Opinion issued June 27, 2017

In The

Court of Appeals

For The

First District of Texas

NO. 01-16-00080-CR

JANAI ATKINS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from County Criminal Court at Law No. 4
Harris County, Texas
Trial Court Case No. 1983681

MEMORANDUM OPINION

Appellant, Janai Atkins, was found guilty by a jury of Class B misdemeanor theft.[1] The trial court sentenced Appellant to 180 days in jail, suspended the

[1] At the time of the commission of the offense, theft of property valued between $50 and $500 was classified as a Class B misdemeanor. *See* Act of May 29, 2011, 82nd Leg., R.S., ch. 1234, § 21, 2011 TEX. GEN. LAWS 3302, 3310 (amended eff.

sentence, placed her on community supervision for 18 months, and assessed a $250 fine.

Appellant raises two issues on appeal. She complains that the evidence was insufficient to support the judgment and that the trial court erred when it failed to hold a hearing on her motion for new trial.

We affirm.

Background

Appellant purchased a bottle of Italian perfume for $125 at Neiman Marcus on September 14, 2014. Appellant made the purchase at a counter in the store's fragrance department. After making the purchase, Appellant walked away from the fragrance counter and then stopped to speak to a store vendor. After that, Appellant wandered around the fragrance department while talking on her cell phone. Appellant then stopped at a table, which had merchandise on it. Appellant picked up what was later described at trial as a "fragrance gift set." The gift set contained two items: the same type of Italian perfume that Appellant had just purchased and a bottle of perfumed lotion. The two items were on a tray and wrapped in clear plastic wrap.

Sept. 1, 2015) (current version at TEX. PENAL CODE ANN. § 31.03(a), (e)(2)(A) (West Supp. 2016)). Effective September 1, 2015, the statute was amended by increasing the property values, so that theft of property valued between $100 and $750 is now classified as a Class B misdemeanor. *See* Act of May 31, 2015, 84th Leg., R.S., ch. 1251, § 10, 2015 TEX. GEN. LAWS 4208, 4212.

Carrying the gift set, Appellant walked up to a counter. She placed the gift set on the counter but there was no employee working at the counter. After waiting for a while, Appellant walked away, carrying the gift set. Appellant walked to the glass doors that exited the store and stood near them, but she did not exit.

Appellant then took the elevator down to the store's lower level. She walked into the customer service department where a customer service representative gave Appellant directions to the restroom.

After she left the customer service department, Appellant walked toward the store's exit on the lower level with the gift set still in her hands. Appellant had the receipt from her purchase of the single bottle of perfume on top of the gift set, but she had not paid for the gift set. Appellant then exited the store through two sets of glass doors that led to the parking lot. Once she was outside the store, Appellant was stopped by L. Patterson, an assistant manager of loss prevention with Neiman Marcus.

Appellant was charged by information with the Class B misdemeanor offense of theft. The information read as follows:

> JANAI ATKINS, . . . on or about SEPTEMBER 14, 2014, did then and there unlawfully appropriate, by acquiring and otherwise exercising control over property, namely, TWO BOTTLES OF PERFUME, owned by L[.] PATTERSON, . . . the Complainant, of the value of over fifty dollars and under five hundred dollars, with the intent to deprive the Complainant of the property.

Before opening statements, Appellant moved to quash the information. She asserted that the there was "a consensus" that Appellant had not taken two bottles of perfume as alleged in the information. The trial court denied the motion.

In its opening statement, the defense asserted that the evidence, specifically the store surveillance video, would show that, after she purchased the single bottle of perfume for $125, Appellant realized, from speaking with the vendor, that the gift set contained the same bottle of perfume as she had just purchased and that the gift set was cheaper than the single bottle of perfume. The defense asserted that the video would then show that Appellant attempted to return the single bottle of perfume and exchange it for the gift set, which contained the same type of perfume but for a cheaper price. The defense claimed that the evidence would show that Appellant went downstairs to customer service to make the exchange but was told to go back upstairs to the fragrance department. The defense claimed that the evidence would further indicate that Appellant went out the exit door by mistake, believing that it was a way back upstairs to the fragrance department. Appellant also averred that, although the State was alleging that Appellant had taken two bottles of perfume, the evidence would show that the gift set contained only one bottle of perfume.

