Fifteenth Court of Appeals
Texahoma, Texas

No. 15-18-00867-CR

Lucille **BLUTH**, Appellant

v.

STATE of Texas

On Appeal from the 555th District Court, Balboa County, Texas
Trial Court No. 17-309-CR
Honorable Lionel Ping, Judge Presiding

Majority Opinion by: B. Knowles, Chief Justice; joined by M. Williams, Justice
Dissenting Opinion by: K. Rowland, Justice

Sitting[1]: B. Knowles, Chief Justice
M. Williams, Justice
K. Rowland, Justice

Delivered and Filed: December 27, 2018

O P I N I O N

After a jury trial, Lucille Bluth was convicted of theft ($2,500–$30,000) and operating a watercraft while intoxicated (BWI). Bluth appeals her convictions, arguing: (1) the evidence is legally insufficient to support her convictions; (2) the trial court erred by admitting evidence obtained from an illegal search of her condo; and (3) the trial court erred by failing to orally

[1] Because this our last opinion for which the Chief Justice and the Associate Justices will be on the court, we would like to thank the Fifteenth Court of Appeals district for the opportunity to serve you over the past six years. While we have all decided to pursue solo careers, we are confident our recently-elected successors will make apt replacements.

pronounce her sentence for the BWI conviction. We affirm Bluth's theft and BWI convictions, but reverse the sentence for the BWI conviction and remand for a new punishment hearing.

FACTUAL BACKGROUND

On the evening of May 4, 2017, long after sundown, Bluth and several members of her family attended an annual, county-wide celebration at the docks of Balboa Bay. Balboa Bay is located in Balboa County, Texas, and is adjacent to the Gulf of Mexico. Bluth, who was at the time in a court-ordered residential treatment program for alcoholism, arrived to the celebration pursuant to a 24-hour court-authorized release. Several of Bluth's family members were present at the celebration, including her husband, George; four of her children; and two of her grandchildren. Also present was the Bluths' long-time family attorney, Barry Zuckerkorn, and George's identical twin brother, Oscar, with whom Bluth had two affairs over the past thirty years.

In an attempt to address their marital issues, Bluth had made plans with whom she believed was George to leave the United States and take a boat to Mexico. Unbeknownst to Bluth, she had actually made plans with Oscar, who was pretending to be George in an attempt to deceive Bluth and rekindle their romantic relationship. During the celebration, Bluth discovered Oscar had deceived her and that George was making no attempt to address their marital issues. Still at the celebration, Bluth found Zuckerkorn and consulted him about getting a divorce. Zuckerkorn shouted, within earshot of a large crowd of people at the celebration, "Take to the sea!" Several people who knew Bluth and Zuckerkorn understood this comment to be legal advice that Bluth's position in a divorce proceeding would be bolstered by interjecting the complexities of not-so-well-known maritime law into the dispute with her husband. After this conversation with Zuckerkorn, Bluth disappeared into the crowd, and nobody saw Bluth at the celebration later for the remainder of the evening.

Within approximately fifteen to twenty minutes of Bluth's conversation with Zuckerkorn, someone boarded *The Sunset*, a boat owned by Lucille Austero, who also owned the residential treatment facility, Austerity, where Bluth was residing. Austero coincidentally owned the condo next to Bluth's condo at the Balboa Towers. The person who boarded *The Sunset* started the engine and departed from the Balboa Bay docks into the bay. Austero, who was also attending the celebration, saw that her boat had been taken, and she notified the on-site security officers, Officers John Taylor and David Carter. Officers Taylor and Carter promptly boarded a police boat and chased *The Sunset*. According to Officers Taylor and Carter, *The Sunset* was not being driven ahead directly but was instead swerving repeatedly and drastically from left to right. The police boat ran out of gas in the middle of Balboa Bay, but they saw *The Sunset* approach land ahead and stop. They were also able to see in the distance someone de-board *The Sunset* and run into the wooded area where the boat had stopped. Neither officer was able to say definitively that the person was a man or a woman or give any other description of the person.

Officers Taylor and Carter called for backup, and another police boat arrived and took them back to the Balboa Bay docks. The officers talked to several people who had overheard Bluth and Zuckerkorn's conversation, as well as Austero, who told them that Bluth had been living at Austerity for several months. Austero did not tell the officers that Bluth's treatment was court-ordered. Having their suspicions, Officers Taylor and Carter asked Bluth's family members where she was. None of them knew her whereabouts, but they told the officers to check Bluth's condo at Balboa Towers, which was located within a quarter mile of where *The Sunset* landed.

