Affirmed and Opinion filed March 2, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-99-00265-CR

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LUTHER LEVELL PARKER, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 248th District Court
Harris County, Texas
Trial Court Cause No. 717,978

O P I N I O N

Appellant appeals his revocation of community service. In its motion to revoke, the State alleged appellant committed theft by appropriating nine Rolex watches from Leonard Reiner. The court found the allegations true, revoked community supervision, and assessed seven years confinement. In a single issue, appellant contends the trial court abused its discretion in revoking his probation because the evidence was insufficient to prove (1) his intent to deprive Reiner of his property and (2) that the watches recovered from him were the ones taken from Reiner in a robbery several days earlier. We affirm.

Background

Three men robbed Leonard Reiner's jewelry store on August 26, 1998.[1] Among the items they stole were eleven Rolex watches. The following day, appellant entered the jewelry store of Manish Dharia. He presented nine Rolex watches wrapped in a hand towel. He told Dharia he paid $35,000 for the watches. He also mentioned that his uncle had a store. Dharia did not buy the watches. But suspecting they were the ones taken in the robbery, he made some calls which alerted the police.

The next day, August 28th, appellant and his girlfriend, Trisha Otems, attempted to sell the watches to another jeweler, George Poe. Also suspicious, Poe called the police. Officer J.M. Wright pulled over appellant and Otems in his Infiniti after they departed Poe's store.

Wright recovered nine Rolexes from Otems' purse. At the time of her arrest, Otems told Wright that the watches were given to appellant by a third party. According to Officer Wright, at no time did Otems tell him the watches were hers. At the revocation hearing, though, Otems testified that she had stolen the watches days before. She also admitted that she had consistently told police and prosecutors that appellant gave her the watches.

Officer Mahr interviewed appellant after his arrest. He testified appellant told him that the watches belonged to Otems. He was only trying to help sell them.

To prove the watches found in Otems' purse were those from the Reiner robbery, the State introduced videotape of the watches in the police property room. Each watch was individually displayed with Reiner dictating the serial number.

The State then called Officer Moreno. Moreno had taken custody of appellant, Otems, and the watches from Officer Wright at the scene shortly after the arrest. Moreno read from the offense report the numbers he had taken from each watch. None of the numbers matched

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[1] The men were not identified in this appeal. There is no contention that appellant was one of the robbers.

the ones given on the video. On cross-examination, Moreno asserted the watches were the ones he had tagged. He also stated that he saw several numbers on the watches, but because he was not familiar with Rolexes, he took the one that looked best.

Reiner testified the watches in the videotape were the ones taken from his store. He also stated the serial numbers were located only by partially disassembling the watch with a special tool. He stated the numbers Moreno recorded were just "band numbers."

On cross-examination, Reiner read a list of serial numbers, none of which matched those on the video. Reiner explained that he had brought the wrong file to court.

Finally, the State recalled Officer Moreno:

[The State]: You also had an opportunity to come in and view the videotape of the inventorying of the nine Rolex watches, correct?

[Moreno]: Yes, sir, I did.

[The State]: As you watched the videotape, do you have an opinion as to whether or not – were those the same watches you recovered on August 28th in the leather purse inside of the Infiniti car?

[Moreno]: Yes, sir, they were.

Standard of Review

Where the issue is whether the terms of community supervision were violated, the State need only prove its case by a preponderance of the evidence. *See Cobb v. State*, 851 S.W.2d 871, 873 (Tex. Crim. App.1993). We review a trial court's decision revoking probation by an abuse of discretion standard. *Jackson v. State*, 645 S.W.2d 303, 305 (Tex.Crim.App.1983). In a revocation proceeding, the trial court is the trier of fact and the judge of the credibility of the witnesses and the weight of the testimony. *Garrett v. State*, 619 S.W.2d 172, 174 (Tex. Crim. App.1981).

Culpable Mental State

In its motion to revoke community supervision, the State alleged appellant "appropriate[d], by acquiring and exercising control over . . . nine watches owned by Leonard Reiner . . . with the intent to deprive [him] of the property." Appellant contends the State's evidence was insufficient to show that the appellant's exercise of control over the watches was done with the requisite intent for theft.

