AFFIRM; and Opinion Filed January 18, 2017.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-15-00950-CR

THOMAS J. ELLIS, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the County Criminal Court No. 3
Dallas County, Texas
Trial Court Cause No. MA1370570-C

MEMORANDUM OPINION

Before Justices Bridges, Lang-Miers, and Whitehill
Opinion by Justice Lang-Miers

After his neighbor testified that he broke her window, a jury convicted Thomas J. Ellis of misdemeanor criminal mischief. The trial court assessed punishment at 180 days in jail but suspended the sentence and placed appellant on community supervision for 12 months. In addition, the trial court ordered appellant to pay a fine of $300 and restitution in the amount of $606.40. In one issue on appeal appellant argues that the evidence is insufficient to support his conviction because (1) the State did not prove that appellant was the perpetrator, and (2) the State did not prove that the object used to break the window was a rock, as alleged in the charging instrument. We resolve appellant's issue against him and affirm.

BACKGROUND

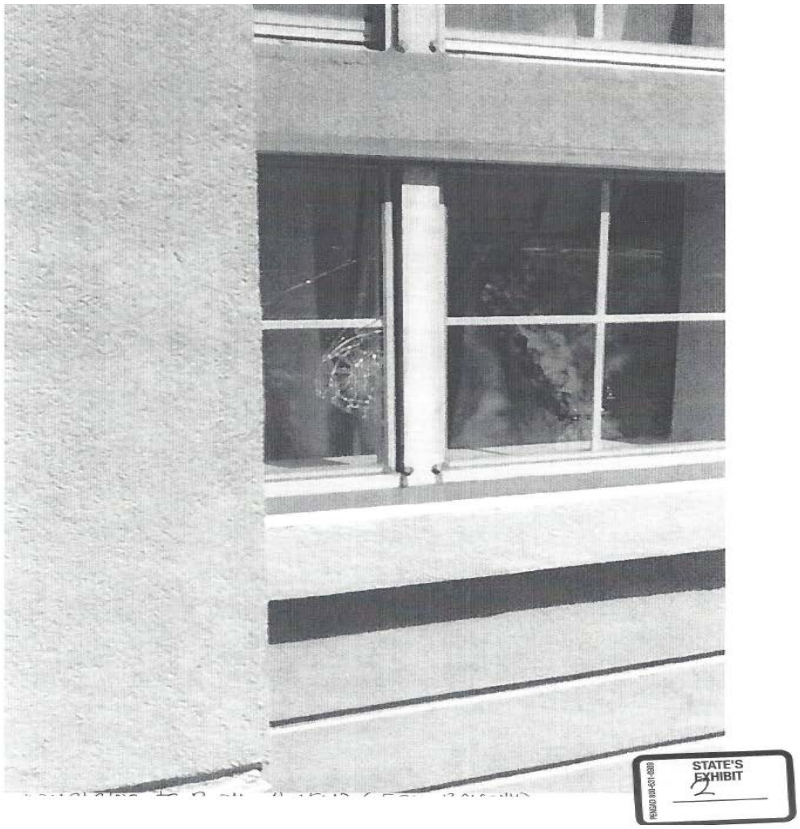
The information in this case alleged, in pertinent part, that on or about April 9, 2013, appellant intentionally and knowingly damaged and destroyed his neighbor's window by striking

it with a rock. As stated in his appellant's brief, appellant's defense theory at trial was that the allegations against him were fabricated.

The complainant lived on the fourteenth floor of a downtown high-rise shown in State's Exhibit 1:

Appellant lived directly beneath the complainant on the thirteenth floor. The complainant generally described their relationship as follows, "Mr. Ellis has been my neighbor for 8 years and he's been harassing me since the day I moved in[.]"

The complainant testified that on April 9, 2013, she went to the gym after work and arrived home around 8:00 p.m. Her friend and 4-year-old daughter were there. When she walked in she heard appellant "banging and banging and banging like crazy." She asked her friend, "What's wrong with him now?" And her friend said, "Well, he was irate since we walked in." This had become a "usual part of [her] life," so she ignored it and went into the kitchen and heated her daughter's dinner. Then she heard a different kind of noise, so she ran towards her bedroom and living area. That is when she saw something inside a fishnet stocking come straight "up and down twice" from appellant's condominium below and hit her window. When asked if she knows what was inside the stocking she responded, "I would assume a rock, something strong enough to damage a window." She could not see the person who was swinging the object, but she is certain it was appellant because he was "screaming profanities" and banging on the railing at the same time. She identified State's Exhibit 2 as a picture of her damaged window:



After watching the object break her window, the complainant called the concierge downstairs. The concierge called the police and told the complainant to call her neighbor who is also the president of the condominium association. The police and her neighbor arrived within 15 minutes. While her neighbor was there, appellant started banging again. Her neighbor heard it and said, "Don't worry about it."