Bluth's grandson, George-Michael, told the officers that Bluth had leased the condo to him for a few months while she was residing at Austerity. He offered to take the officers to the condo to check for Bluth. Before visiting the condo, Officers Taylor and Carter, as well as George-Michael, visited the site where *The Sunset* had docked. Officers Taylor and Carter boarded *The*

Sunset and found an empty bottle of vodka with a green sticky note attached to it that stated in pink ink and in barely-legible handwriting, "DO YOU KNOW WHO I AM?!" There was also a green sticky note on the wheel of the boat that stated in the same barely-legible handwriting, "THIS BOAT IS MINE, TWO!" Both sticky notes had a monogram with the letters "BT" near the top of the note. The bottle of vodka was a limited "Cinco de Mayo 2017" edition. The boat also appeared to have been hotwired.

Officers Taylor and Carter then went to Bluth's condo, and Bluth answered the door. Officer Carter asked Bluth, "Can we come inside?" Bluth said no and explained she did not allow men into her condo without her husband present. Officer Carter then asked Bluth, "When was the last time you were on *The Sunset*?" Bluth responded, "I don't understand the question, and I won't respond to it." Officer Taylor, attempting to clarify the question, asked, "Where were you the last time you saw *The Sunset*?" Bluth responded, "Something-dale. I don't know, Brookfeather, Raintree. It's hot. It's very hot there. I've never been. Get a warrant!" Officers Taylor and Carter believed Bluth still did not understand the question. Officer Taylor again asked Bluth if they could enter the condo, and Bluth "glared at him menacingly."

George-Michael, who went to the condo with the officers, said that although Bluth was not living at the condo because she had been residing at Austerity and had temporarily leased the condo to him, Bluth demanded earlier that night at the celebration that he let her stay the night with him before returning to Austerity the next day.

Bluth confirmed with the officers that the condo was hers, George-Michael had a lease because he was having "roommate issues" at college, and she was currently residing at Austerity. She also confirmed that she had told George-Michael she was staying at her condo that night, but asserted she had a superior right to the condo because it was her condo. The officers asked Bluth and George-Michael whether the written lease allowed Bluth to stay whenever she wanted, but

Bluth and George-Michael could not remember. However, George-Michael told the officers that Bluth is the matriarch of the family, is very controlling, and that, generally, he and the family will do what she says.

George-Michael then entered the condo, moving past Bluth, and told the officers they could come inside. Bluth again stated the officers were not welcome inside. The officers moved slowly past Bluth into the apartment. Once inside, the officers found a pink pen and a note-pad of stickies on the coffee table. The stickies on the notepad were the same size and color as the ones found on *The Sunset*, and they had the same BT monogram. The officers told Bluth they knew she stole *The Sunset* and operated the boat while intoxicated. Bluth responded, "Prove it." The officers then placed Bluth under arrest.

There were several developments after Bluth was arrested. As she was being taken away from the condo, Bluth shouted obscenities at Austero's condo. A person opened the door of Austero's condo to see what the commotion was about. The person was later identified as Austero's adopted son, Perfecto. After Bluth was placed in the car, Officer Taylor went back to Austero's condo and spoke briefly with Perfecto, who said he was also at the celebration earlier that evening. Officer Taylor smelled a strong odor of alcohol coming from Austero's condo. Officer Taylor asked if he could come inside, but Perfecto refused, stating that he did not permit strangers to enter without Austero present, and that he was busy practicing how to effectively confront bullies at school.

PROCEDURAL BACKGROUND

Bluth was indicted for theft ($2,500–$30,000). She was also charged with operating a watercraft while intoxicated. Bluth pled not guilty to both charges, and the case proceeded to a jury trial. During opening statements, Bluth's counsel[2] told the jury the State would not be able to

[2] Bluth was not represented at trial by Mr. Zuckerkorn. Her trial counsel was Mr. Robert "Bob" Loblaw.

prove that Bluth was the person who stole *The Sunset* and that Bluth's family members would testify. However, none of Bluth's family members appeared for the trial.

During the State's case-in-chief, the State called Officer Taylor to testify. When the prosecution asked Officer Taylor about what he and Officer Carter had found in the condo, Bluth's counsel requested a hearing outside the jury's presence on the admissibility of Officer Taylor's answer to the question. After Officer Taylor's voir dire testimony, which recounted the facts described above, Bluth objected to any testimony of events following the warrantless entry of her condo. Citing George-Michael's consent, the trial court ruled Officer Taylor could testify about what he and Officer Carter found in the condo. Officer Taylor then testified he and Officer Carter found the pink pen and the green notepad with the BT monogram stickies inside Bluth's condo.

