AFFIRMED as MODIFIED and Opinion Filed June 4, 2020

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-18-01524-CR

No. 05-18-01525-CR

No. 05-18-01526-CR

JUAN MIGUEL LOPEZ, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the 195th Judicial District Court
Dallas County, Texas
Trial Court Cause Nos. F17-00358-N, F17-00360-N, F17-00362-N

MEMORANDUM OPINION

Before Justices Whitehill, Osborne, and Carlyle
Opinion by Justice Whitehill

A jury convicted appellant of securities fraud involving $100,000 or more, theft of property valued at $300,000 or more, and money laundering of funds valued at $300,000 or more and assessed punishment at seventy-nine years in prison and a $10,000 fine for each offense. The trial court entered separate judgments on the verdicts and ordered that appellant pay restitution.

In ten issues falling into four categories, appellant argues: (i) the evidence is insufficient to support his convictions; (ii) the trial court erred in ordering appellant

to pay restitution; (iii) his conviction for both theft and securities fraud violates the Double Jeopardy Clause; and (iv) jury charge error. For the reasons discussed below, we modify the judgments to include the court's oral restitution order (concurrent with the concurrent sentences), and as modified, affirm the trial court's judgments.

I. BACKGROUND

Appellant ran a Ponzi scheme through several companies operating under his parent company, Mito Group. His scheme involved telling investors that his company made high-interest small business loans funded by the investments. In return, the investor was to receive a monthly interest check of between three to eight per cent of the original investment amount. Early investors received some payments, which persuaded them to invest more and tell others about the company.

But appellant's scheme collapsed. He made few loans and did not make enough money to pay his investors. As a result, appellant paid investors out of new investments until he ran out of money in 2015. Nonetheless, as checks to investors bounced, appellant continued to recruit new investors and solicit new investments.

Overall, appellant made less than $150,000 in loans and received only $88,000 in loan payments. But he raised more than $9.4 million from investors and paid back only $6.4 million, none of which was interest on investments.

Appellant had at least seventy-nine investors, but only eighteen of them were listed in the indictments. The named eighteen victims collectively invested more than $4.3 million, and included:

- Francisco, Jose, and Ricardo Lomelin (the Lomelin brothers) and their company, LI Financiera SA de CV (LIF);
- Francisco and Julia Tellez;
- Lisa and John Kenner;
- German Vivanco;
- Sandra Magallon;
- Enrique Enciso;
- Dr. Guillermo Soto;
- Benito Borbolla;
- Maria Vargas;
- Vincente Garcia;
- Victor Natareno; and
- Jesus and Teresa Cisneros

Most of these individual investors testified at trial. They all said that they would not have invested had they known appellant was not using their money for small business loans, that he was using the money for personal expenses and to pay other investors, and that he would not be able to make the promised interest payments.

Appellant testified at trial and admitted that he "did most of what [the] witnesses said [he] did. Specifically, he admitted that he failed to disclose that (i) he used money contributed by one investor to pay other investors; (ii) he used investors' money to pay business and personal expenses; (iii) there was not enough

income to pay interest on the investments, and (iv) all of these were important or material facts.

He also admitted to not telling investors that he was not using the money for small business loans, that he promised a three to eight per cent monthly interest rate, and these were relevant facts an investor would want to know.

Nonetheless, appellant claimed that he did not intend to defraud investors or to take their money and not return it. Instead, he blamed the investors and claimed that others gave him the investment idea and in 2015, when checks were bouncing, suggested that he lie to investors and say his accounts were frozen by the IRS. He also noted that investors knew that checks were bouncing.

Appellant explained that he used investor money to pay "interest" so that "everybody would be calm about it." He said he should not have introduced the investors to each other because they "could talk to one another about it."

Appellant also admitted that he acquired money from investors, deposited it at the bank, and then wrote checks to investors and other people. He also used the money to buy cars, jewelry, and artwork, and transferred money to his personal account.

After the evidence closed, the jury convicted appellant of securities fraud involving $100,000 or more, theft of $300,000 property or more, and money laundering of funds valued at $300,000 or more and assessed punishment at seventy-nine years in prison for each offense. When pronouncing sentence, the judge orally

ordered that appellant pay restitution to the eighteen named victims.[1] Judgments were entered on the verdict, and appellant appeals from those judgments.

II. ANALYSIS

A. Issues One through Five: Is the evidence sufficient to support the convictions?

Yes, because (i) there is ample evidence, much of which appellant admitted to, of facts supporting a reasonable inference that appellant acted with the required intent and (ii) sufficient evidence shows that appellant achieved the required monetary thresholds.

Appellant's first five issues challenge the sufficiency of the evidence to support his convictions for theft, securities fraud, and money laundering.

