Opinion issued May 28, 2020

In The

Court of Appeals

For The

First District of Texas

NO. 01-18-00897-CR

JAMAILE BURNETT JOHNSON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 178th District Court
Harris County, Texas
Trial Court Case No. 1532340

O P I N I O N

A jury found appellant, Jamaile Burnett Johnson, guilty of the felony offense of theft of property with a value of more than $2,500 but less than $30,000.[1] After

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[1] *See* TEX. PENAL CODE ANN. § 31.03(a), (e)(4).

finding true the allegations in two enhancement paragraphs that appellant had twice been previously convicted of felony offenses, the jury assessed his punishment at confinement for eleven years. In three issues, appellant contends that the evidence is legally insufficient to support his conviction, his trial counsel provided him with ineffective assistance of counsel, and the trial court erred in admitting certain evidence.

We reverse and remand.

Background

Veronica Lopez, the complainant, testified that on November 28, 2016, she, along with her husband, Jorge Gonzalez, went to a tire store. Gonzalez drove a brown Chevrolet truck with a stripe and darkened windows. The truck was a family car in Gonzalez's name.

Upon arrival at the tire store, Gonzalez parked the truck in the back of the store's parking lot and got out. The complainant remained inside the truck in the front passenger seat with the truck's engine still running. As the complainant sat in the truck looking at her cellular telephone, she saw appellant riding toward the truck on a bicycle. Appellant opened the unlocked door of the truck and got inside. He had a screwdriver in his hand, but he did not point it directly at the complainant, and the complainant did not see the screwdriver when appellant first entered the truck. Appellant did not hit the complainant with the screwdriver, stab her with the

screwdriver, or point it at her face. Instead, the complainant saw the screwdriver in appellant's hand when his hand was on the gearshift.

The complainant asked appellant if he worked at the tire store, and he told her that he did not. He then asked her if she wanted to go for a ride or if she was "ready for a ride." The complainant felt scared and feared for her life. She yelled and got out of the truck by opening her door and hanging onto it, while appellant accelerated the truck backward and forward. The complainant landed on her feet and was not harmed. According to the complainant, it would have been apparent to appellant that she was upset.

After the complainant exited the truck, the complainant's husband, Gonzalez, threw a wrench at it, which broke the truck's windshield. He also called for emergency assistance. And appellant drove out of the tire store's parking lot. The truck was returned to the complainant later the same day. Several weeks later, the complainant and Gonzalez found a screwdriver in the truck, which they threw away.

Gonzalez testified that he is married to the complainant, and on November 28, 2016, he drove his truck, with the complainant, to a Truck Zone store where he had left his "dumper" for its tires to be replaced. Upon arrival, Gonzalez got out of the truck and went inside the store for about four or five minutes while the complainant remained in the truck. At the time, the truck was still running. While Gonzalez was inside the store, "[t]he tire man yelled . . . that something was happening outside

because [the complainant] was screaming." Gonzalez went back to his truck and saw an unknown person driving his truck backward and forward, while the complainant hung onto the door of the truck. Gonzalez grabbed "a piece of iron" and threw it at the windshield. The complainant got out of the truck, and the person driving the truck drove off in a hurry. Gonzalez got his truck back later that day.

Gonzalez stated that his truck was a 2002 Chevrolet 1500 "[c]ab and a half" and it was used by his family. Gonzalez did not get a clear look at the person driving his truck, and he did not see the screwdriver at the Truck Zone store. He later found a screwdriver in the truck and threw it away.

Galena Park Police Department ("GPPD") Officer J. Torres testified that on November 28, 2016, he was on patrol when he was dispatched to a Truck Zone store in Harris County, Texas. Upon his arrival, the complainant ran toward him screaming that "she had been the victim of a robbery" and her truck had been taken. The complainant told Torres that the truck was a brown Chevrolet truck with a stripe. Torres gave dispatch a description of the truck and the direction in which it was traveling. Other law enforcement officers located the truck and stopped it. There was only one person in the truck, and he was arrested by the officers.

Torres noted that the truck, before being taken, was parked "all the way in the back" of the Truck Zone store's parking lot behind a gate. He could not identify the person who took the truck.

The trial court admitted into evidence a surveillance videotaped recording from the Truck Zone store on November 28, 2016. On the recording, a person can be seen riding a bicycle on the street in front of the Truck Zone store. After passing the Truck Zone store, the person turns the bicycle around and rides into the Truck Zone store's parking lot toward the back. About a minute later, a tan truck with a stripe drives out of the Truck Zone store's parking lot.

Former GPPD Officer P. Orea testified that on November 28, 2016, while on patrol, he went to assist Officer Torres following a call for emergency assistance about a stolen truck at a Truck Zone store in Harris County, Texas. Orea did not go to the Truck Zone store, but instead he went to look for the truck with another law enforcement officer. GPPD Officer Martin, another law enforcement officer assisting in the search, ultimately found the truck on a nearby road. As Martin approached the truck, appellant drove off. After that, Orea followed behind Martin's patrol car as they drove behind the truck, which Orea described as a tan or beige pickup truck with a stripe. Orea and Martin pursed the truck for about forty-five minutes until appellant pulled over and stopped.

Eventually, Officer Martin got appellant out of the truck, and Officer Orea helped arrest him. Appellant was the only person found inside the truck, and no weapon was found by law enforcement officers. When asked whether he knew that

appellant lived in the neighborhood where the truck had stopped during the chase, Orea responded that he did not.

The trial court admitted into evidence a videotaped recording from Officer Orea's body camera taken on November 28, 2016. The recording shows Orea following behind a tan truck with a stripe. Eventually, the truck is stopped, and a man is removed from the driver's seat of the truck. Orea testified, while viewing the videotaped recording at trial, that appellant was the man who was found driving the truck and he was arrested.