The State also called Austero to testify, but her testimony was very brief. In sum, Austero testified she owned *The Sunset* and its value was $29,000. She did not provide any basis for her opinion of *The Sunset*'s value other than stating that as the owner, she was giving her opinion of its worth. On cross-examination, Austero admitted she often let Perfecto drive *The Sunset*, and that he was at the celebration, but he was angry with Austero and disappeared sometime during the evening. She also testified Perfecto knew how to hotwire a motor vehicle, but she did not think Perfecto would have taken *The Sunset*.

The jury heard additional evidence from the State's witnesses about the events of May 4, 2017. The jury heard testimony from "Phil D." who was at the residential treatment facility with Bluth, but who was being treated for an addiction to methamphetamines. Phil D. testified Bluth had made plans with her husband George to take a boat to Mexico and "ride off into the sunset." On cross-examination, Phil D. reiterated Bluth said "into" and not "with," clarified he meant the actual sunset and not the boat, and that it was a figure of speech. Another witness, Dixie Herbster, testified that at the May 4, 2017 celebration, the event hosts were selling limited Cinco de Mayo

2017 edition bottles of vodka, and the bottle found on *The Sunset* was similar to the ones sold at the celebration. She also testified about several of the other background facts discussed above.

Bluth testified in her own defense. She explained to the jury that she went to the celebration to perform in a local production of *Fantastic Four: The Musical* as part of her therapy, and to see her family, but that she decided to take a cab back to the condo because she became very upset. Bluth explained she had learned in her treatment program that she needed to avoid stressful and emotional situations that made her want to drink, and becoming emotionally distraught at a celebration where alcohol was being sold was too risky. She elaborated that she was disappointed by her children, who despise her, and her husband, who defies her, and that it all did not surprise her. She was also disappointed by her brother-in-law Oscar, who had deceived her; and by her lawyer, Zuckerkorn, who kept giving her bad legal advice despite his constant advertisement that he "is very good." Bluth complained that she always is made out to be the villain and that she actually felt like "The Invisible Girl." Bluth described in detail the cab she took back to Balboa Towers, her cab driver, and the conversation they had, and stated that she had paid the cab fare in cash. She also testified the "BT" on the monogramed sticky notes referred to Balboa Towers, and the guards at the security gate to the condos gave out pads of those green stickies and pink pens to pretty much everyone. A Balboa Bay Tower security guard testified Balboa Towers gave out the green BT stickies and pink pens to residents, including Bluth and Perfecto.[3]

During closing arguments, the parties focused on the identity of the person who stole Austero's boat. Bluth argued it was Perfecto who stole *The Sunset*; the State argued it was Bluth who stole *The Sunset*. The State relied heavily on the green stickies and pink pen found in Bluth's apartment and argued that Bluth was not a credible witness.

[3] During her cross-examination, Austero also testified there were green BT stickies and a pink pen in her condo, but she has not seen them since Perfecto ran away.

The jury found Bluth guilty on both counts. The trial court, at Bluth's election, sentenced her. During the punishment phase, the trial court noted the state jail felony conviction for theft, and pronounced Bluth's sentence for theft conviction at 180 days in state jail and a $5,000 fine. The trial court did not pronounce Bluth's sentence for driving while intoxicated, but thereafter signed written judgments of conviction. The written judgment for the theft conviction accurately reflected the orally pronounced sentence; the written judgment for the BWI conviction recited the sentence for the conviction was 90 days in jail and a $1,000 fine. Bluth filed a motion for new trial raising the trial court's failure to orally pronounce the sentence for the BWI conviction. After the trial court heard and denied the motion for new trial, Bluth timely appealed.[4]

ISSUES ON APPEAL

Bluth raises two legal sufficiency issues on appeal: (1) the evidence is legally insufficient to show she was the person who stole and operated *The Sunset*; and (2) the evidence is legally insufficient to show the value of the boat. In her third issue, Bluth argues the trial court committed reversible error by admitting Officer Taylor's testimony about the pen and notepad found in the condo over her objection that Officer Taylor's knowledge was obtained in violation of her Fourth Amendment rights. In her last issue, Bluth argues the trial court erred by failing to orally pronounce her sentence as to the misdemeanor BWI conviction.