We review the sufficiency of the evidence to support a conviction by viewing all the evidence in the light most favorable to the verdict to determine whether any rational factfinder could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

This standard gives full play to the factfinder's responsibility to resolve testimonial conflicts, weigh the evidence and draw reasonable inferences from basic to ultimate facts. *Id*. at 319; *Murray v. State*, 457 S.W.3d 446, 448 (Tex. Crim. App.

[1] Restitution was awarded as follows: Francisco Lomelin, $118,840, Jose Lomelin, $160,300, Ricardo Lomelin, $84,100, Francisco Telez, $1.92, Julia Telez, $21,450, John and Lisa Kenner, $61,143, Sandra Magallon, $22,725.57, Enrique Encisco, $76,076, Dr. Guillermo Soto, $437,558.44, Benito Borbolla, $174,000, Maria Vargas, $100,000, Vincente Garcia, $40,600, Victor Natereno, $59,220, and Jesus and Teresa Cisneros, $117,400.

2015). And the factfinder is the sole judge of the evidence's weight and credibility. *See* TEX. CODE CRIM. PROC. art. 38.04; *Dobbs v. State*, 434 S.W.3d 166, 170 (Tex. Crim. App. 2014).

Thus, when performing an evidentiary sufficiency review, we may not re-evaluate the evidence's weight and credibility and substitute our judgment for that of the factfinder's. *See Montgomery v. State*, 369 S.W.3d 188, 192 (Tex. Crim. App. 2012). Instead, we determine whether the necessary inferences are reasonable based upon the cumulative force of the evidence when viewed in the light most favorable to the verdict. *Murra*y, 457 S.W.3d at 448. We must presume that the factfinder resolved any conflicting inferences in the verdict's favor and defer to that resolution. *Id.* at 448–49. The standard of review is the same for direct and circumstantial evidence cases; circumstantial evidence is as probative as direct evidence in establishing guilt. *Dobbs*, 434 S.W.3d at 170; *Acosta v. State*, 429 S.W.3d 621, 625 (Tex. Crim. App. 2014).

As discussed below, we conclude the evidence is sufficient to support each of the convictions.

1. Theft

Appellant's first two issues challenge the sufficiency of the evidence in the theft case. Specifically, appellant argues that the evidence does not show that he intended to deprive the victims of their property and the State failed to prove the

$300,000 threshold value for theft or that the crime occurred within the five-year limitations period.

a. Intent to Deprive

A person commits theft if he unlawfully appropriates property with the intent to deprive the owner of the property, and the offense is a first-degree felony if the value of the property is $300,000 or more. TEX. PENAL CODE § 31.03(a), (e)(7).

A person acts with intent to deprive an owner of property when it is his conscious objective or desire "to withhold property from the owner permanently or for so extended a period of time that a major portion of the value or enjoyment of the property is lost to the owner," or "to dispose of property in a manner that makes recovery of the property by the owner unlikely." TEX. PENAL CODE §§ 6.03(a), 31.01(2)(A), (C).

Appropriation is unlawful if it is without the owner's effective consent. *Taylor v. State*, 450 S.W.3d 528, 535 (Tex. Crim. App. 2014). Consent is not effective "if induced by deception." *Id.*

Intent may be inferred from circumstantial evidence such as acts, words, and appellant's conduct. *Guevara v. State*, 152 S.W.3d 45, 50 (Tex. Crim. App. 2004). The fact finder may also consider whether there is a "pattern or scheme established" in multiple transactions. *See Riley v. State*, 312 S.W.3d 673, 676 (Tex. App.—Houston [1st Dist.] 2009, pet. ref'd); *see also* TEX. PENAL CODE § 31.03(c)(1) (similar transactions admissible for showing intent in theft cases). Whether a

defendant experienced personal gain from the property obtained may also be considered in determining whether a defendant had criminal intent to commit theft. *Christensen v. State*, 240 S.W.3d 25, 32 (Tex. App.—Houston [1st Dist.] 2007, pet. ref'd).

There is ample evidence that appellant intended to dispose of investors' property in a manner that made the owners' recovery of the property unlikely. Appellant co-mingled his business and personal expenses, spent lavishly from investor money, lied to investors, refused to cooperate with investigations, and made threats.

Specifically, Kwon Sung, a forensic financial analyst, testified in detail about his analysis of appellant's accounts. Song found that over ninety per cent of the funds in appellant's accounts came from investor deposits and less than one per cent came from loans.

Between August 2011 and March 2016, appellant made $142,384.21 in loans, most of which were not small business loans and many of which were not charged interest. He received $88,000 back from these loans.

Appellant had less than $500,000 in other business revenue, but spent over $1.9 million for business expenses, including over $600,000 on advertising, and $150,000 on donations, events, and restaurants. Song opined that because

appellant's expenses exceeded his revenue, he had to have used investor deposits for his expenses.

Song also described how appellant comingled his personal and business accounts. Appellant transferred over $680,000 from his Mito account to his personal account. This amount was eighty-seven per cent of his personal funds. He also directly deposited $41,000 of investor funds in his personal account. He then spent over $1.7 million on personal expenses, including art, jewelry, personal credit card payments, clothing, and $644,000 on vehicles.