Lewis Armstead, appellant's step-father, testified that on November 28, 2016, Armstead went to his mother's house in Galena Park, Texas near the Truck Zone store. When he arrived, appellant was at the home of Armstead's mother, and Armstead spoke with appellant, who initially seemed "like a normal person at the time." At some point, while Armstead was at his mother's house, appellant went outside. Armstead later found appellant sitting in front of the house near a dead-end sign on the street. Appellant was "pulling up grass" and "rubbing it all on him." Armstead went to get his mother, who called to appellant, but appellant "looked like he was not there." Appellant would not answer Armstead's mother; he just looked at her. Armstead went back inside the house. Later, he came outside again and found that appellant had "got[ten] up and walked across the ditch in the mud and water, went on the railroad track, laid down on the track and started throwing rocks."

Armstead kept calling appellant's name and asking if he was okay, but appellant did not respond and continued to look like he was not there. Armstead stated, "that's how . . . he's been"; and while growing up, appellant had "schizophrenia or something." According to Armstead, he and his mother called for emergency assistance that day because of appellant's behavior, but law enforcement officers did not take appellant to the hospital.

Armstead further testified that after the law enforcement officers had left Armstead's mother's house and after appellant had told Armstead that he was going to get his truck, appellant left. Appellant was gone for about twenty or twenty-five minutes and came back driving a truck. Armstead noted that while appellant did own a truck, the truck that he returned in was not appellant's truck. Appellant had originally ridden his bicycle to Armstead's mother's house.

According to Armstead, after appellant arrived back at Armstead's mother's house, appellant wanted Armstead to leave with him, but Armstead chose not to leave. Armstead testified that appellant "was not himself" or in his right mind with "what he was doing" that day.

Kenyon Johnson, appellant's brother, testified that he was present when appellant was arrested and that appellant appeared spacey, normal, calm, and non-combative. Kenyon also stated that appellant's truck was a Dodge extended cab.

Gwendolyn Johnson, appellant's mother, testified that appellant owned a truck, which appellant had in the Beaumont, Texas area at some point. She knew this because a law enforcement officer from the Anahuac Police Department had called her after he found appellant on the highway "licking the guardrail." Gwendolyn did not know how appellant got from the Beaumont area to Houston, but when she saw him, appellant appeared aggravated, which was not his normal demeanor. He was not clean, was not walking normally, and could not have a normal conversation with her. Gwendolyn told appellant that she did not have his truck, his brother did not have his truck, and his truck was not in Houston; but it appeared to Gwendolyn that appellant either did not understand her or he believed that what she was saying was not true. After speaking with appellant, Gwendolyn was concerned for his well-being, but she was unable to get any sort of assistance based on her concerns.

Appellant testified that in November 2016 he was homeless. On November 20, 2016, while driving his truck, a 1997 Dodge 1500 extended cab, he ran out of gas on the Trinity River bridge late at night. At some point, appellant locked his truck with his keys still in the ignition. Eventually, law enforcement officers arrived and a tow truck towed appellant's truck off the bridge. The officers took appellant to Spindletop Medical Center in Beaumont for a psychological evaluation.

Appellant spent a few hours at Spindletop Medical Center and was told that he was discharged. He remained on the property, however, and was arrested for trespassing. Following his release from jail, appellant began walking and hitchhiking around Beaumont to look for his truck. He did not succeed in finding it. Appellant then walked and hitchhiked back to Houston. After arriving in Houston, appellant spent the night with his cousin. He also realized that he needed some money because his truck was missing and it could have been impounded. On November 28, 2016, appellant went to Armstead's mother's house because he planned to ride around on a bicycle to look for his truck and he believed that he knew where it was located.

While looking for his truck, appellant stopped at several places, and as he rode his bicycle to his mother's work, he passed by the Truck Zone store. Appellant then "ca[ught] a glance at [a] truck" "way in the back" of the Truck Zone store's parking lot sitting sideways. According to appellant, his "mind told [him]" that it was his truck. Appellant explained that the truck that he saw in the Truck Zone store's parking lot was similar to and resembled his missing truck. The truck was similar in brand and body style, it had two doors, and it was an extended cab.

Appellant noted that he did not see anyone else around because he was only focused on riding his bicycle to get his truck. Although the truck in the Truck Zone store's parking lot had tinted windows, and appellant's truck did not, appellant stated

at trial that he believed at the time that his truck had been stolen or was missing and "when someone acquire[s] someone[] [else's] property, they are going to alter it a little bit."

Appellant had a "multipurpose tool" with him while he was looking for his truck because he did not have the keys to his truck. And he did not see anyone inside the truck in the Truck Zone store's parking lot because of its tinted windows. Thus, he thought he would have to use the multipurpose tool to unlock the truck.

Appellant first tried to use the multipurpose tool, but he discovered that the truck was unlocked already. When appellant got into the truck, the multipurpose tool was in his pocket. He saw a woman inside his truck, which surprised him. Appellant also saw that the keys were in the truck's ignition, and he noticed that the truck's engine was running. Appellant held the multipurpose tool in his hand while he began shifting gears, but he did not point it at the woman or threaten her. The woman inside the truck smiled at appellant, and he asked if she wanted a ride because he did not know if the woman wanted a ride or not. As appellant explained: "She's in the truck, she's in my truck. I asked her: Do you want to ride because I'm fixing to leave in my truck." Because the woman did not respond to his question, appellant "moved the truck." But once the woman opened her truck door, appellant hit the brake so that she could get out and stand up because he did not want her to be hurt. When asked at trial, "[D]id you want to give [the complainant] an opportunity to get

out?," appellant responded, "Yes." But appellant agreed that if the complainant had wanted a ride to some place, he would have given her one.

After the woman got out of the truck, appellant saw three men approaching the truck quickly, so he put the truck in drive. Someone then threw something long and solid at the truck's windshield. Appellant drove to Armstead's mother's house because Armstead was there and appellant knew that Armstead, his step-father, had been looking for his missing truck as well. When appellant arrived at the house, he told Armstead that he had seen Armstead's truck and asked Armstead if he wanted a ride to go look for his truck. When Armstead declined, appellant left. At some point after driving around for a bit, appellant saw law enforcement officers driving behind him, but he did not think that they were looking for him. Eventually, appellant stopped the truck when he saw a law enforcement officer outside his patrol car with a firearm pointed at the truck. Appellant took the keys out of the truck's ignition, put them on the dashboard, rolled the window down, and put his hands outside the window so that law enforcement officers could see that he did not have a weapon. Law enforcement officers got appellant out of the truck.