LEGAL SUFFICIENCY

Bluth's first two issues are legal sufficiency issues. In reviewing the legal sufficiency of the evidence, we must determine whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Villa v.* State, 514 S.W.3d 227, 232 (Tex. Crim. App. 2017) (citing *Jackson v. Virginia*, 443 U.S. 307 (1979)). We view all of the evidence in a

[4] Bluth has been out on bail during the pendency of this appeal.

light most favorable to the verdict. *Id.* We must defer to the jury's responsibility to fairly resolve conflicts in testimony, weigh the evidence, and draw reasonable inferences. *Id.*

A. Identity

Bluth does not dispute that someone stole *The Sunset*. But she argues there is legally insufficient evidence to prove that it was her. "Identification of the defendant as the person who committed the offense charged is part of the State's burden of proof beyond a reasonable doubt." *Wiggins v. State*, 255 S.W.3d 766, 771 (Tex. App.—Texarkana 2008, no pet.). "When a defendant contests the identity element of the offense, we are mindful that identity may be proven by direct evidence, circumstantial evidence, or even inferences." *Id.* If circumstantial evidence gives rise to a reasonable inference that the defendant committed the offense, the State's proof need not affirmatively negate inferences that another person might have committed the offense. *See Geesa v. State*, 820 S.W.2d 154, 158–61 (Tex. Crim. App. 1991) (rejecting the "outstanding reasonable hypothesis" requirement in legal sufficiency reviews), *overruled on other grounds by Paulson v. State*, 28 S.W.3d 570 (Tex. Crim. App. 2000).

The following evidence favorable to the jury's verdict, taken as true, supports the jury's implied finding that Bluth was the person who stole *The Sunset*: Bluth was present at the scene where the boat was taken, she was present near the location where the boat was recovered, she shouted obscenities toward Austero's condo, and most importantly, the officers found a pad of green sticky notes and a pink pen in Bluth's condo. The stickies were the same size and color, and contained the same initials, as the sticky notes with pink ink on them that were found on *The Sunset*. The jury rationally could have inferred the notes on the two stickies on *The Sunset* were written on May 4, 2017, because one was stuck to the limited-edition Cinco de Mayo 2017 bottle of vodka being sold at the celebration.

Although the defense presented evidence that Perfecto could have plausibly taken the boat, the State was not required to present evidence to rebut Bluth's reasonable alternative hypothesis that Perfecto stole *The Sunset*. *See Wise v. State*, 364 S.W.3d 900, 903 (Tex. Crim. App. 2012). The dissent makes a good argument that resembles Bluth's closing argument to the jury, and the issue is undeniably close, but we must defer to the jury's role of assessing credibility and drawing reasonable inferences from the evidence. *See Villa*, 514 S.W.3d at 232. We hold there is legally sufficient evidence to prove that Bluth was the person who stole *The Sunset*.

B. Value of *The Sunset*

Bluth also argues there is legally insufficient evidence showing the value of *The Sunset*. Bluth was indicted for theft of property with the value of $2,500 or more but less than $30,000. *See* TEX. PENAL CODE ANN. § 31.03(e)(5) (West Supp. 2017). "Value" refers to "the fair market value of the property . . . at the time and place of the offense." *Id.* § 31.08 (West 2011). "Fair market value" is the amount of money the property in question would sell for in cash, given a reasonable time for selling it. *Keeton v. State*, 803 S.W.2d 304, 305 (Tex. Crim. App. 1991).

Fair market value may be proved by, among other means, the owner's opinion testimony as to the value of the property. *See id.* "It has long been the rule in this State that the owner of property is competent to testify as to the value of his own property." *Sullivan v. State*, 701 S.W.2d 905, 908 (Tex. Crim. App. 1986). "[W]hen the owner of the property is testifying as to the value of the property, he or she may testify as to his or her opinion or estimate of the value of the property in general and commonly understood terms." *Id.* at 909. "Because such testimony is an offer of the owner's best knowledge of the value of his property, it is legally sufficient evidence for the trier of fact to make a determination as to value based on the owner's credibility as a witness." *Smiles v. State*, 298 S.W.3d 716, 719 (Tex. App.—Houston [14th Dist.] 2009, no pet.).

Austero testified the value of *The Sunset* was $29,000. She testified she owns *The Sunset* and that she knew its value as the owner. It is well- and long-established law in Texas, under *Sullivan*, that the owner of property is competent to testify as to the property's value. 701 S.W.2d at 908. Here, the owner testified to the value of the property, thereby providing the jury with competent evidence upon which to base Bluth's theft conviction. Although Bluth cites to a different standard used in civil cases, we are not bound by the decisions of the Supreme Court of Texas in criminal appeals. We are, however, bound by the decisions of the Texas Court of Criminal Appeals. *See McFadden v. State*, 541 S.W.3d 277, 292 (Tex. App.—Texarkana 2018, pet. ref'd). Even if Bluth is correct that *Sullivan* should be overruled, we lack the authority to overrule the Court of Criminal Appeals. And, although the dissent argues a higher standard applies in civil cases, that does not mean the Supreme Court of Texas's holding was correct. Applying the law handed down by the Court of Criminal Appeals, we are bound to hold the evidence is legally sufficient to prove the value of *The Sunset*.