By February 2016, appellant had no money left in his personal account and had closed all but two of his business accounts. He had only $7,521.07 remaining in those accounts.

When checks started bouncing, appellant lied to investors, claiming he used the wrong checkbook, the IRS had frozen his account, and promised to make even better interest payments.

In 2015, when Lisa Kenner requested that appellant return the principal she and her husband had invested, appellant wrote a back-dated check that bounced when Kenner tried to deposit it.

Appellant also promised to repay the $70,000 Vicente Garcia invested, but only paid him $15,000.

At one point, appellant hired Francisco Tellez to look into whether one of the Mito companies, a credit repair service, could be franchised. Tellez and another

employee discovered that there was no such service. When Tellez asked to see the files for the small business loans, appellant said his wife had them and would not give Tellez the files. And when the employee working with Tellez on the franchise inquiry confronted appellant about not providing the credit repair services that customers had purchased, appellant became upset and told her she should not "meddle in his company." He also said that she "should remember that [her] children were very beautiful," which she interpreted as a threat.

In 2016, after another employee left the company, appellant told her that he "was going to hell, and [she] was going with him and that the devil [would] show up at [her] door . . . if she kept saying things about the company or about him."

Investigative reporter Yezmin Thomas interviewed appellant after receiving complaints about his business. Although appellant told Thomas they could not meet at his office because it had been "shut down" for not paying rent, he drove to the interview in a Maserati. Initially, appellant was very confident and told Thomas that she "didn't have anything on him." But when she asked why he was bouncing checks appellant became very defensive and said he used the wrong checkbook. Appellant claimed to be licensed to sell investments, but when Thomas pressed him to show her the license appellant said, "You're not a judge. I'm not going to provide you with that evidence."

The Texas Securities Board also investigated appellant after receiving a complaint. The investigation showed that neither appellant nor his companies were

registered to offer or sell securities and none of his investment contracts were registered securities. Joseph Oman, the investigator, contacted the IRS to inquire about appellant's claim that his accounts had been frozen and leaned that there was no investigation of appellant at the IRS.

Appellant delivered noncompliant documents when the Securities Board subpoenaed his company records. Oman then contacted appellant's landlord and was told that "investor contracts, spreadsheets, [and] investment agreements" had all been thrown in the trash. When Oman finally received the records, he concluded that appellant was taking investors' money to pay (i) other investors principal and interest payments, (ii) commissions, and (iii) personal expenses.

Appellant insists that the money he paid to investors demonstrates that he did not intend to deprive the investors of their money. But given the evidence of appellant's lies, lavish personal spending, threats, obstructiveness, and pattern of deceptive behavior, a rational juror could have disbelieved all of appellant's self-serving testimony and inferred the requisite intent to deprive investors of their property and that they were not likely to get it back. *See Guevara*, 152 S.W.3d at 50.

b. The $300,000 Threshold and Limitations

The evidence shows that appellant received over $4.3 million from the investors named in the indictment. But appellant argues that the $300,000 threshold making his theft a first-degree felony was not met because: (i) the State failed to

prove that the theft occurred within the five year limitations period; (ii) $4.19 million should be excluded from the aggregate amount because those funds are from investors who knew he was using investor deposits to make interest payments, or alternatively, that $100,000 should be excluded from the aggregate because Tellez received that amount as a commission on Borbolla's investment; and (iii) certain investors were accomplices, so the amounts they invested should be excluded from the aggregate. We reject these arguments.

We begin with limitations. According to appellant, the State did not prove theft within five years because the indictment alleged the theft occurred between August 1, 2011 and January 31, 2016 and the State did not prove any investments until September 29, 2011. *See* TEX. CODE CRIM. PROC. art. 12.01(4) (A).

It is well-established that "on or about" language in an indictment allows the State to prove a date other than the one alleged in the indictment if the date is anterior to the indictment's presentment and within the statutory limitation period. *Sledge v. State*, 953 S.W.2d 253, 256 (Tex. Crim. App. 1997). Because aggregate theft is an offense that is based on continuing conduct, the five-year limitations period begins to run after the last theft is completed. *Graves v. State*, 795 S.W.2d 185, 187 (Tex. Crim. App. 1990).

Here, appellant continued to appropriate property as late as December 2015 when he received investments from Cisneros and Natareno. Thus, the five-year

period did not begin until December 2015 and the proof of theft was within that time frame.

Appellant's argument for excluding $4.19 million from the aggregate also fails. According to appellant, the Borbollas, the Lomelins, Tellez, Vivaneo, Magallon, Enciso and Soto all knew he was using investor deposits to make interest payments. Appellant seems to suggest the jury should therefore have concluded that the investors were not deceived. But Borbolla, two of the Lomelin brothers, Tellez, Vivanco, Magallon and Soto all testified they would never have invested had appellant disclosed that he was using investor deposits to make interest payments. Moreover, appellant did not tell any of his investors that he was using their money for personal expenses. The jury was free to believe the investors' testimony and conclude that appellant deceived them. *See Zuniga v. State*, 551 S.W.3d 729, 733 (Tex. Crim. App. 2018).