The State offered the surveillance video into evidence. The video showed all of Appellant's activities in the store from her purchasing the single bottle of

perfume to her walking out of the store with the fragrance gift set. However, the video did not have audio. None of the conversations that Appellant could be seen having with store employees in the video could be heard. The vendor that Appellant claimed in her opening statement had told her that the gift set was cheaper than the single bottle of perfume did not testify. And, contrary to Appellant's claim in her opening statement, the store employee seen in the video speaking to Appellant in the customer service department testified that Appellant had asked her where the restroom was located. Appellant had not asked her how to exchange the single bottle of perfume for the gift set as she had indicated in her opening statement.

The State also offered the testimony of the store's loss prevention officer, D. Cross, who operated the surveillance camera. He testified that the gift set contained two items: perfume and lotion.

On cross-examination, the defense showed Cross a photo of the gift set. The gift set was wrapped in clear plastic wrap, allowing the perfume and the lotion in the set to be viewed. The photo showed that the box for the lotion had a sticker on it, indicating a price of $98. When asked by defense counsel if the entire gift set was only $98, Cross testified that it was not. He stated that the lotion alone was $98 and that the entire gift set cost $258.

In addition, L. Patterson, the assistant manager of loss prevention who stopped Appellant as she left the store, and who was named as the complainant in the information, also testified. On direct, she testified that the gift set contained "a bottle of fragrance and a bottle of perfumed lotion." On cross-examination, Patterson testified that the gift set contained one bottle of perfume and one bottle of lotion. She was then asked whether "[i]n any way, in any form, can this be construed as two bottles of perfume?" Patterson answered, "No." However, Patterson then stated that the gift set was "a two-piece fragrance set." When further questioned by the defense whether the gift set contained two bottles of perfume, Patterson again agreed that it did not.

On redirect examination, the State asked Patterson to read the bottom of the lotion. Patterson then testified that the bottom of the lotion said that it was "perfume body cream."

After Patterson testified, the State rested, and the defense moved for a directed verdict. The defense argued that the evidence did not show that Appellant had taken two bottles of perfume as alleged in the information; rather, the evidence had shown that the gift set contained only one bottle of perfume. The trial court did not expressly deny the motion for directed verdict, but it was implicitly denied when the trial then proceeded.

During closing argument, the defense again asserted that, when Appellant had walked out of the store with the gift set, she had done so mistakenly. Appellant continued to claim that the gift set was priced less than the single bottle of perfume that she had purchased. The defense indicated that Appellant had wanted to exchange the gift set for the single bottle of perfume. Appellant averred that, while trying to get back upstairs to return the perfume, she had become confused and had walked out of the store with the gift set by mistake.

Appellant also asserted that the State had not proven that she had taken two bottles of perfume as alleged in the information. Appellant pointed to Patterson's testimony in which she had agreed that the gift set did not contain two bottles of perfume.

In its closing, the State argued that the evidence showed that Appellant had intended to walk out of the store without paying for the gift set. The State also argued that the evidence had shown that the gift set had contained two "perfume products." And it further asserted that the evidence had shown that each item in the gift set—the bottle of perfume and the lotion—individually was worth more than $50.

The jury found Appellant guilty of the offense of Class B misdemeanor theft. Appellant choose to have the trial court assess her punishment. The trial

court sentenced Appellant to 180 days in jail, suspended the sentence, placed her on community supervision for 18 months, and assessed a $250 fine.

Appellant filed a motion for new trial and supporting affidavit, asserting that she had not received effective assistance of counsel at trial, but she did not request a hearing on the motion. The State responded to Appellant's motion for new trial, offering trial counsel's affidavit to refute the claims Appellant made in her motion. The trial court then signed an order, denying Appellant's motion for new trial.

This appeal followed. Appellant presents two issues. She asserts the evidence was not sufficient to support the judgment of conviction, and she complains that the trial court erred by denying her motion for new trial without holding a hearing.

Sufficiency of the Evidence

Appellant structures her first issue as a challenge to the sufficiency of the evidence to support the judgment of conviction for the offense of Class B misdemeanor theft. As framed, Appellant asserts that the evidence is insufficient to support her conviction because a variance existed between the offense alleged in the information and the evidence admitted at trial. Appellant avers that the State failed to prove that she misappropriated two bottles of perfume worth more than $50, as alleged in the information, and as required to prove Class B misdemeanor theft. *See* Act of May 29, 2011, 82nd Leg., R.S., ch. 1234, § 21, 2011 TEX. GEN.