FOURTH AMENDMENT

In her third issue, Bluth complains that the trial court erred by admitting evidence that the officers found the notepad of green stickies and the pink pen in her apartment because the officers entered her condo without a warrant and the search was otherwise unreasonable. The State argues the officers' entrance into Bluth's condo was justified by George-Michael's express consent.

A. Standard of Review

We review a trial court's ruling on a motion to suppress under a bifurcated standard. *Carmouche v. State*, 10 S.W.3d 323, 327 (Tex. Crim. App. 2000). We review a trial court's conclusions of law de novo. *Id.* at 328. If a trial court's fact findings are supported by the record or are based on the evaluation of witness credibility and demeanor, we should afford them almost total deference. *Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997). "The trial

judge is the sole trier of fact and judge of the credibility of the witnesses and the weight to be given their testimony." *Valtierra v. State*, 310 S.W.3d 442, 447 (Tex. Crim. App. 2010). When, as here, the trial judge makes no express findings of fact, we must assume the trial court made implicit findings of fact that support its ruling so long as those findings are supported by the record. *Id.*

B. The Warrant Requirement & the Consent Exception

"The Fourth Amendment does not proscribe all state-initiated searches and seizures; it merely proscribes those which are unreasonable." *Florida v. Jimeno*, 500 U.S. 248 (1991). Thus, the ultimate "touchstone" of any Fourth Amendment analysis is reasonableness. *Id.*; *Meekins v. State*, 340 S.W.3d 454, 459 (Tex. Crim. App. 2011). To determine reasonableness in this context, we apply an objective standard that views the officer's conduct in light of the facts and circumstances known to the officer at the time of the search. *See Meekins*, 340 S.W.3d at 459.

A warrantless police entry into a person's home is presumptively unreasonable "unless the entry falls within an exception to the warrant requirement." *Valtierra*, 310 S.W.3d at 448. Voluntary consent is generally an exception to the warrant requirement. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973). A police officer may obtain voluntary consent from either the suspect or a third party who has actual or apparent authority to consent to the search. *Illinois v. Rodriguez*, 497 U.S. 177, 181 (1990).

The Supreme Court of the United States has addressed the reasonableness of a search when there is "disputed consent," which is when one resident of a home expressly consents to the search and another resident is present and expressly objects to the search. *Georgia v. Randolph*, 547 U.S. 103, 120 (2006). In *Randolph*, an officer obtained a wife's consent to search a house for evidence of her husband's possession of drugs, but the husband, who was present, unequivocally objected. *Id.* at 107. The Supreme Court held the warrantless search was invalid "as to him" (the husband) given the great significance of "widely shared social expectations." *Id.* at 111, 120. The Court

explained that "[w]ithout some very good reason, no sensible person would go inside" a residence "when a fellow tenant stood there saying, 'stay out.'" *Id.* at 113.

There are not many "disputed consent" cases in Texas. *See, e.g.*, *Pace v. State*, 318 S.W.3d 526, 531–32 (Tex. App.—Beaumont 2010, no pet.). However, the Supreme Court of the United States has clearly recognized an exception to the general rule that, when two residents are present at the threshold of a residence, and one objects to a search and the other consents, officers may rely on a hierarchy established by social expectations. *Randolph*, 547 U.S. at 111-14. The Court in *Randolph* expressly rejected the position that the social expectations test is strictly governed by property law, but instead stated the test is merely "influenced" by property law. *Id.*

C. Analysis

The evidence supports an implied finding that George-Michael's express consent made the officers' entry into the condo reasonable. *Randolph* is inapplicable when, as here, the defendant and the third party are not co-tenants. At the time of the search, Bluth was temporarily living at Austerity, and George-Michael was temporarily living at the condo. Thus, it is undisputed that Bluth and George-Michael were not living together. Because *Randolph* does not apply, we overrule Bluth's third issue.