Likewise, there is no basis for excluding the aggregate amount because of Tellez's commission. Appellant's claim that Tellez received a $100,000 commission is not supported by the record. Instead, the evidence shows that Tellez received "**a commission on"** Borbolla's "first $100,000 investment." In addition, appellant does not explain how the receipt of a commission on another investors' investment changes the fact that appellant unlawfully and intentionally appropriated Tellez's property.

We also reject appellant's argument that amounts received from certain investors should be excluded from the aggregate because those investors were accomplices. Appellant's accomplice theory rests solely on his premise that the investors "encouraged [him], albeit passively." Passive encouragement, however, does not rise to the level of an affirmative act required for an accomplice. *See Druery v. State*, 225 S.W.3d 491, 498–99 (Tex. Crim. App. 2007). And even if the investors were accomplices, we consider all evidence in a sufficiency analysis. *See Herron v. State*, 86 S.W.3d 621, 632 (Tex. Crim. App. 2002).

Viewing the evidence under the appropriate standard, a jury could rationally find that appellant stole $4.3 million, which is greater than $300,000. Therefore, the evidence is sufficient to support appellant's theft conviction.

We resolve appellant's first two issues against him.

2. Securities fraud

Appellant's third and fourth issues challenge the sufficiency of the evidence supporting the securities fraud conviction. Appellant claims he lacked the requisite intent to defraud and disputes that the amount involved was $100,000 or more.

Under the Texas Securities Act, any person who shall, in connection with the sale, offering for sale or delivery of, the purchase, offer to purchase, invitation of offers to purchase, invitations of offers to sell, or dealing in any other manner in any security or securities, directly or indirectly, "knowingly make any untrue statement of a material fact or omit to state a material fact necessary in order to make the

statements made, in the light of the circumstances under which they are made, not misleading" or "engage in any act, practice or course of business which operates or will operate as a fraud or deceit upon any person" is guilty of a felony. TEX. REV. CIV. STAT. art. 581–29(C)(3),(4).

The terms "fraud" or "fraudulent practice" include "any misrepresentations, in any manner, of a relevant fact" or "an intentional failure to disclose a material fact." *Id*. art. 581–4(F). "[A]n omitted fact is material if there is a substantial likelihood that it would have assumed actual significance in the deliberations of a reasonable investor, in that it would have been viewed by the reasonable investor as significantly altering the total mix of available information used in deciding whether to invest." *Bridwell v. State*, 804 S.W.2d 900, 904 (Tex. Crim. App. 1991).

In the present case, the indictment alleged that appellant intentionally failed to disclose four material facts: (i) that he used investor money to pay other investors; (ii) that he bounced checks in October and November 2015; (iii) that he used investor money to pay his and his family's personal expenses; and (iv) that Mito did not earn enough interest and income to pay investors what they were owed.

Appellant admitted that he failed to disclose the first and third fact and that he did not disclose the fourth fact to some of his investors. He claims, however, that investors knew about the checks bouncing.

But the investors said they did not know and would have wanted to know the foregoing facts before investing. Appellant acknowledged that the facts he was

charged with not disclosing were important. To the extent that there was conflicting testimony about whether some or all the investors were aware of the second and fourth facts, the jury was free to resolve the conflicts in favor of an inference of nondisclosure. *See Merritt v. State*, 368 S.W.3d 516, 525 (Tex. Crim. App. 2012) (when record supports conflicting inferences, we presume jury resolved conflicts in favor of verdict and defer to that determination).

The indictment also alleged that appellant knowingly and intentionally misrepresented (i) that Mito would use the investments to finance small business loans and (ii) that Mito would pay three to eight per cent monthly interest to investors.

Appellant admitted that he made only a few small business loans that were "not anywhere near enough to make the interest payments." Song testified that appellant made less than $150,000 in loans and was paid back only $88,000—meaning that he was not using the $9 million in investor deposits to make loans and that he could not use the payments on the loans to make interest payments. From this evidence, the jury could rationally conclude that appellant knowingly and intentionally misrepresented the relevant facts as alleged.

Appellant advances the same arguments concerning the aggregate amount for securities fraud that he made concerning the aggregate amount for his theft conviction. We concluded that these arguments have no merit, and for the same reasons, reject those arguments now.

The evidence shows that appellant received over $4.3 million in investments, an amount greater than the $100,000 threshold. Therefore, the evidence supports appellant's conviction for securities fraud involving $100,000 or more.

We resolve appellant's third and fourth issues against him.