The detective who investigated the incident two days after it occurred also testified for the State. He testified that he spoke to the complainant at her condominium and to the manager of the building. He also tried contacting appellant and left a card for him, but appellant did not respond. Based on his investigation, the detective concluded that there was sufficient probable cause to believe that it was appellant who damaged the complainant's window.

During cross-examination appellant's counsel showed the detective pictures of the building, including this picture, which was admitted into evidence as Defendant's Exhibit 2:

In response to cross-examination questions, the detective testified that he recalls standing on the complainant's balcony. He also testified that he recalls being able to see the windows of the unit above, despite the "two- to three-foot wall" between them. But he was "not 100% sure" whether the windows he looked at were above or below the balcony because it had been a couple of years since he was there. He also acknowledged that he did not execute a search warrant for appellant's condominium. When asked why he explained that he did not think he needed one because the complainant saw the window being broken. He also acknowledged that he did not look for the "fishnet stocking and rock or object," and did not check to see if anyone else was visiting appellant on the day in question.

After the State rested, appellant's counsel called one witness—a police officer who went to the complainant's condominium to investigate a second window that was broken on April 17, 2013, eight days after the window at issue in this case. The officer testified that during that investigation the complainant said she did not know what appellant was using to break the windows, and that she suspected it was "some type of long object." The officer talked to appellant and filed an offense report identifying him as the suspect, but there was no probable cause to arrest him that day.

During closing argument appellant's counsel argued that the State did not prove beyond a reasonable doubt that appellant broke the complainant's window. Appellant's counsel described the complainant's testimony as "accusation only," and posited that the complainant or a bird may have broken it instead.

The jury rejected appellant's defense theory and found beyond a reasonable doubt that appellant was guilty of criminal mischief as charged in the information.

ISSUE ON APPEAL

On appeal appellant argues that the evidence is legally insufficient to prove that he was the perpetrator. Alternatively, he argues that the evidence was insufficient due to a material variance between the allegation and the evidence concerning the object used to break the window.

Applicable Law and Standard of Review

A person commits the offense of criminal mischief when he intentionally or knowingly damages or destroys tangible property without the effective consent of the owner. See TEX. PENAL CODE ANN. § 28.03(a)(1) (West Supp. 2016). The degree of the offense depends upon the amount of pecuniary loss suffered by the owner. *See Holz v. State*, 320 S.W.3d 344, 345 (Tex. Crim. App. 2010).

When an appellant challenges the sufficiency of the evidence to support a conviction, we review all of the evidence in the light most favorable to the verdict to determine whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Wise v. State*, 364 S.W.3d 900, 903 (Tex. Crim. App. 2012). Evidence is sufficient if "the inferences necessary to establish guilt are reasonable based upon the cumulative force of all the evidence when considered in the light most favorable to the verdict." *Id.* If the evidence is conflicting, we "'presume that the factfinder resolved the conflicts in favor of the prosecution' and defer to that determination." *Id.* (quoting *Jackson v. Virginia*, 443 U.S. 307, 326 (1979)). This standard is the same for both direct and circumstantial evidence. *Kuciemba v. State*, 310 S.W.3d 460, 462 (Tex. Crim. App. 2010).

Reversal on evidentiary sufficiency grounds is restricted to "the rare occurrence when a factfinder does not act rationally." *Laster v. State*, 275 S.W.3d 512, 517 (Tex. Crim. App. 2009); *see Thornton v. State*, 425 S.W.3d 289, 303 (Tex. Crim. App. 2014) (stating that a reviewing

court should not act as a "thirteenth juror"). In other words, the appellate scales are weighted in favor of upholding a trial court's judgment of conviction. *Winfrey v. State*, 323 S.W.3d 875, 879 (Tex. Crim. App. 2010).

Identity of the Perpetrator

Appellant argues that the evidence was insufficient to prove that he was the perpetrator for multiple reasons: (1) there is no physical evidence to corroborate the complainant's testimony that appellant broke her window; (2) the fact that appellant was cursing at her at the time "is not sufficient in itself" to prove who broke her window; (3) the pictures of the building show that it would be impossible for appellant to swing an object from his balcony to the complainant's window "because there is a protruding column that would prevent the same"; and (4) the testimony of the police officer proves that the complainant was lying because she could not give him "an exact answer on who damaged her window" and she did not tell him that she saw it happen. We disagree.

When resolving a sufficiency challenge we must look at the combined and cumulative force of all the evidence. *Merritt v. State*, 368 S.W.3d 516, 526 (Tex. Crim. App. 2012). In this case the complainant heard appellant screaming profanities at the same time that her window in the upper floor of a high-rise was broken by an object being swung from below. The pictures introduced during trial do not conclusively demonstrate that it would be impossible for someone to swing an object from one of the balconies up and over to a window in the unit directly above. For example, State's Exhibit 1 pictured above shows what appears to be a second opening on the side of the balcony in the wall that separates the balcony from the windows on either side. And the investigator testified that he could see windows above or below when he stood on the balcony. The police officer who was called as a witness for the defense testified that he investigated a separate incident involving a second broken window that occurred eight days after

the offense at issue in this case. As a result, the police officer's testimony does not contradict the complainant's testimony nor render the evidence legally insufficient to support a finding that appellant broke the complainant's window on the date at issue here.