FAILURE TO ORALLY PRONOUNCE THE SENTENCE FOR THE BWI CONVICTION

In her final issue, Bluth argues the trial court erred by failing to orally pronounce her sentence, which included confinement for a year in county jail, in her presence. When, as here, a trial court imposes a sentence resulting in confinement for a misdemeanor offense, the trial court reversibly errs by failing to orally pronounce the sentence in the defendant's presence. *See Edwards v. State*, 106 S.W.3d 377, 380 (Tex. App.—Fort Worth 2003, no pet.). We therefore reverse the sentence for the BWI conviction and remand to the trial court for a new punishment hearing. *See id.*; *see also* TEX. CODE CRIM. PROC. art. 33.03.

CONCLUSION

Based on the foregoing, we hold there is legally sufficient evidence to support Bluth's theft and BWI convictions. We further hold the trial court did not err by admitting evidence obtained from a consensual search of her condo. However, the trial court erred by not orally pronouncing Bluth's sentence as to the misdemeanor BWI conviction. We affirm Bluth's convictions, but reverse the sentence for the BWI offense and remand for another punishment hearing.

–B. Knowles, Chief Justice

PUBLISH

DISSENTING OPINION

No matter what I do, all I think about is N. Bluth,[5] who is mentioned only briefly in this case. This and several other aspects about this case give me pause. Nevertheless, I must focus on the issues presented in this appeal. I must say, at the outset, I truly believe Bluth was wrongfully convicted of both offenses. So, I dissent (respectfully of course) for three reasons that parallel Bluth's first three issues; I also disagree that the case must be remanded to the trial court for pronouncement of the sentence for misdemeanor BWI conviction. In short, I disagree with the majority as to all issues. I would reverse and render acquittals as to the charges against Bluth for theft and BWI. Alternatively, I would reverse and remand as to both judgments of conviction. And, alternatively to all that, I'm not sure what I would do because, with all due respect to the courts that have struggled with issue, I tend to agree that the case law regarding the oral pronouncement of sentences for misdemeanor offenses involving confinement is—in Bluth's words—"a hot mess."

First, although the evidence could support the contention that Bluth stole *The Sunset*, the evidence supports an equal inference that Perfecto stole *The Sunset*. The majority relies on evidence that inculpates Bluth, but all of the same facts equally inculpate Perfecto. When the jury is presented with two, equally possible culprits of an offense, and the jury just chooses to pick one out of emotion, speculation, or "gut feeling," the jury's decision to just pick the one sitting at the defense table is per se irrational under *Jackson v. Virginia*, 443 U.S. 307 (1979). Second, the Supreme Court of Texas has abandoned its holding that an owner of property may give conclusory testimony as to the value of property. In criminal cases, defendants should be afforded at least the same, if not more protections, as defendants in civil cases; certainly not less. There is no

[5] Citing to a sworn statement filed by her husband, Bluth explains "N" stands for "Nelly," but it remains unclear who exactly Nelly is.

constitutionally valid reason for having a higher evidentiary standard in civil cases than in criminal cases on the exact same legal principle. Third, I would hold George-Michael's consent was invalid because he and Bluth were more akin to roommates than to a property owner and guest. Finally, I'm not really sure what to say about the failure to orally pronounce sentence as to the BWI conviction, but I do not think there is a problem with what the trial court did in this case regarding the sentence for the BWI conviction.

THE JURY ACTED IRRATIONALLY UNDER *JACKSON* BY JUST PICKING ONE OF MULTIPLE PEOPLE WHO WERE EQUALLY LIKELY TO HAVE COMMITTED THE OFFENSE

The purpose of a legal sufficiency review is to prevent wrongful convictions by ensuring the jury acts rationally. *See Kiffe v. State*, 361 S.W.3d 104, 112 n.2 (Tex. App.—Houston [1st Dist.] 2011, pet. ref'd). I believe the jury failed, and the majority now fails, Bluth and the public in that regard. *See id.* All of the evidence the majority cites inculpates Perfecto just as much, if not more so, than Bluth. Like Bluth, Perfecto was at the May 4, 2017 celebration; both Bluth and Perfecto were apparently angry with Austero that night; Perfecto was nearly equidistant to *The Sunset* as Bluth was after the boat was stolen because they were both physically present in the same condo building; and there is undisputed evidence that Perfecto had the same kind of notepad of green sticky notes and pink pen with the BT monogram that were identified by a Balboa Towers employee as a Balboa Towers trademark that Bluth did. The Court of Criminal Appeals has held that a jury is free to disbelieve any of witness's testimony, even if uncontroverted. *Penagraph v. State*, 623 S.W.2d 341, 343 (Tex. Crim. App. [Panel Op.] 1981). But it is not rational for a jury to believe evidence for the purpose of convicting a defendant, and then reject those same facts, supported by undisputed evidence, when it inculpates someone else to a greater degree. Such an assessment of evidence is, facially, irrational.