On cross-examination, appellant testified that the truck he saw at the Truck Zone store resembled his truck, although his truck was "kind of like gray" and did not have a stripe on it and the truck at the Truck Zone store was tan with a stripe.

Appellant also acknowledged that Armstead had testified that the truck from the Truck Zone store did not look like appellant's truck.

Appellant further testified that initially he did not see a woman in the truck because the windows were tinted. He also did not see a woman when he first opened the door to the truck. He finally noticed the woman after he sat down in the driver's seat and looked at the ignition. Appellant stated that he did not know the woman in the truck and he was surprised to see her inside his truck. But he did ask her if she wanted a ride. The woman at first did not scream when appellant got in the truck. The woman did not start screaming until she was outside the truck.

As for the law enforcement officers who were following him as he drove the truck, appellant reiterated that he did not think that they were after him and the officers might have simply been driving in the same direction he was driving. Appellant stopped the truck because he came upon a red light and he noticed that a law enforcement officer was pointing a firearm at his truck.

Appellant also stated that he had the multipurpose tool with him because he did not have the keys to his truck and he might need the tool to start its ignition. And at multiple times during cross-examination, appellant stated that the truck from the Truck Zone store was his truck and that he thought that the truck was his own truck. He testified that he did not know where his truck had been taken after he was in Beaumont. Although, at the time, he thought that it could have been impounded, he

was unsure. He testified that he did not tell law enforcement officers that the truck from the Truck Zone store was his truck because no one asked him that question.

Sufficiency of Evidence

In his first issue, appellant argues that the evidence is legally insufficient to support his conviction because the State did not prove beyond a reasonable doubt that he acted with the requisite intent to commit the offense of theft.[2]

We review the legal sufficiency of the evidence by considering all of the evidence in the light most favorable to the jury's verdict to determine whether any "rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 318–19 (1979); *Williams v. State*, 235 S.W.3d 742, 750 (Tex. Crim. App. 2007). Our role is that of a due process safeguard, ensuring only the rationality of the trier of fact's finding of the essential elements of the offense beyond a reasonable doubt. *See Moreno v. State*, 755 S.W.2d 866, 867 (Tex. Crim. App. 1988). We give deference to the responsibility of the fact finder to fairly resolve conflicts in testimony, weigh evidence, and draw reasonable inferences from the facts. *Williams*, 235 S.W.3d at 750. However, our duty requires

[2] We first review appellant's sufficiency-of-evidence complaint because it is the appellate ground that could potentially afford appellant the greatest possible relief—an acquittal. *See Roberson v. State*, 810 S.W.2d 224, 224–25 (Tex. Crim. App. 1991) (appellate court should not determine ineffective-assistance-of-counsel issue without first reviewing sufficiency of evidence supporting defendant's conviction); *Davis v. State*, 413 S.W.3d 816, 820 (Tex. App.—Austin 2013, pet. ref'd).

us to "ensure that the evidence presented actually supports a conclusion that the defendant committed" the criminal offense of which he is accused. *Id.*

In reviewing the legal sufficiency of the evidence, a court must consider both direct and circumstantial evidence, and any reasonable inferences that may be drawn from the evidence. *See Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007); *see also Wise v. State*, 364 S.W.3d 900, 903 (Tex. Crim. App. 2012) (evidence-sufficiency standard of review same for both direct and circumstantial evidence). Circumstantial evidence is just as probative as direct evidence in establishing the guilt of an actor, and circumstantial evidence alone can be sufficient to establish guilt. *Clayton*, 235 S.W.3d at 778; *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007). For evidence to be sufficient, the State need not disprove all reasonable alternative hypotheses that are inconsistent with a defendant's guilt. *See Wise*, 364 S.W.3d at 903; *see also Cantu v. State*, 395 S.W.3d 202, 207–08 (Tex. App.—Houston [1st Dist.] 2012, pet. ref'd). Rather, a court considers only whether the inferences necessary to establish guilt are reasonable based on the cumulative force of all the evidence when considered in the light most favorable to the jury's verdict. *Wise*, 364 S.W.3d at 903; *Hooper*, 214 S.W.3d at 13.

Appellant argues that the State did not prove that he had the intent to deprive the complainant of the truck in the Truck Zone store's parking lot because "[t]he surrounding circumstance[s], upon which intent may be inferred, at best, amount to

a mere modicum of evidence." Appellant asserts that he "believed [the truck] to be his truck" and "his actions and his statement to the [c]omplainant upon entering the truck[] [were] not indicative of an intent to deprive her of 'her' property."

A person commits the offense of theft if he unlawfully appropriates property with the intent to deprive the owner of the property. *See* TEX. PENAL CODE ANN. § 31.03(a); *Byrd v. State*, 336 S.W.3d 242, 250 (Tex. Crim. App. 2011). "Intent is almost always proven by circumstantial evidence." *Trevino v. State*, 228 S.W.3d 729, 736 (Tex. App.—Corpus Christi–Edinburg 2006, pet. ref'd); *see also Hart v. State*, 89 S.W.3d 61, 64 (Tex. Crim. App. 2002); *Smith v. State*, 56 S.W.3d 739, 745 (Tex. App.—Houston [14th Dist.] 2001, pet. ref'd). A person acts intentionally with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or to cause the result. TEX. PENAL CODE ANN. § 6.03(a) "A jury may infer intent from any facts which tend to prove its existence, including the acts, words, and conduct of the accused, and the method of committing the crime . . . ." *Edwards v. State*, 497 S.W.3d 147, 157 (Tex. App.—Houston [1st Dist.] 2016, pet. ref'd) (internal quotations omitted); *see also Guevara v. State*, 152 S.W.3d 45, 50 (Tex. Crim. App. 2004); *Lee v. State*, 442 S.W.3d 569, 580 (Tex. App.—San Antonio 2014, no pet.) ("While proof of intent cannot rely simply on speculation and surmise, the factfinder may consider the defendant's conduct and surrounding circumstances and events in deciding the issue

of intent."). Intent to deprive must exist at the time the property is taken. *Flores v. State*, 888 S.W.2d 187, 191 (Tex. App.—Houston [1st Dist.] 1994, pet. ref'd); *see also Davis v. State*, No. 14-04-00610-CR, 2006 WL 177581, at *2 (Tex. App.—Houston [14th Dist.] Jan. 26, 2006, pet. ref'd) (mem. op., not designated for publication).

