3d at 15; *Thomas v. State*, 915 S.W.2d 597, 599 (Tex. App.—Houston [14th Dist.] 1996, pet. ref'd). In appellant's testimony at trial he never admits to lying or deceiving anyone, and though he was president of the company, he characterized himself as an independent contractor, who only did what King told him to do. However, there is ample circumstantial evidence in the record that appellant aided his co-defendant in the commission of the offense of theft. Appellant acted as the president of IPIC. Appellant solicited the start-up funds from Mounce, Buske, Heermans and Nielson. Appellant told the complainants that the reason their portfolios had not been made and deals had not been closed was due to weather, printer troubles and the like, all the while assuring them that the deals were near to closing. Appellant told complainants this when he knew that he and King considered some of the complainants' accounts to be in default. Complainants relied on these excuses for the delay and promises of closing. It made them readily pay for the services IPIC alleged it would provide. The fact that appellant did not have control of the bank account during some of this time is inconsequential with respect to appellant's responsibility under the law of parties. As this court recognized in *King v. State*, appellant and King "shared a close business relationship for many years and worked together to

market IPIC to start-up ventures." 17 S.W.3d at 15. This court went on to state that appellant "had more personal contact with the complainants [than King] . . . ." *Id*.

Appellant urges this Court to find that this was a mere contractual dispute, and not theft. When there is no evidence of requisite criminal intent, theft convictions resulting from an otherwise contractual dispute may warrant reversal for insufficient evidence. *See Peterson v. State*, 645 S.W.2d 807, 811-12 (Tex. Crim. App. 1983). Unlike *Peterson*, this is not a case where appellant failed to perform due to unforeseen cash flow problems. *See id*. at 808-09. Rather, this case more closely resembles *Ellis v. State* in which the defendant convinced eight complainants he would assist them in locating financing for vehicle purchases, but never actually arranged for financing and refused to return their money. 877 S.W.2d 380, 381-84 (Tex. App.—Houston [1st Dist.] 1994, pet. ref'd). Appellant does not cite us to any evidence in the record, and we find none, that appellant and King even attempted to make the portfolios the contracts contemplate. However, the record contains copious instances where IPIC, through appellant, made misrepresentations to clients and made specious excuses for IPIC's failure to perform. As in *Ellis*, IPIC's "promises to the complainants were merely a ruse to accomplish theft by deception." *Id*. at 383.

The State's evidence demonstrates that appellant took steps to elicit the funds for IPIC and affirmatively acted to deceive the complainants to ensure the success of appellant and King's overall scheme. The evidence against the appellant is factually sufficient to support the jury's verdict in this case. The jury's finding is not manifestly unjust and does not shock the conscience; nor does it clearly demonstrate bias. *See Clewis v. State*, 922 S.W.2d 126, 134 (Tex. Crim. App. 1996). Appellant's evidence did not greatly outweigh the State's evidence, nor was the State's evidence so weak as to be factually insufficient. *See Johnson v. State*, 23 S.W.3d 1, 11 (Tex. Crim. App. 2000). We overrule appellant's second issue for review.

III. DEFECTIVE NOTICE IN THE INDICTMENT

In his fourth issue presented for review, appellant contends that his pretrial motion to quash the indictment was improperly denied. In this motion, which the trial court denied, appellant complained of eight defects in the indictment. It is unclear from appellant's brief which of these eight alleged defects in the indictment he complains about to us. However, from the cases he relies on it appears that the complaint

is that the indictment fails to give notice of the crime because it fails to aggregate the amount of money allegedly stolen. We assume this is his argument.

Appellant did not raise this defect in his motion to quash the indictment. In aggregate theft cases, "the allegation that the values of the property taken were aggregated . . . is an element of the offense and must be included in the indictment." *See Whitehead v. State*, 745 S.W.2d 374, 376 (Tex. Crim. App. 1988). Failure to allege an element of an offense in a charging instrument is a defect of substance. *See Muhammad v. State*, 846 S.W.2d 432, 437 (Tex. App.—Houston [14th Dist.] 1992, pet. ref'd). However, by failing to raise a defect of substance in the indictment pre-trial or otherwise, appellant "forfeited his right to raise the objection on appeal or by collateral attack." *Id*. Even if we could conclude that this indictment failed to aggregate the amount of money stolen,[2] we would still have to find that appellant waived his right to complain. Thus, appellant's fourth point of error is overruled.

The judgment of the trial court is affirmed.

/s/ Wanda McKee Fowler
Justice

Judgment rendered and Opinion filed November 9, 2000.

Panel consists of Justices Anderson, Fowler and Edelman.

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[2] We do not so conclude. The indictment in this cause of action includes all the elements of the offense of aggregate theft. It states the dates between which the thefts occurred, names the four complainants, states that the appropriation and acquisition of money was a result of a continuing scheme against complainants and that all the property taken from complainants was over the statutory amount for a felony offense. To give notice, an indictment need not state more than that which is necessary to be proved. *See Sharp v. State*, 707 S.W.2d 611, 625 (Tex. Crim. App. 1986). Thus, this indictment alleges all the elements of the offense and is sufficient to give notice.