If we know that only one person committed an offense, and several people are equally likely to have committed the offense, it simply fails the *Jackson* standard for a jury to just pick the

person who is on trial, and say—beyond a reasonable doubt—*that* person committed the offense. *See Roberts v. State*, 681 S.W.2d 845, 846 (Tex. App.—Houston [14th Dist.] 1984, no pet.); *see also Clark v. Procunier*, 755 F.2d 394, 396 (5th Cir. 1985) ("[I]f the evidence viewed in the light most favorable to the prosecution gives equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence of the crime charged, then a reasonable jury must necessarily entertain a reasonable doubt."). I disagree that this case is an "outstanding reasonable hypothesis" case, because the evidence the jury must have believed to convict Bluth would give rise to an equal inference that Perfecto took *The Sunset*. But even if it were such a case, the Court of Criminal Appeals revived the test in *Rabb v. State*. *See* 434 S.W.3d 613, 619 (Tex. Crim. App. 2014) (Alcala, J., dissenting) (noting "the majority . . . resurrect[ed] the long-dead reasonable-alternative-hypothesis analysis"). If the evidence requires the jury to flip a coin to decide whether it is the defendant who is guilty as opposed to someone else, the evidence fails the *Jackson* standard of rationality and risks wrongful convictions. *Cf.* TEX. R. APP. P. 21.3(c) (requiring the granting of a new trial when the jury decides the case by lot).

THE PROPERTY OWNER RULE:
ARE PROPERTY OWNERS INHERENTLY MORE CREDIBLE
IN CRIMINAL CASES THAN IN CIVIL CASES?

Honestly, I disagree that *Sullivan v. State* is still good law. 701 S.W.2d 905, 908 (Tex. Crim. App. 1986). I know that we must apply civil law as handed down by the Supreme Court of Texas, and criminal law, as handed by the Texas Court of Criminal Appeals. But, on this issue, I have a fundamental problem with the Texas Supreme Court and the Texas Court of Criminal Appeals applying the exact same legal principle, and yet a plaintiff in a civil suit is held to a higher standard of proof than the State in a criminal prosecution, when criminal defendants are generally afforded greater protections. Under the current state of the law, property owners are given inherent

credibility in criminal cases, but not given the same credibility in civil cases, when the standard of proof is lower. This is just wrong.

The Supreme Court of Texas and the Court of Criminal Appeals are in palpable discord on how specific a property owner's testimony as to the value of property must be. Under the criminal standard in *Sullivan*, a property owner "may testify as to his or her opinion or estimate of the value of the property in general and commonly understood terms" without "a specific statement as to 'market value' or replacement value" and "[s]uch testimony will constitute sufficient evidence for the trier of fact to make a determination as to value based on the witness' credibility." 701 S.W.2d at 909. Under the new civil standard in *National Gas Pipeline Company of America v. Justiss*, "an owner's conclusory or speculative testimony will not support a judgment." 397 S.W.3d 150, 158 (Tex. 2012). In *Sullivan*, the Court of Criminal Appeals stated the rule it was explaining "applies both in criminal theft cases and in cases which involve only civil issues." 701 S.W.2d at 908. However, the Court of Criminal Appeals has not yet followed suit. If a property owner's conclusory testimony as to the value of property would be insufficient in a civil case, when all that is at risk is a money judgment, then why is that exact same testimony in a criminal case sufficient to send someone to prison for up to 99 years? *See* TEX. PENAL CODE 12.32(a); *id.* 31.03(e)(7). Because I believe our justice system should value liberty over dollars, I echo Bluth's sentiments that the Court of Criminal Appeals must reconsider *Sullivan* in light of *Justiss*.

RANDOLPH'S SOCIAL EXPECTATIONS TEST

I agree with the majority's explanation of the applicable law on the Fourth Amendment issue. However, I disagree with the majority's application of the law to the facts of this case. For clarity, I reemphasize that under *Georgia v. Randolph*, a third party's consent to search a residence is generally not valid as to the defendant if the defendant is present and objecting. 547 U.S. 103, 113-14 (2006). However, the third party's consent can override the defendant's express refusal to

consent if the defendant and the third party "fall within some recognized hierarchy, like a household of parent and child or barracks housing military personnel of different grades," where there is a societal understanding of a superior and an inferior. *Id.* This test gives "great significance given to widely shared social expectations, which are naturally enough influenced by the law of property, but not controlled by its rules." *Id.* at 111.