Viewing the evidence in the light most favorable to the verdict, the evidence shows that on November 28, 2016, the complainant's truck was parked in the Truck Zone store's parking lot. The truck was a brown 2002 Chevrolet 1500 "[c]ab and a half" with a stripe and tinted windows. This differed from appellant's truck.

As the complainant sat in the truck, she saw appellant ride his bicycle toward the truck. Appellant opened the door of the truck and got inside. The truck's engine was running at the time, and the complainant was inside the truck in the front passenger seat. Appellant had a screwdriver in his hand. Appellant told the complainant that he did not work at the Truck Zone store and asked her if she was "ready for a ride." The complainant yelled and made it apparent to appellant that she was upset. The complainant got out of the truck by opening her door and hanging onto it while appellant accelerated the truck backward and forward. Gonzalez, the complainant's husband, threw a wrench at the truck, which broke the windshield,

and appellant drove out of the parking lot in a hurry.[3] *See Foster v. State*, 779 S.W.2d 845, 859 (Tex. Crim. App. 1989) ("Evidence of flight is admissible as a circumstance from which an inference of guilt may be drawn."); *Rowland v. State*, 744 S.W.2d 610, 613 (Tex. Crim. App. 1988) (circumstances surrounding way defendant obtained truck constituted evidence he had requisite intent to deprive); *Griffin v. State*, 614 S.W.2d 155, 159 (Tex. Crim. App. [Panel Op.] 1981) ("Intent to deprive must be determined from the words and acts of the accused."); *see also Mitchell v. State*, No. 08-15-00258-CR, 2018 WL 3629384, at *7 (Tex. App.—El Paso July 31, 2018, no pet.) (mem. op., not designated for publication) (evidence sufficient for jury to rationally conclude defendant intended to deprive complainant of car when complainant fell out of car and defendant got in car and drove away); *Frank v. State*, No. 01-16-00197-CR, 2017 WL 1416882, at *4 (Tex. App.—Houston [1st Dist.] Apr. 20, 2017, pet. ref'd) (mem. op., not designated for publication) (evidence sufficient to establish defendant intended to commit theft where complainant saw defendant enter her apartment and confronted him, defendant fled, and complainant saw appellant with her property); *Cano v. State*, No.

[3] The jury viewed the surveillance videotaped recording from the Truck Zone store on November 28, 2016. On the recording, a person can be seen riding a bicycle on the street in front of the Truck Zone store. After passing the Truck Zone store, the person turns the bicycle around and rides into the Truck Zone store's parking lot toward the back. About a minute later, a tan truck with a stripe drives out of the Truck Zone store's parking lot.

13-11-00568-CR, 2012 WL 6061788, at *5–6 (Tex. App.—Corpus Christi–Edinburg Dec. 6, 2012, no pet.) (mem. op., not designated for publication) (defendant's intent to commit theft "indicated by his immediate flight").

Law enforcement officers then located the complainant's truck. When Officer Martin tried to approach the truck, however, appellant drove off. Law enforcement officers pursued the truck for about forty-five minutes until appellant pulled over and stopped.[4] *See Mims v. State*, 434 S.W.3d 265, 273–74 (Tex. App.—Houston [1st Dist.] 2014, no pet.) (evidence legally sufficient to show defendant intended to commit theft where he ran after hearing complainant scream and then led law enforcement officers on car chase); *see also Sneed v. State*, No. 13-05-163-CR, 2006 WL 439859, at *3 (Tex. App.—Corpus Christi–Edinburg Feb. 23, 2006, no pet.) (mem. op., not designated for publication) (flight from law enforcement officers constituted circumstance from which inference of guilt may be drawn). When law enforcement officers eventually stopped the truck, appellant was the only person inside. *See Beaver v. State*, No. 11-15-00290-CR, 2017 WL 5195972, at *2–3 (Tex. App.—Eastland Nov. 9, 2017, no pet.) (mem. op., not designated for publication) ("Because the State adduced evidence that [defendant] had not received consent to

[4] The jury also viewed a videotaped recording from Officer Orea's body camera taken on November 28, 2016. The recording shows Orea following behind a tan truck with a stripe on its tailgate. Eventually, the truck is stopped, and a man is removed from the driver's seat of the truck.

remove the vehicle from the dealer's lot and was stopped by the police in possession of the vehicle after [the complainant] had reported it stolen, the jury could infer that [defendant] took the vehicle with the intent to deprive the [complainant] of its property."); *McBride v. State*, No. A14-88-00157-CR, 1989 WL 81326, at *5 (Tex. App.—Houston [14th Dist.] July 20, 1989, no pet.) (not designated for publication) (evidence sufficient where witnesses saw defendant take property and property recovered from defendant at scene).

We note that the record does contain conflicting inferences related to appellant's intent. That said, in conducting a legal-sufficiency review, we must presume that the trier of fact resolved any such conflicts in favor of the State, and we must defer to that resolution. *Padilla v. State*, 326 S.W.3d 195, 200 (Tex. Crim. App. 2010).

Viewing the evidence in the light most favorable to the verdict, we conclude that a rational jury could have determined beyond a reasonable doubt that appellant had the intent to deprive the complainant of the truck in the Truck Zone store's parking lot. *See Blankenship v. State*, 780 S.W.2d 198, 207 (Tex. Crim. App. 1988) ("[W]e test the evidence to see if it is at least conclusive enough for a reasonable factfinder to believe based on the evidence that the element is established beyond a reasonable doubt."). Thus, we hold that the evidence is legally sufficient to support appellant's conviction for the offense of theft.

We overrule appellant's first issue.