LAWS 3302, 3310 (amended eff. Sept. 1, 2015) (current version at TEX. PENAL CODE ANN. § 31.03(a), (e)(2)(A) (West Supp. 2016)). Appellant asserts that the evidence showed that the gift set she was accused of taking contained only one bottle of perfume, not two bottles.

Pursuant to the Penal Code in effect at the time of the instant offense, a person commited the class B misdemeanor offense of theft if she unlawfully appropriates property, valued at between $50 and $500 dollars, with the intent to deprive the owner of the property. *Id.* Although a description of the property stolen is not a substantive element of the offense, the Code of Criminal Procedure requires the State to describe the property in its charging instrument. TEX. CODE CRIM. PROC. ANN. art. 21.09 (West 2009); *Byrd v. State*, 336 S.W.3d 242, 257 (Tex. Crim. App. 2011); *see also Lehman v. State*, 792 S.W.2d 82, 84 (Tex. Crim. App. 1990) (explaining that stolen property must be generally described in charging instrument and conforming evidence must be adduced).

Due process requires that the State prove, beyond a reasonable doubt, every element of the crime charged. *See Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979); *Byrd*, 336 S.W.3d at 246. The State was required to prove, beyond a reasonable doubt, that the property alleged in the indictment was the same property shown by the evidence. *See Byrd*, 336 S.W.3d at 252. When reviewing the sufficiency of the evidence to support a conviction, we consider 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. *See Jackson*, 443 U.S. at 319, 99 S. Ct. at 2789; *Brooks v. State*, 323 S.W.3d 893, 899 (Tex. Crim. App. 2010).

Under Texas state law, we measure the sufficiency of the evidence by the elements of the offense as defined by the hypothetically correct jury charge for the case. *Gollihar v. State*, 46 S.W.3d 243, 252–53 (Tex. Crim. App. 2001); *Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997). Such a hypothetically correct jury charge is one that accurately sets out the law, is authorized by the charging instrument, does not unnecessarily increase the State's burden of proof or unnecessarily restrict the State's theories of liability, and adequately describes the particular offense for which the defendant was tried. *See Gollihar*, 46 S.W.3d at 253; *Malik*, 953 S.W.2d at 240. However, sometimes the words in the charging instrument do not perfectly match the evidence at trial. *Byrd*, 336 S.W.3d at 246.

"The hypothetically correct jury charge does not necessarily have to track all of the charging instrument's allegations—'a hypothetically correct charge need not incorporate allegations that give rise to immaterial variances.'" *Daugherty v. State*, 387 S.W.3d 654, 665 (Tex. Crim. App. 2013) (quoting *Gollihar*, 46 S.W.3d at 253, 256). A variance occurs when there is a discrepancy between the charging instrument and proof at trial. *Id.* A variance is material if it (1) failed to provide

the defendant with sufficient notice of the charges against her such that she was unable to prepare an adequate defense at trial, or (2) would subject the defendant to the risk of being prosecuted later for the same crime. *Fuller v. State*, 73 S.W.3d 250, 253 (Tex. Crim. App. 2002); *Gollihar*, 46 S.W.3d at 257. Only a material variance between the charging instrument and the proof at trial will render the evidence insufficient to support the conviction. *Gollihar*, 46 S.W.3d at 257.

Even if we accept Appellant's argument that the perfumed lotion in the gift set is not "perfume," and thus a variance occurred, we conclude that such variance was not material. In her brief, Appellant offers no argument that she was without sufficient notice of the charged offense. At trial, Appellant's defense was to negate the intent element of the theft offense. Throughout trial, Appellant defended against the State's theft charge by asserting that she had mistakenly walked out the exit door with the gift set. She claimed that she had wanted to exchange the gift set for the bottle of perfume that she had purchased because she believed the gift set, which contained the same type of perfume as she had purchased, was cheaper. Appellant further claimed that she was attempting to walk back up to the fragrance department when she went out the exit door, mistakenly believing that there was a stairway outside that led back upstairs. The record indicates that Appellant had formulated this defense already at the time of her opening statement. This was

before the State offered its evidence showing that the gift set contained a bottle of perfume and a bottle of perfumed lotion and not two bottles of perfume.

In addition, Appellant elicited testimony from the State's witnesses to support this defensive theory. For example, defense counsel questioned the customer service representative regarding whether she told Appellant to go back upstairs to return the perfume. The questioning intimated that Appellant was doing what the customer service representative had told her to do when she mistakenly exited the store.