Considering the logical force of all the circumstantial evidence in this case, we conclude that a rational jury could have found beyond a reasonable doubt that appellant was the perpetrator.

Variance

Next, appellant argues that the evidence is also insufficient to support his conviction because "the State plead[ed] but failed to prove that a rock was used to strike the window." In other words, appellant argues that the "difference between what was alleged and what was proved" was "significant enough to be material." We disagree.

Variances occur whenever there is a discrepancy between the allegations in the charging instrument and the proof offered at trial. *Byrd v. State*, 336 S.W.3d 242, 246 (Tex. Crim. App. 2011). Variances generally fall into one of three categories: (1) variances involving statutory language that defines the offense; (2) variances involving a non-statutory allegation that describes an "allowable unit of prosecution" element of the offense; and (3) variances involving immaterial non-statutory allegations. *Johnson v. State*, 364 S.W.3d 292, 298–99 (Tex. Crim. App. 2012). To illustrate the distinction between these categories, and the corresponding effect on appeal, the court of criminal appeals has explained:

> Suppose, for example, the indictment alleges that the defendant killed Dangerous Dan McGrew. At trial, the State proves that the defendant killed Little Nell, not Dangerous Dan. That is a big mistake. Murder may be murder, but killing one person is not the same offense as killing an entirely different person. In such a case, the State has failed to prove its allegation that the defendant killed Dangerous Dan McGrew, and the defendant is entitled to an acquittal[.]
>
> Now suppose that the State proves that the defendant killed Dan McGrew, but every witness agreed that Dan was not at all dangerous and had never been called Dangerous. Or suppose that the evidence showed that the murder victim was

> really Don McGrew, Daniel Macgrew, or Dan Magoo. These are all examples of variances between the allegation and the proof, but they are little mistakes, generally not likely to prejudice a defendant's substantial rights by either (1) failing to give him notice of who it was he allegedly killed, or (2) allowing a second murder prosecution for killing the same person with a different spelling of his name. Little mistakes or variances that do not prejudice a defendant's substantial rights are immaterial. On the other hand, a conviction that contains a material variance that fails to give the defendant sufficient notice or would not bar a second prosecution for the same murder requires reversal, even when the evidence is otherwise legally sufficient to support the conviction.

Byrd v. State, 336 S.W.3d at 246–48.

Appellant's argument in this case is nearly identical to an argument recently raised and rejected in *Johnson v. State*, No. 12-14-00160-CR, 2015 WL 5439743 (Tex. App.—Tyler Sept. 16, 2015, no pet.) (mem. op., not designated for publication). In that case a defendant challenged the sufficiency of the evidence to support her conviction for criminal mischief because the State alleged that she broke windows using her foot, but the evidence showed that she broke the windows in an unspecified way. *Id.* at *5. In that case the court concluded that the variance involved an immaterial non-statutory allegation:

> The focus or gravamen of the offense charged is the damage to tangible property, not the particular way the damage was caused. Doe's testimony that Appellant broke the windows does not show an entirely different offense from the one alleged in the indictment—breaking the windows with her foot. Therefore, the allegation that Appellant used her foot to break the windows does not help define the allowable unit of prosecution, and the variance is immaterial.

Id. (internal citations omitted).

For the reasons stated by our sister court in *Johnson*, we conclude that the variance at issue in this case concerning the object that was used to damage tangible property involves an immaterial non-statutory allegation and does not render the evidence insufficient to support appellant's conviction. *See id.* (citing *Johnson*, 364 S.W.3d at 298). The variance in this case is analogous to the court of criminal appeal's hypothetical example of an immaterial variance in a case involving another result-oriented crime: "an indictment might allege that Dangerous Dan

was murdered by being stabbed with a knife, but the proof at trial might show[ ] that he was, instead, bludgeoned with a baseball bat." *Johnson*, 364 S.W.3d at 296. And as the court of criminal appeals explained, "[v]ariances such as this can never be material because such a variance can never show an 'entirely different offense' than what was alleged." *Id.* at 298.

CONCLUSION

We conclude that a rational jury could have found beyond a reasonable doubt that appellant was the perpetrator. We also conclude that the variance at issue in this case involves an immaterial non-statutory allegation. As a result, we conclude that the evidence is sufficient to support appellant's conviction. We resolve appellant's issue against him and affirm.

/Elizabeth Lang-Miers/
ELIZABETH LANG-MIERS
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

THOMAS J. ELLIS, Appellant	On Appeal from the County Criminal Court No. 3, Dallas County, Texas
No. 05-15-00950-CR V.	Trial Court Cause No. MA1370570-C. Opinion delivered by Justice Lang-Miers.
THE STATE OF TEXAS, Appellee	Justices Bridges and Whitehill participating.

Based on the Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

Judgment entered this 18th day of January, 2017.