Ineffective Assistance of Counsel

In his third issue, appellant argues that his trial counsel did not provide him with effective assistance during the guilt phase of trial because counsel did not properly prepare and offer appellant's medical records into evidence in admissible form when the medical records directly related to whether appellant formed the requisite intent to commit the offense of theft.

The Sixth Amendment to the United States Constitution guarantees the right to the reasonably effective assistance of counsel in criminal prosecutions. U.S. CONST. amend. VI; *Garcia v. State*, 57 S.W.3d 436, 440 (Tex. Crim. App. 2001); *see also* TEX. CONST. art. I, § 10; TEX. CODE CRIM. PROC. ANN. art. 1.05; *Hernandez v. State*, 726 S.W.2d 53, 55–57 (Tex. Crim. App. 1986) (test for ineffective assistance of counsel same under both federal and state constitutions). To prove a claim of ineffective assistance of counsel, appellant must show that (1) his trial counsel's performance fell below an objective standard of reasonableness and (2) there is a reasonable probability that, but for his counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687–88, 694 (1984); *Lopez v. State*, 343 S.W.3d 137, 142 (Tex. Crim. App. 2011). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

In reviewing counsel's performance, we look to the totality of the representation to determine the effectiveness of counsel, indulging a strong presumption that counsel's performance falls within the wide range of reasonable professional assistance or trial strategy. *See Robertson v. State*, 187 S.W.3d 475, 482–83 (Tex. Crim. App. 2006). Appellant has the burden to establish both prongs by a preponderance of the evidence. *Jackson v. State*, 973 S.W.2d 954, 956 (Tex. Crim. App. 1998). "[A]ppellant's failure to satisfy one prong of the *Strickland* test negates a court's need to consider the other prong." *Williams v. State*, 301 S.W.3d 675, 687 (Tex. Crim. App. 2009); *see also Strickland*, 466 U.S. at 697.

Generally, a silent record that provides no explanation for trial counsel's actions will not overcome the strong presumption of reasonable assistance. *Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005). However, when trial counsel's ineffectiveness is apparent from the record, an appellate court may address and dispose of the claim on direct appeal. *Lopez*, 343 S.W.3d at 143. In such instances, the record demonstrates that counsel's performance fell below an objective standard of reasonableness as a matter of law and no reasonable trial strategy could justify trial counsel's acts or omissions, regardless of counsel's subjective reasoning. *Id.*

Here, appellant argues that his trial counsel did not provide him with effective assistance because counsel did not properly prepare and offer appellant's medical

records into evidence in admissible form when the medical records directly related to whether appellant formed the requisite intent to commit the offense of theft.

The Texas Rules of Evidence allow the admission of records, such as medical records, kept in the course of regularly conducted activities. TEX. R. EVID. 803(6); *Williams v. State*, 176 S.W.3d 476, 483–84 (Tex. App.—Houston [1st Dist.] 2004, no pet.); *Castaneda v. State*, 28 S.W.3d 685, 694 (Tex. App.—Corpus Christi–Edinburg 2000, pet. ref'd) (medical records admissible under Texas Rule of Evidence 803(6)); *Brooks v. State*, 901 S.W.2d 742, 746–47 (Tex. App.—Fort Worth 1995, pet. ref'd) (medical records from jail admissible under Texas Rule of Evidence 803(6)). To be properly admitted under rule 803(6), the proponent of the records must prove that the record was made at or near the time of the events recorded, from information transmitted by a person with knowledge of the events, and made or kept in the course of a regularly conducted business activity. TEX. R. EVID. 803(6); *see also Haq v. State*, 445 S.W.3d 330, 334 (Tex. App.—Houston [1st Dist.] 2013, pet. ref'd); *Reyes v. State*, 48 S.W.3d 917, 921 (Tex. App.—Fort Worth 2001, no pet.).

The predicate for admission of a business record may be established through testimony of the custodian of records or another qualified witness or by an affidavit that complies with Texas Rule of Evidence 902(10). TEX. R. EVID. 803(6), 902(10); *see also Dominguez v. State*, 441 S.W.3d 652, 657 (Tex. App.—Houston [1st Dist.] 2014, no pet.) ("Rule 902(10) . . . provides a cost-effective method of authenticating

business records; it allows business records to be authenticated by an affidavit that substantially conforms to the model affidavit provided in the rule, rather than by live testimony."); *Reyes*, 48 S.W.3d at 921. The predicate witness does not have to be the record's creator or have personal knowledge of the contents of the record. *Canseco v. State*, 199 S.W.3d 437, 440 (Tex. App.—Houston [1st Dist.] 2006, pet. ref'd); *Reyes*, 48 S.W.3d at 921; *Brooks*, 901 S.W.2d at 746. The witness need only have personal knowledge of how the records were prepared. *Canseco*, 199 S.W.3d at 440; *Reyes*, 48 S.W.3d at 921; *Brooks*, 901 S.W.2d at 746.

At trial, when appellant's trial counsel sought to have appellant's medical records admitted into evidence, the following exchange occurred:

[Appellant's Trial Counsel]:	We're going to offer [appellant's] medical records.
THE COURT:	Response.
[State]:	. . . [T]he State objects to relevancy.
THE COURT:	Tell me the relevancy . . . .
[Appellant's Trial Counsel]:	These medical records support what . . . Armstead stated earlier that [appellant] is schizophrenic and that he has mental health issues.
[State]:	. . . [T]hat all goes to punishment and not to the case in chief.
THE COURT:	I'm just asking if it includes the medical records since he came into custody?

[Appellant's Trial Counsel]:	. . . [T]his specific set of records . . . does not include the current incarceration.
THE COURT:	. . . Do we have those records?
[Appellant's Trial Counsel]:	If I can explain. I have a portion of the current records and because he's under consistent monitoring they're not -- this stamp says incomplete because they're updating daily several times a day.
THE COURT:	Any response?
[State]:	. . . [I]f we were in an insanity case or something and they had some expert to testify about these records maybe it would be relevant, but *right now there is no relevancy or foundation for this to come in in the case in chief, guilt or innocence*.
THE COURT:	*What I have difficulty with is there's no foundation laid, nobody can support the documents that's here*. I mean, that may be something you're able [to] arrange at a later point. *I'm going to sustain the objection on the basis of foundation*. Thank you.