3. Money Laundering

Appellant's fifth issue argues that the evidence is insufficient to support his money laundering conviction. The argument is based on appellant's sufficiency challenge to theft as the predicate offense—both in terms of the timeframe for the theft and the aggregate value. For the reasons previously discussed, we reject those arguments.

To convict appellant of money laundering, the State had to prove that he knowingly acquired, maintained an interest in, concealed, possessed, transferred, or transported the proceeds of a criminal activity. *See* TEX. PENAL CODE § 34.02(a)(1). "Proceeds" are defined as funds acquired or derived directly or indirectly from, produced through, realized through, or used in the commission of an act." *Id.* § 34.01(4)(A). "Criminal activity" is defined as "any offense, including any preparatory offense, that is classified as a felony under the laws of this state or the United States." *Id.* § 34.01(1)(A).

The evidence shows that appellant received over $4.3 million from the eighteen named victims of his securities fraud. He transferred money to his personal account, spent lavishly on personal expenses, and paid investor money to the other

investors under the guise of making interest payments. Thus, the evidence is sufficient to prove that appellant "acquired or maintained an interest in, possessed, transferred, or transported" more than $300,000 he acquired from his securities fraud. We resolve appellant's fifth issue against him.

B. Issues Six and Seven: Was the restitution order erroneous?

No, because (i) immediate restitution is the general rule; (ii) the trial court did not order "group" restitution; and (iii) evidence supports the restitution amounts.

Appellant's sixth issue argues that we should delete all of part of the restitution order because the court was not authorized to (i) order that appellant pay restitution "instanter" or (ii) award restitution to several groups of victims. Appellant's seventh issue argues that the restitution order is not supported by the evidence and should be vacated and remanded. Appellant's arguments are not persuasive.

The court is authorized to award restitution to the victim of a criminal offense. TEX. CODE CRIM. PROC. art. 42.037(a). When doing so, the court must consider "the amount of loss sustained by a victim," and "other factors the court deems appropriate," and the State bears the burden of proving by a preponderance of the evidence "the amount of loss sustained by a victim as a result of the offense." TEX. CODE CRIM. PROC. art. 42.037(c), (k).

We review restitution orders for an abuse of discretion. *Cartwright v. State*, 605 S.W.2d 287, 288–89 (Tex. Crim. App. 1980). Due process places three

limitations on the restitution a trial judge may order: (i) the restitution must only be for the offense for which the defendant is criminally responsible; (ii) the order must be for only the victim or victims of the offense for which the defendant is charged; and (iii) the amount awarded must be just and supported by a factual basis in the record. *Burt v. State*, 445 S.W.3d 752, 758 (Tex. Crim. App. 2014). If the amount awarded is not supported by the record, appellate courts should vacate the order and remand to the trial court for a restitution hearing. *Id*.

We begin with appellant's argument that the judge was not authorized to order restitution "instanter." The statute provides that, "If the court does not provide otherwise, the defendant shall make restitution immediately." TEX. CODE CRIM. PROC. art. 42.037 (g)(3). "Instanter" means "immediately, forthwith, without delay." *Rippey v. State*, 104 S.W.2d 850, 851 (Tex. Crim. App. 1937). Thus, the language used in the order was authorized.

Appellant's arguments concerning the award to various groups are similarly unpersuasive. First, appellant contends that restitution should not be awarded to the Lomelin brothers because they held partnership interests in LIF. This argument fails because each brother testified that he invested individually.

Next, appellant argues that restitution should not have been awarded to individuals who were "in the know passive accomplices." We rejected this argument in the sufficiency analysis and reject it now for the same reasons.

Appellant also argues that the order is confusing because each set of two victims is listed together. The record reflects, however, that not all victims are listed together. While John and Lisa Kenner are listed together, John is deceased, and Lisa was the named beneficiary in John's investment contracts.[2] Jesus and Teresa Cisneros are also listed together, but not inappropriately so. Both are named as victims in the indictments and the record reflects that they invested together.

Finally, appellant argues that Tellez suffered no loss because he received a $100,000 commission. The record, however, does not support this assertion.

In addition, the order is supported by the evidence. An analysis of the total loss to each investor was admitted during the trial's punishment phase. We thus resolve appellant's sixth and seventh issues against him.

Appellant requests reformation of the judgment to reflect the court's oral restitution order but does not specify which of the three judgments should be reformed.

We may reform a judgment to make the record speak the truth when we have the necessary information to do so. *Bigley v. State*, 865 S.W.2d 26, 27 (Tex. Crim. App. 1993); *see also Brown v. State*, No. 02–08–063–CR, 2009 WL 1905231, at *2 (Tex. App.—Fort Worth July 2, 2009, no pet.) (mem. op., not designated for publication) (holding that restitution is punishment that is part of a defendant's

[2] Appellant's arguments that (i) restitution should be to John's estate rather than Lisa; (ii) Lisa's contributions are not separated from John's; and (iii) Lisa was not a victim fail for the same reason.

sentence and, therefore, must be included in the trial court's oral pronouncement of sentence to be properly included in the written judgment). Here, the record reflects that the court ordered restitution in addition to the sentences to be served concurrently. We therefore modify the judgments to reflect the court ordered restitution concurrently.

