IN THE MUNICIPAL COURT OF APPEALS

OF THE CITY OF EL PASO, TEXAS

LEONOR AGUIRRE, Appellant

vs. NO. 84-MCA-1175

STATE OF TEXAS, Appellee

OPINION

Appellant attacks her conviction in Municipal Court for the offense of theft.

In her first point of error she contends that the State failed to prove that she intentionally took the item alleged since her testimony indicated that she had put the item in her purse, but had forgotten to pay for it.

Certainly, if believed by the factfinder, such evidence would support an acquittal. However, the factfinder is not obligated to accept that testimony as true, but has the responsibility of judging the credibility of the witnesses and the weight to be given to their testimony.

Although, Appellant contends that the act was unintentional and therefore not criminal, the prosecution can seldom prove by direct evidence the essential element of intent, but necessarily must rely in most cases, on proving a person's intent by their conduct and actions. In fact, intent is generally shown and inferred from the activities and conduct of a person, and exactly what inference may be drawn from that conduct is best left to the decision of the factfinder. This Court is not in a position to substitute its judgment for that of the Trial Court on that issue.

After reviewing the record in this case, and despite Appellant's testimony to the contrary, this Court holds that there was sufficient evidence to support the element of intent in State's case. Certainly, suspicious conduct coupled with an ambiguous explanation, either at the scene

of the event or at trial, may be considered by the fact-finder in ascertaining the guilt or innocence of the person charged. The Trial Court performed its function in this respect, and is supported by the evidence in the record.

In passing, this Court recognizes that the defense raised by Appellant is certainly not uncommon to these type of cases and this Court is not inclined to adopt Appellant's apparent position that if the testimony raises this defense, that the Trial Court would somehow be obligated to accept it as true.

The point of error relating to the sufficiency of the evidence on intent is overruled.

Nonetheless, there is a fatal error in the prosecution of this case relating to another essential element of the State's case relating to nonconsent. The State concedes that an essential element of the offense of theft is that the property is taken without the consent of the owner. Without addressing whether the evidence supports that the store in question was established as the owner of this property or the legal custodian thereof, the record is absolutely silent that the property was taken without the consent of the store in this case.

The State contends that nonconsent can certainly be inferred from the arrest and prosecution of Appellant in this case, but this Court declines the invitation. Alternatively, the State argues that the Defendant, by taking the stand, establishes this element of their case by admitting that she had the item but forgot to pay for it. Certainly, the State could establish that the item was taken without the consent of the owner by the testimony of the Defendant, but the defensive testimony of the Appellant in this case does not establish nonconsent. Additionally, the State contends that the issue of nonconsent was not raised by the evidence, and therefore there is no disputed fact

issue to be resolved. Although, the State is correct that some issues of a State's case may not be contested, nevertheless, evidence must be introduced on all of the essential elements of the State's case, and proved beyond a reasonable doubt to the satisfaction of the factfinder, be it judge or jury. However, to say that the issue is not contested begs the question. It is still incumbent on the prosecution to introduce evidence supporting each element of the crime alleged, and failure to do so renders the evidence insufficient to support a conviction.

At one time, when an Appellate Court determined that the evidence was insufficient, it had the authority to remand the case for retrial, and thus gave the prosecution an opportunity to correct the error. However, the law is no longer such, and therefore it becomes even more imperative that the prosecution, at its first opportunity, prove all the elements of the offense alleged. Now, if the Court finds that the evidence is insufficient, the prosecution is barred from retrying the case, and the Appellate Court must reverse and render the decision in the Appellant's favor. Burks v. United States, 437 U.S.1, 98 S.Ct. 2141, 57 LE2d 1 (1978). Greene v. Massey, 437 U.S. 19, 98 S.Ct. 2151, 57 LE2d 15 (1978). Johnson v. State, (Tx.Cr.App. 1984) en banc.

No citation of authority need be cited for the proposition that the State has the burden of proving all of the essential elements of the offense charged. Although the State may use the Defendant's testimony and their cross-examination of the Defendant to establish an element of their case, such was not done in this particular case. Accordingly, having found error, the Judgment of the Trial Court is reversed and rendered in Appellant's favor.

Signed this 9 day of Jan, 1985.

JUDGE