I first note that the "social expectations" standard is a horribly unclear standard for determining reasonableness of a search as a matter of constitutional law. However, *Randolph* is the only guiding authority for "disputed consent" issues such as the one before us. I respectfully disagree with the majority that *Randolph* is wholly inapplicable. Although *Randolph* speaks in terms of "tenants," the Court expressly disclaimed strict application of property law standards. What triggers *Randolph* is that two individuals are present in a residence in which they have a privacy interest and the two individuals expressly dispute whether to consent to a search. Here, George-Michael had a privacy interest in the condo because was living at the condo; Bluth was the property owner, the landlord, and an overnight guest. *See Luna v. State*, 268 S.W.3d 594, 603 (Tex. Crim. App. 2008). Because both Bluth and George-Michael had a privacy interest in the condo, the majority erroneously concludes *Randolph* is inapplicable.

Consequently, the issue turns on whether there was a recognized hierarchy that set the social expectations. *See Randolph*, 547 U.S. at 113-14. The undisputed evidence establishes that Bluth held a socially superior position to George-Michael. First, Bluth owned the condo and George-Michael's lease was only temporary. Second, according to George-Michael, Bluth is the family matriarch and the family generally defers to what she says. Third, at best, the social expectations were unclear and, it must be said under *Randolph*, that no sensible person would go inside a residence when one resident is saying come in, the other is saying stay out, and the officers are not sure who superior and who is inferior. *See id.* at 113. This complexity only further supports

the conclusion that the officers' search was unreasonable; when police officers cannot assess the social expectations of a situation, they should defer to the rights of individuals to be free from unreasonable searches and seizures. What's the harm of protecting people's constitutional rights in such a situation?

ORAL PRONOUNCEMENT OF THE SENTENCE

The trial court's failure to orally pronounce Bluth's sentence for the misdemeanor BWI conviction in her presence does not trouble me. What troubles me is the state of the law on what courts of appeals must do under such circumstances. The majority cites *Edwards v. State*, which supports that we should reverse and remand for a new punishment hearing. But in *Keys v. State*, another court of appeals determined the trial court's failure to orally pronounce the defendant's sentence, which included confinement, was a jurisdictional defect. 340 S.W.3d 526, 528 (Tex. App.—Texarkana 2011, no pet.). The *Keys* court abated and remanded for the trial court to pronounce sentence in the defendant's presence. *Id.* at 529. Thus, *Keys* and *Edwards* are in conflict, and both courts took issue with the trial court's failure to pronounce a defendant's sentence in the defendant's presence.

Despite *Keys* and *Edwards*, I see no issue with the trial court's actions in this case. Articles 42.03 and 42.12 of the Code of Criminal Procedure provide that a sentence need not be pronounced in the defendant's presence in a misdemeanor case. The sentence can be rendered in the written judgment without an oral pronouncement. Chapter 42 of the Code of Criminal Procedure makes no distinction between misdemeanor offenses that are "fine only" and those that could include punishment. *See* TEX. CODE CRIM. PROC. arts. 42.03, § 1(a), 42.14(a). Although I am not sure what effect the failure of the trial court to orally pronounce the sentence for the BWI conviction should have if it were error, I do not believe the trial court erred.

CONCLUSION

There's something fundamentally wrong when civil litigants are afforded more rights than criminal defendants under the exact same test that applies in both cases. I would therefore ask that the Court of Criminal Appeals reconsider *Sullivan* in light of *Justiss*. Furthermore, Bluth was wrongfully convicted of both offenses in this case and the jury irrationally decided Bluth committed the offense because it was necessarily more probable that Perfecto stole *The Sunset*. Thus, the trial court's judgments should be reversed, and Bluth should be acquitted on both counts.

–K. Rowland, Justice

The Texas Court of Criminal Appeals

No. PD-19-0001

Lucille **BLUTH**, Appellant

v.

STATE of Texas

From the Fifteenth Court of Appeals, 15-18-00867-CR
On Appeal from the 555th District Court, Balboa County, Texas
Trial Court No. 17-309-CR
Honorable Lionel Ping, Judge Presiding

ORDER

Lucille Bluth's petition for discretionary review is granted. The State's cross-petition for discretionary review is also granted. We order the briefing is limited to the following issues, as the parties may fairly reframe them:

1. Is there legally sufficient evidence of identity?

2. Should *Sullivan v. State*, 701 S.W.2d 905, 908 (Tex. Crim. App. 1986), be overruled?

3. Did the court of appeals err by holding the trial court properly admitted evidence about items found in Bluth's condo?

4. Did the court of appeals err by reversing the sentence for the BWI conviction and remanding for a new punishment hearing?

IT IS SO ORDERED