C. Issue Eight: Do appellant's convictions for fraud and theft violate the double jeopardy clause?

No, because (i) the offenses have different elements and focus on different conduct, and (ii) statutory text shows legislative intent to punish them separately.

Appellant's eighth issue argues that his double-jeopardy rights were violated because the State was not required to elect between the securities fraud and theft case and as a result, he was subjected to multiple punishments for the same conduct.

The Double Jeopardy Clause protects a defendant from impermissible multiple punishments for the "same offense." *Bigon v. State*, 252 S.W.3d 360, 369 (Tex. Crim. App. 2008). There are three types of double jeopardy claims: (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense. *Langs v. State*, 183 S.W.3d 680, 685 (Tex. Crim. App. 2006).

A multiple-punishments violation can arise either in the context of lesser-included offenses, where the same conduct is punished under a greater and a lesser-included offense, and when the same conduct is punished under two distinct statutes

where the Legislature only intended for the conduct to be punished once. *Id*. Appellant asserts that the latter occurred here.

The controlling inquiry in a multiple-punishments case is whether the Legislature intended to authorize the separate punishments. *See Garifas v. State*, 424 S.W.3d 54, 58 (Tex. Crim. App. 2014). Legislative intent can be ascertained by analyzing the offenses' elements, or by identifying the appropriate "unit of prosecution" for the offenses. *Id*. Because appellant complains of convictions stemming from different statutory sections, we utilize an "elements" analysis to determine whether multiple-punishments principles have been violated. *See id.*

The starting point of an "elements" analysis in the multiple-punishments context is the *Blockburger* test, used to determine whether each of the offenses requires proof of an element that the other does not. *Bignon*, 252 S.W.3d at 570 (citing *Blockburger v. U.S.*, 284 U.S. 299, 304 (1932)). Texas courts focus on the elements alleged in the charging instrument—not on the offense as defined in the Penal Code. *Parrish v. State*, 869 S.W.2d 352, 354 (Tex. Crim. App. 1994).[3]

But the *Blockburger* test is only a starting point—it is not the exclusive indicator of a double-jeopardy violation. *Garfias*, 424 S.W.3d at 59. Thus, absent clear guidance from the legislature, courts consider additional, non-exclusive factors to determine legislative intent, including whether: (i) the offenses are in the same

[3] This is referred to as the "cognate pleadings" approach. *See Garfias*, 424 S.W.3d at 58–59.

statutory section; (ii) the offenses are named in the alternative; (iii) the offenses are named similarly; (iv) the offenses have common punishment ranges; (v) the offenses have a common focus; (vi) the common focus tends to indicate a single instance of conduct; (vii) the elements that differ between the two offenses can be considered the same under *Blockberger*; and (viii) there is legislative history containing an articulation of intent to treat the offenses as the same or different for double-jeopardy purposes. *See id.* The best indicator of legislative intent, however, is the offense's "focus" or "gravamen." *Id.*

Here, the legislature clearly intended multiple punishments for securities fraud and theft. Specifically, the securities act provides that "[n]othing herein . . . shall limit or diminish the liability of any person . . . for the violation of the provisions of any other statute." TEX. REV. CIV. STAT. art. 581-31; *see Hudson v. State*, No. 05-14-0024-CR, 2015 WL 1313984, at *2 (Tex. App.—Dallas Mar. 20, 2015, no pet.) (mem. op., not designated for publication) (concluding unambiguous statutory language allowing prosecution of offenses under "any other law" reflected legislature's intent to allow multiple punishments).

Additional legislative intent indicators further support our conclusion that these are separate offenses for which the legislature intended separate punishments. For example, the offenses have different elements, each requiring proof that the other does not. The securities fraud indictment alleged that appellant:

> . . . pursuant to one scheme and continuing course of conduct, sell and offer for sale securities in the form of notes, evidences of indebtedness, and investment contracts issued by . . . "Mito," to [the named victims], hereinafter referred to as "purchasers," and . . . engaged in fraud in connection with the offer for sale and sale of said securities by [failing to disclose four material facts and misrepresenting two relevant facts]. . . And the aggregate amount obtained was $100,000 or more . . . .

On the other hand, the theft indictment alleged that appellant:

> . . . pursuant to one scheme and continuing course of conduct, unlawfully appropriate property, by acquiring or otherwise exercising control over property, to wit: money, of the aggregate value of $300,000.00 or more, from the following owners, [listing the named victims], and without the effective consent of said owners, namely, by deception, with intent to deprive the owners of the property . . . .