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. *Sutherlin v. State*, 682 S.W.2d 546, 549 (Tex.Crim.App.1984) Mere possession of stolen property, however, does not give rise to a presumption of guilt; it is only an inference of guilt. *Id*. 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.* When the party in possession gives a reasonable explanation for having recently come into possession of the stolen property, the State must prove the explanation is false. *McElyea v. State*, 599 S.W.2d 828, 829 (Tex. Crim. App.1980).

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 watches one day after the robbery to Dharia and the following day to Poe. *See Smith v. State*, 518 S.W.2d 823, 825 (Tex.Cr.App.1975) (twenty-eight days held recent). Personal: Appellant alone went to Dharia's jewelry store to try to sell him the watches. *Id*. at 824. Distinct and conscious assertion: Dharia's testimony that appellant, by himself, tried to sell him the watches and that appellant told Dharia he paid $35,000 for them. *See Todd v. State*, 601 S.W.2d 718, 720 (Tex. Crim. App. 1980).

Finally, the State proved appellant's possession of the watches was "unexplained" by showing his explanation was false. Appellant explained to Officer Mahr the watches were not his. However, Dharia gave testimony to the contrary in that appellant told him that *he* had paid

$35,000 for the watches. Otems testimony also showed appellant's explanation was false. She admitted that, up until trial, she had maintained appellant had obtained the watches from a third party. Though Otems recanted her story, the court, as trier of fact, was entitled to disbelieve her trial testimony and believe what she had stated earlier. *See Callahan v. State*, 502 S.W.2d 3, 6 (Tex. Crim. App.1973). The State therefore adduced legally sufficient evidence to show that appellant's explanation that the watches were not his was false. The evidence was legally sufficient to show appellant's culpable mental state.

Identification of the Watches

Next, appellant correctly states that when the State relies on possession of recently stolen property to support a conviction, it must show the recovered property is the identical property that was stolen. *See Mixon v. State*, 507 S.W.2d 238, 245-46 (Tex. Crim. App. 1974)(op. on reh'g). In this connection, he argues that the State failed to show the watches recovered from appellant's car were the watches stolen from Reiner. His assertion rests on the fact that the serial numbers shown on the videotape were inconsistent with the numbers provided by both Reiner and Officer Moreno. We agree the attempted method of identifying the watches by serial numbers was unsuccessful. However, this does not necessarily preclude a finding the watches recovered from appellant's Infiniti were the ones taken in the robbery.

The State offered independent proof of identity apart from serial numbers. First, Officer Moreno testified the watches on the video were the ones he tagged "into property." He also asserted he believed the watches he took from the arrest scene were the same as the ones on the videotape. Leonard Reiner testified that the watches on the video were the watches stolen from his store two days earlier. This evidence is sufficient to prove the watches stolen from Reiner were the ones recovered from appellant. *See Cruz v. State*, 629 S.W.2d 852, 858-60 (Tex.App.--Corpus Christi 1982, pet. ref'd) (witness' testimony that a watch recovered

from defendant was the same one belonging to its deceased owner sufficient to support conviction[2]).

The apparent inconsistencies complained of by appellant were reconciled by Reiner. He explained that the numbers recorded by Moreno were merely band numbers. He also noted that Moreno likely would not have been able to locate the serial numbers. Finally, Reiner explained his own inconsistency with testimony he had brought the wrong paperwork to court. The court, as trier of fact, was within its discretion to accept these explanations. *See Jones v. State*, 944 S.W.2d 642, 647 (Tex. Crim. App.1996) (reconciliation of conflicts in the evidence is within the exclusive province of the factfinder). Despite the different numbers, the State nonetheless put on sufficient proof of Reiner's stolen watches in possession of appellant. Our duty as an appellate court is not to reweigh the evidence from reading a cold record but to act as a due process safeguard ensuring only the rationality of the factfinder. *See Williams v. State*, 937 S.W.2d 479, 483 (Tex. Crim. App.1996). Accordingly, we hold the evidence was sufficient to show the watches stolen from Reiner were the ones recovered from appellant's car.

Appellant's sole issue is overruled. The judgment of the trial court is affirmed.

/s/ Don Wittig
Justice

Judgment rendered and Opinion filed March 2, 2000.

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

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

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[2] The conviction was for murder/robbery but the pertinent elements of proof for identity of property were the same as in this case.