(Emphasis added.)

The record reveals that trial counsel did not present a witness, either the custodian of records or another qualified witness, to testify that appellant's medical records were made at or near the time of the events recorded, from information

transmitted by a person with knowledge of the events, and made or kept in the course of a regularly conducted business activity. TEX. R. EVID. 803(6); *Haq*, 445 S.W.3d at 334; *Reyes*, 48 S.W.3d at 921. And although an affidavit from Lisa Lopez, the custodian of records at the University of Texas Medical Branch—Correctional Managed Care, Health Services Archives,[5] is included with appellant's medical records in our record on appeal, the record in the trial court does not indicate that appellant's trial counsel had this affidavit when he sought to have the medical records admitted into evidence or even that trial counsel recognized that he could establish the proper predicate for the admission of appellant's medical records by affidavit. *See* TEX. R. EVID. 803(6), 902(10); *see also Sanders v. State*, No. 01-17-00113-CR, 2018 WL 4129895, at *5 (Tex. App.—Houston [1st Dist.] Aug.

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[5] Lopez in her affidavit testifies:

> I am the Custodian of Records at [t]he University of Texas Medical Branch – Correctional Managed Care, Health Services Archives and my office is located in Huntsville, Texas. In this capacity, I am the individual who can authenticate and certify as official, copies of medical records at the TDCJ Health Services Archives. Attached here to 1095 pages of records from the medical records of [appellant;] said records are kept in the regular course of business by an employee or representative of UTMB-Correctional Managed with knowledge of the act, event, condition, opinion or diagnosis, recorded or to transmit information thereof to be included in such record; and the record was made at or near the time or reasonably soon thereafter. The records attached hereto are the original or exact duplicates of the original and no other documents exist in the files on the above named person at TDCJ Health Services Archives.

(Emphasis and internal quotations omitted.)

30, 2018, pet. ref'd) (mem. op., not designated for publication) (affidavit that substantially complies with Texas Rule of Evidence 902(10) will suffice); *Dominguez*, 441 S.W.3d at 657; *Reyes*, 48 S.W.3d at 921. The record shows that trial counsel failed to bring the affidavit to the trial court's attention and did not argue in the trial court that Lopez's affidavit provided the proper predicate for the admission of appellant's medical records. In fact, appellant's trial counsel made no mention of Lopez's affidavit either before or after the trial court denied his request for the admission of appellant's medical records based on "no foundation laid."

Defense counsel must have a "firm command" of the law governing a case before he can render reasonably effective assistance to his client. *Ex parte Ybarra*, 629 S.W.2d 943, 946 (Tex. Crim. App. 1982); *see also Ex parte Welch*, 981 S.W.2d 183, 185 (Tex. Crim. App. 1998) (to be reasonably likely to render effective assistance to his client, trial counsel must be sufficiently abreast of criminal law aspects that are implicated in case); *Ex parte Williams*, 753 S.W.2d 695, 698 (Tex. Crim. App. 1988); *Davis v. State*, 413 S.W.3d 816, 833 (Tex. App.—Austin 2013, pet. ref'd). "This is because the Sixth Amendment at a minimum guarantees an accused the benefit of trial counsel who is familiar with the applicable law." *Ex parte Lewis*, 537 S.W.3d 917, 921 (Tex. Crim. App. 2017) (internal quotations omitted); *see also Aldrich v. State*, 296 S.W.3d 225, 251 (Tex. App.—Fort Worth 2009, pet. ref'd) (trial counsel's errors in misunderstanding and misinterpretation

law and Texas Rules of Evidence were so serious that he was not functioning as counsel guaranteed by Sixth Amendment).

A misunderstanding of the applicable law or the Texas Rules of Evidence is never a legitimate trial strategy. *See Ex parte Welch*, 981 S.W.2d at 184–86 (misunderstanding of law constituted ineffective assistance of counsel); *Ex parte Felton*, 815 S.W.2d 733, 734–36 (Tex. Crim. App. 1991); *Davis*, 413 S.W.3d at 833 (trial counsel's misunderstanding about predicate for introduction of evidence did not constitute legitimate trial strategy and fell below objective standard of reasonableness); *Garcia v. State*, 308 S.W.3d 62, 75–76 (Tex. App.—San Antonio 2009, no pet.); *Aldrich*, 296 S.W.3d at 251 (trial counsel's misunderstanding and misinterpretation of Texas Rules of Evidence fell below objective standard of reasonableness and no plausible strategy existed for counsel's continued misunderstanding); *see also Ex parte Chandler*, 182 S.W.3d 350, 358 (Tex. Crim. App. 2005) ("Ignorance of well-defined general laws, statutes and legal propositions is not excusable and such ignorance may lead to a finding of constitutionally deficient assistance of counsel . . . .").

Appellant's trial counsel's misunderstanding of the predicate for the introduction of appellant's medical records was not legitimate trial strategy, particularly here where the medical records directly related to whether appellant formed the requisite intent to commit the offense of theft. *See Davis*, 413 S.W.3d at

833–34; *see also Flores v. State*, 576 S.W.2d 632, 634 (Tex. Crim. App. [Panel Op.] 1987) ("It is fundamental that an attorney must acquaint himself not only with the law but also the facts of a case before he can render reasonably effective assistance of counsel.").

Having reviewed the record, we cannot conclude that there was any plausible, professional reason for the failure of appellant's trial counsel to properly prepare and offer appellant's medical records into evidence in admissible form. *See Davis*, 413 S.W.3d at 833–34. Thus, we conclude that there is sufficient evidence in the record establishing that trial counsel's performance fell below an objective standard of reasonableness. *See Ex parte Felton*, 815 S.W.2d at 735–36 (in some circumstances single error by counsel can constitute ineffective assistance); *Ramirez v. State*, 301 S.W.3d 410, 416 (Tex. App.—Austin 2009, no pet.) (record on direct appeal can be sufficiently developed regarding misunderstanding of law). We next determine whether there is a reasonable probability, sufficient to undermine confidence in the outcome, that but for appellant's trial counsel's deficiency, the result of the proceeding would have been different. *See Strickland*, 466 U.S. at 687–88, 694; *Lopez*, 343 S.W.3d at 142.