Thus, to prove securities fraud, the State had to prove that appellant engaged in fraud in the offer or sale of securities by failing to disclose and misrepresenting relevant facts. *See* TEX. REV. CIV. STAT. art. 581-29 (C)(1). To prove theft, the State had to prove that appellant unlawfully appropriated property valued at $300,000 or more with the intent to deprive the owners of that property. *See* TEX. PENAL CODE § 31.03 (a)(e)(7). Because each offense requires different facts to convict, they are not the same under *Blockberger*. *See Garfias*, 424 S.W.3d at 59.

The focus is also different for these offenses. Fraud involves failing to disclose or misrepresenting a material fact. TEX. REV. CIV. STAT. art. 581-4(F), 581-29(C)(1)(c). Theft involves taking property from its rightful owner. *See* TEX. PENAL CODE § 31.03(a).

In addition, securities fraud and theft are in different statutes. They are not phrased in the alternative or named similarly, and they have different threshold amounts to be categorized as a first-degree felony.[4] *See generally*, TEX. PENAL CODE § 31.03; TEX. REV. CIV. STAT. art. 581-29.

The foregoing demonstrates that securities fraud and theft are different offenses with different elements that the legislature intended to punish separately. Therefore, appellant's double jeopardy rights were not violated.

We resolve appellant's eighth issue against him.

D. Issues Nine and Ten: Was there charge error?

Appellant's ninth and tenth issues argue that the jury charge was erroneous because the statute of limitations instructions for theft and securities fraud were incorrect and accomplice witness instructions should have been given for all three cases.

When reviewing a jury charge, we first determine whether error occurred; if error did not occur, our analysis ends. *Kirsch v. State*, 357 S.W.3d 645, 649 (Tex. Crim. App. 2012). If error occurred, whether it was preserved determines the degree of harm required for reversal. *Id*.

[4] Securities fraud involving $100,000 or more is a first-degree felony. TEX. REV. CIV. STAT. art. 581-29 (C)(1)(c). Theft involving value of $300,000 or more is a first-degree felony. TEX. PENAL CODE 31.03(C)(7).

1. Statute of Limitations

Appellant argues that the jury charge should have instructed the jurors that "the statute of limitations precluded prosecution based on conduct prior to May 4, 2012" because the indictments were presented on May 4, 2017, and the statute of limitations is five years. This argument misapplies the statute of limitations for aggregate offenses.

The statute of limitations for both securities fraud and felony theft is five years. TEX. REV. CIV. STAT. art. 581-29-1 (securities fraud); TEX. CODE CRIM. PROC. 12.01(4)(A) (theft).

Because aggregate theft is based on continuing conduct, the limitations period begins to run after the last theft is completed. *Graves*, 795 S.W.2d at 187. The statutory language for aggregate securities fraud is "substantially similar" to the aggregate theft statute. *Murchison v. State*, 93 S.W.3d 239, 259 (Tex. App.—Houston [14th] Dist. 2002, pet. ref'd); *see also Williams v. State*, Nos. 13-18-00454-CR, 13-18-00546-CR, 2020 WL 1950864, at *12 (Tex. App.—Corpus Christi Apr. 23, 2020, no pet.) (mem. op. not designated for publication) (limitations for aggregate theft and securities fraud began to run from the date the last element of the last offense was performed).[5] Thus, the limitations period for both crimes begins

[5] TEX. REV. CIV. STAT. art. 581-29-2 provides: "When amounts are obtained in violation of this Act under one scheme or continuing course of conduct . . . the conduct may be considered as one offense and the amounts aggregated in determining the grade of the offense."

to run after the last such act is committed and the offense encompasses all acts alleged within the indictment's time period.

Here, both indictments alleged a continuing course of conduct between August 1, 2011 and January 31, 2016. As long as the indictments were presented within five years of the last fraudulent act or the last theft, the entire aggregate offense during that time frame was within the limitations period. *Martinez v. State*, 527 S.W.3d 310, 323 (Tex. App.—Corpus Christi 2017, pet. ref'd).

The evidence shows that appellant was still engaging in fraud and appropriating property in December 2015. This is within the time frame alleged in the indictments and is less than five years from the indictments' presentment. Therefore, the jury charge was not erroneous.

Accordingly, we resolve appellant's ninth issue against him.

2. Accomplice Witness Instruction

Appellant's tenth issue argues that the trial court should have given accomplice witness instructions in all three cases. We disagree, because there is no evidence that any of the witnesses were accomplices.

An accomplice is someone who could have been charged with the same or a lesser-included offense as that with which the defendant was charged because he participated with the defendant before, during, or after the commission of the crime, acted with the requisite mental state, and performed an affirmative act promoting the commission of the offense. *See Zamora v. State*, 411 S.W.3d 504, 513 (Tex. Crim.

App. 2013). The jury must be instructed on the accomplice-witness rule if the issue is raised by the evidence. *State v. Ambrose*, 487 S.W.3d 587, 593–94 (Tex. Crim. App. 2016).