The State argues that appellant cannot establish prejudice because the "evidence strongly supports the conclusion that appellant knew the truck he took was not his and that he intended to deprive the complainant of it."

Throughout trial, appellant's trial counsel argued that appellant lacked the requisite intent to commit the offense of theft because appellant believed that the truck he took from the Truck Zone store's parking lot was *his* truck. *See* TEX. PENAL CODE ANN. § 31.03(a) ("A person commits an offense if he unlawfully appropriates property *with intent to deprive the owner of property*." (emphasis added)); *Bryant v State*, 627 S.W.2d 180, 182–83 (Tex. Crim. App. 1982) (holding evidence insufficient to show intent to deprive where defendant testified he believed he owned property and was responsible for it); *Roper v. State*, 917 S.W.2d 128, 131 (Tex. App.—Fort Worth 1996, pet. ref'd) (defendant lacked intent to deprive owner of money when he believed he was entitled to money for unpaid work he had performed). And to support this defensive-strategy, trial counsel elicited testimony from several witnesses related to appellant's intention.

For instance, Armstead, appellant's step-father, testified that on November 28, 2016, appellant was not in a normal mental state. Earlier in the day, Armstead found appellant outside Armstead's mother's house "pulling up grass" and "rubbing it all on him." When Armstead's mother called to appellant, appellant "looked like he was not there" and would not answer Armstead's mother; he just looked at her. Later, appellant "got up and walked across the ditch in the mud and water, went on the railroad track, laid down on the track and started throwing rocks." Armstead kept calling appellant's name and asking if he was okay, but appellant did not

respond and continued to look like he was not there. Armstead and his mother called for emergency assistance because of appellant's behavior.

Armstead further testified that on November 28, 2016, after appellant told him that he was going to get his truck, appellant left. Appellant was gone for about twenty or twenty-five minutes and then came back driving a truck. Armstead testified that appellant "was not himself" or in his right mind with "what he was doing" that day. And appellant had "schizophrenia or something."

Gwendolyn, appellant's mother, testified that appellant owned a truck, which appellant had in the Beaumont area at some point. According to Gwendolyn, a law enforcement officer in the Beaumont area had found appellant on the highway "licking the guardrail." Gwendolyn did not know how appellant got from the Beaumont area to Houston, but when she saw him, he appeared aggravated which was not his normal demeanor. He was not clean, was not walking normally, and could not have a normal conversation with her. Gwendolyn told appellant that she did not have his truck, his brother did not have his truck, and his truck was not in Houston; but it appeared to her that either appellant did not understand her or he believed that what she was saying was not true. Gwendolyn was concerned for his well-being, but she was unable to get any sort of assistance based on her concerns.

Appellant testified that on November 20, 2016, while driving his truck, a 1997 Dodge 1500 extended cab, he ran out of gas on the Trinity River bridge late at night.

At some point, appellant locked his truck with his keys still in the ignition. Eventually, law enforcement officers arrived and a tow truck towed appellant's truck off the bridge. The officers also took appellant to Spindletop Medical Center in Beaumont for a psychological evaluation.

Appellant spent a few hours at Spindletop Medical Center and was told that he was discharged. He remained on the property, however, and was arrested for trespassing. Following his release from jail, appellant began walking and hitchhiking around Beaumont to look for his truck. He did not succeed in finding it. Appellant then walked and hitchhiked back to Houston. Once back in Houston, appellant realized he needed money because his truck was missing.

On November 28, 2016, appellant planned to look for his truck on a bicycle, and he believed that he knew where it was located. While looking for his truck, appellant stopped at several places, and as he rode his bicycle to his mother's work, he passed by a Truck Zone store. Appellant then "ca[ught] a glance at [a] truck" "way in the back" of the Truck Zone store's parking lot sitting sideways.

According to appellant, his "mind told [him]" that it was *his* truck in the back of the parking lot. Appellant testified that the truck that he saw in the Truck Zone store's parking lot was similar to and resembled his missing truck. The truck was similar in brand and body style, it had two doors, and it was an extended cab. Although the truck in the Truck Zone store's parking lot had tinted windows, and

appellant's truck did not, appellant stated at trial that he believed at the time that his truck had been stolen or was missing and "when someone acquire[s] someone[] [else's] property, they are going to alter it a little bit."

Appellant also testified that he had a "multipurpose tool" with him while he was looking for his truck because he did not have the keys to his truck. And he did not see anyone inside the truck in the Truck Zone store's parking lot because of its tinted windows. Thus, he thought he would have to use the multipurpose tool to unlock it.

When appellant got in his truck, he was surprised to find a woman inside. The woman smiled at appellant, and he asked if she wanted a ride because he did not know if the woman wanted a ride or not. As appellant explained: "She's in the truck, she's in *my* truck. I asked her: Do you want to ride because I'm fixing to leave in *my* truck." (Emphasis added.) Because the woman did not respond to his question, appellant "moved the truck." When the woman then opened her truck door, appellant hit the brake so that she could get out and stand up because he did not want her to be hurt. When asked at trial, "[D]id you want to give [the complainant] an opportunity to get out?," appellant responded, "Yes." But appellant agreed that if the complainant had wanted a ride to some place, he would have given her one.

After leaving the Truck Zone store's parking lot, appellant drove to Armstead's mother's house because Armstead was there and appellant knew that Armstead had also been looking for his own missing truck. When appellant arrived at the house, he told Armstead that he had seen Armstead's truck and asked Armstead if he wanted a ride to go look for his truck. When Armstead declined, appellant left. At some point after driving around for a bit, appellant saw law enforcement officers driving behind him, but he did not think that they were looking for him.

Although the State asserts that appellant's medical records are merely cumulative of the evidence presented by the defense at trial, we disagree. Instead, the medical records that appellant's trial counsel sought to have admitted into evidence at trial would have provided extensive insight into appellant's severe mental health issues and his seemingly abnormal behavior.

The over 1000 pages of medical records reveal that appellant has been diagnosed with mental health disorders, including psychotic disorder with delusions, antisocial personality disorder, schizophrenia, paranoid schizophrenia, depression, and bipolar disorder, and appellant has been prescribed many antipsychotic and antidepressant medications over the years. Appellant has also suffered a head injury in the past and has a "dull range of intellectual functioning."

In the medical records, appellant's mental health issues are described as significant, severe, and chronic. Appellant's mental health issues cause him to be unable to stay focused or recall why he is present at certain places. These issues also cause appellant to engage in inappropriate and bizarre behavior. Appellant lacks self-awareness, hallucinates, is paranoid, and has "little insight into [his] own behavior." Appellant's insight and judgment are impaired, he is unaware of his abnormal behavior, and he sees his abnormal behavior as "normal."[6] Appellant's target problems include extreme or consistent distrust of others, expectation of being exploited or harmed by others, "[b]izarre [c]ontent of [t]hought," "[i]llogical [f]orm of [t]hought/[s]peech," and hallucinations. And appellant's thought processes have been described as "not related to reality" and disorganized. Without medication, appellant likely "suffer[s] from severe and abnormal mental, emotional, and physical distress or deterioration of [his] ability to function independently." And the records show that appellant has a history of not taking his medication.

The records also reveal that in the past, appellant's family had appellant involuntarily admitted for mental health treatment after he engaged in severe

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[6] As the medical records describe, while appellant was previously incarcerated, he "tor[e] his mattress open" leaving "the cotton batting . . . on the floor." The "cotton batting [was then] soaked with urine and . . . feces." The "odor from the room [was] strong of urine and feces." Yet, appellant was "unaware that the condition of his cell [was] not normal." Appellant was further "unable to relate his constant pacing [in his cell] with the pain and swelling [he was feeling] in his feet."

irrational and abnormal behavior, and appellant self-reported that he had twice spent time at the Mental Health and Mental Retardation Authority. While previously incarcerated, appellant received treatment for his chronic psychotic condition and spent at least six months in the Texas Department of Criminal Justice's Skyview Unit—a psychiatric facility.

In his opening statement at trial, appellant's trial counsel told the jury:

> Th[e] incident didn't start on November 28th for [appellant].
>
> Th[e] incident started a few days earlier when he was released from a mental hospital and he walked back from Beaumont to Houston. When he got to Houston he was looking for his truck, he could not find his truck.
>
> On November 28, he rides around the neighborhood. He sees a truck that he believes is his. . . .
>
> So, yes, [appellant] rode up to the truck. He believed it was his truck. He got in the truck. He never said, "I'm taking this truck." . . .
>
> He believed the truck was his truck. That's why he took the truck.

And in his closing argument to the jury, counsel reemphasized:

> One thing we can all agree is that on that video you see [appellant] ride up to the truck. . . . If you pay attention to that video, you see that he passes two other vehicles, one which has his truck up, the tailgate up or the bed up. Another one is over on the side. There are people walking around. We are not talking about some dark, desolate area. We are talking in the middle, there were people around.
>
> If he just wanted to go up and take something, if he's an opportunist, he does not go all the way to the back. He stops right there at the first truck because that first truck is open. It's easy if you want

> to take something and run. But he's not an opportunist. He was there for a reason. He believed that was his truck. You heard it from several times on the witness stand, he thought that was his truck.
>
> . . . .
>
> And I want you to also look at the events that happened prior to. As [appellant] said, this started a few days before when he went to a mental hospital for being out on the side of the road licking -- I believe he said precipitation or water off of a guardrail on the side of the road.
>
> Not normal. Goes to the mental hospital, gets released. Goes from the mental hospital straight to jail and then he's released from jail. He's trying to get back. Mixture of walking and hitchhiking, looking for his truck because he does not know where it is.
>
> In his mind he wants to find his truck so he can get back to Houston. When he gets back to Houston, he charts out that day to try and find his truck.
>
> He tells his family he's trying to find his truck. . . . He[] was going out to visit his mom because his mother had some papers for his truck. And that's when he -- that's when you see him on that video bicycling past. He makes that loop and then comes back around because he thinks he sees his truck. And you can tell the exact moment where he thinks he sees his truck because he goes from riding on the bike to standing up on the back and looking over. At that moment he thinks he found his truck.

Appellant's medical records provide context for why appellant, as his trial counsel argued repeatedly to the jury, would have believed that the truck from the Truck Zone store's parking lot was his truck, when perhaps another person would have not. And because of trial counsel's misunderstanding of the predicate for the introduction of appellant's medical records, the jury did not get a full opportunity to consider appellant's defensive argument at trial—that appellant did not form the

requisite intent to commit the offense of theft. *See Davis*, 413 S.W.3d at 834–36 (counsel's misunderstanding of law deprived fact finder opportunity to consider evidence related to defensive-theory and prejudiced defendant's defense); *Garcia*, 308 S.W.3d at 75–76 (counsel's misunderstanding of the law prejudiced defendant's ability to present his only viable defense); *see also Vasquez v. State*, 830 S.W.2d 948, 951 (Tex. Crim. App. 1992) ("Without giving the jury an opportunity to consider a defense, conviction was . . . a foregone conclusion . . . ." (internal quotations omitted)). This is particularly important because appellant's "intent to deprive the [complainant] of [the] property" was hotly contested at trial. *See* TEX. PENAL CODE ANN. § 31.03(a).

Appellant has shown a reasonable probability, sufficient to undermine confidence in the outcome, that but for his trial counsel's deficiency, the result of the proceeding would have been different. Thus, we hold that appellant's trial counsel provided him with ineffective assistance of counsel during the guilt phase of trial.

We sustain appellant's third issue.

Due to the disposition of appellant's third issue, it is not necessary to address appellant's second issue. *See* TEX. R. APP. P. 47.1.

Conclusion

We reverse the judgment of the trial court and remand the case for a new trial.

Julie Countiss
Justice

Panel consists of Justices Keyes, Goodman, and Countiss.

Keyes, J., concurring.

Goodman, J., dissenting.

Publish. TEX. R. APP. P. 47.2(b).