Appellant identifies seven witnesses he claims were accomplices as a matter of law because they "all encourage[d] [him], albeit passively." But a witness is only an accomplice as a matter of law when that witness has been charged with the same or a lesser-included offense, or when the evidence clearly shows that the witness could have been charged. *Zamora*, 411 S.W.3d at 510.

Appellant points to Cisneros's testimony that he "had his doubts" about appellant's investment "at the beginning" and joked with appellant asking him if "it was like Bernie Madoff." But Cisneros also testified that appellant assured him that "everything was safe and legal" and he invested because he believed appellant's misrepresentation. This does not establish that Cisneros was an accomplice.

None of the investors were charged with any crimes and nothing in the record demonstrates that they could have been charged. There is no evidence that the investors participated in appellant's crimes or committed any affirmative act promoting the commission of the offenses. *See Cocke v. State*, 201 S.W.3d 744, 748 (Tex. Crim. App. 2006).

Therefore, the evidence did not implicate the accomplice-witness rule and the trial court was not required to so instruct the jury, and we resolve appellant's tenth issue against him.

III. CONCLUSION

Having resolved all of appellant's issues against him, we modify the judgments to reflect that the jury assessed punishment and to include the court ordered restitution in each case to run concurrently with the restitution in the other two cases, and as modified, affirm the trial court's judgments.

/Bill Whitehill/
BILL WHITEHILL
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

JUAN MIGUEL LOPEZ, Appellant	On Appeal from the 195th Judicial District Court, Dallas County, Texas
No. 05-18-01524-CR V.	Trial Court Cause No. F-1700358-N.
THE STATE OF TEXAS, Appellee	Opinion delivered by Justice Whitehill. Justices Osborne and Carlyle participating.

Based on the Court's opinion of this date, the judgment of the trial court is **MODIFIED** to reflect that the jury assessed punishment and to include the trial court's order that appellant pay restitution as follows:

> Francisco Lomelin $118,840, Jose Lomelin $160,300, Ricardo Lomelin $84,100, Francisco Telez $1.92, Julia Telez $21,450, John and Lisa Kenner $61,143, Sandra Magallon $22,725.57, Enrique Encisco $76,076, Dr. Guillermo Soto $437,558.44, Benito Borbola $174,000, Maria Vargas $100,000, Vincente Garcia $40,600, Victor Natereno $59,220 and Jesus and Teresa Cisneros $117,400, with such restitution to be concurrent with the concurrent sentences.

As **REFORMED**, the judgment is **AFFIRMED**.

Judgment entered June 4, 2020

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

JUAN MIGUEL LOPEZ, Appellant	On Appeal from the 195th Judicial District Court, Dallas County, Texas
No. 05-18-01525-CR V.	Trial Court Cause No. F17-00360-N. Opinion delivered by Justice Whitehill. Justices Osborne and Carlyle participating.
THE STATE OF TEXAS, Appellee	

Based on the Court's opinion of this date, the judgment of the trial court is **MODIFIED** to reflect that the jury assessed punishment and to include the trial court's order that appellant pay restitution as follows:

> Francisco Lomelin $118,840, Jose Lomelin $160,300, Ricardo Lomelin $84,100, Francisco Telez $1.92, Julia Telez $21,450, John and Lisa Kenner $61,143, Sandra Magallon $22,725.57, Enrique Encisco $76,076, Dr. Guillermo Soto $437,558.44, Benito Borbola $174,000, Maria Vargas $100,000, Vincente Garcia $40,600, Victor Natereno $59,220 and Jesus and Teresa Cisneros $117,400, with such restitution to be concurrent with the concurrent sentences.

As **REFORMED**, the judgment is **AFFIRMED**.

Judgment entered June 4, 2020

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

JUAN MIGUEL LOPEZ, Appellant	On Appeal from the 195th Judicial District Court, Dallas County, Texas
No. 05-18-01526-CR V.	Trial Court Cause No. F17-00362-N. Opinion delivered by Justice Whitehill. Justices Osborne and Carlyle participating.
THE STATE OF TEXAS, Appellee	

Based on the Court's opinion of this date, the judgment of the trial court is **MODIFIED** to reflect that the jury assessed punishment and to include the trial court's order that appellant pay restitution as follows:

> Francisco Lomelin $118,840, Jose Lomelin $160,300, Ricardo Lomelin $84,100, Francisco Telez $1.92, Julia Telez $21,450, John and Lisa Kenner $61,143, Sandra Magallon $22,725.57, Enrique Encisco $76,076, Dr. Guillermo Soto $437,558.44, Benito Borbola $174,000, Maria Vargas $100,000, Vincente Garcia $40,600, Victor Natereno $59,220 and Jesus and Teresa Cisneros $117,400, with such restitution to be concurrent with the concurrent sentences.

As **REFORMED**, the judgment is **AFFIRMED**.

Judgment entered June 4, 2020