While cross-examining the State's witnesses, Appellant also pointed out that she is seen in the surveillance video speaking to a store vendor after she purchased the perfume. Through her questions, Appellant introduced the idea that the vendor had told her that the gift set was cheaper than the perfume and that had prompted her to pick up the gift set from the table and then attempt to exchange it for the perfume.

Throughout trial, Appellant also asserted that the State could not prove its case because the gift set did not contain two bottles of perfume as alleged in the information. Appellant first made this assertion during her opening statement. Appellant then elicited testimony from Cross and from Patterson to support her position that the gift set contained only one bottle of perfume. And, during her closing statement, Appellant argued that she should be found not guilty because the

State could not prove that she had unlawfully appropriated two bottles of perfume. Thus, the record shows that Appellant used the variance as another means to argue to the jury that it should find her not guilty. In short, the record does not reflect Appellant was either confused or surprised by the variance or that her defense was prejudiced by the State's failure to prove the property description exactly as alleged in the information. *See Fuller*, 73 S.W.3d at 254 ("There is no indication in the record that appellant did not know whom he was accused of injuring or that he was surprised by the proof at trial.").

Nor does the purported variance prevent the application of double jeopardy to this case. The evidence at trial showed that Appellant exited the store with a gift set containing perfume and perfumed lotion without paying for it. The video showing Appellant pick up the gift set and ultimately leave the store with it was admitted into evidence. In addition, a close-up photo of the gift set, which the parties did not dispute was the item Appellant was accused of taking, shows the word "parfum" on both the box for the perfume and on the box for the lotion.

From the record, it is clear that the items shown at trial to be in the gift set are the same property as the "two bottles of perfume" described in the information. *See Gollihar*, 46 S.W.3d at 258 (citing *United States v. Apodaca*, 843 F.2d 421, 430 n.3 (10th Cir. 1988) for proposition that entire record, not just indictment, may be considered in determining whether double jeopardy precludes subsequent

prosecution). Appellant is in no danger of being prosecuted again for the theft of the items contained in the gift set.

The record shows that Appellant was provided with sufficient notice of the charges against her to prepare an adequate defense at trial, and she would not be subject to being prosecuted later for the same crime. *See Fuller*, 73 S.W.3d at 253–54; *Gollihar*, 46 S.W.3d at 257. Thus, we conclude that the variance between the information and the proof at trial was immaterial. We hold that the evidence was sufficient to support the judgment of conviction. *See Jackson*, 443 U.S. at 319, 99 S. Ct. at 2789.

We overrule Appellant's first issue.

Hearing on Motion for New Trial

In her second issue, Appellant claims that the trial court abused its discretion because it did not conduct a hearing on her motion for new trial.

The right to a hearing on a motion for new trial is not absolute. *Rozell v. State*, 176 S.W.3d 228, 230 (Tex. Crim. App. 2005). Preservation of a complaint that the trial court abused its discretion by not holding an evidentiary hearing on a motion for new trial requires a defendant to give notice to the trial court that she desires a hearing on the motion. *Id.* ("[A] reviewing court does not reach the question of whether a trial court abused its discretion in failing to hold a hearing if no request for a hearing was presented to it."); *see also Gardner v. State*, 306

S.W.3d 274, 305–06 (Tex. Crim. App. 2009) (holding attached document entitled "Order for a Setting" was insufficient to request hearing). To give proper notice, the defendant must present the motion to the trial court within ten days of filing it, and the motion must inform the trial court that the defendant wants a hearing. TEX. R. APP. P. 21.6; *Perez v. State*, 429 S.W.3d 639, 643–44 (Tex. Crim. App. 2014) (holding error not preserved because there was no evidence that attorney took steps to get hearing or obtain ruling on request for hearing); *Gardner*, 306 S.W.3d at 305 (noting that presentment must be apparent from the record).

Presentment may be established in various ways. *Jenkins v. State*, 495 S.W.3d 347, 353 (Tex. App.—Houston [14th Dist.] 2016, no pet.). Here, Appellant correctly points out that the record establishes that she presented her motion to the trial court, as required by Rule of Appellate Procedure 21.6, because the trial court signed an order denying her motion. *See Carranza v. State*, 960 S.W.2d 76, 79 (Tex. Crim. App. 1998) (holding that presentment can be shown by obtaining trial court's ruling on a motion for new trial). "The mere presentment of the motion, however, does not establish that the trial court had notice of appellant's desire for a hearing." *Jenkins*, 495 S.W.3d at 353.

Here, the record does not reflect that Appellant sought a hearing on her motion for new trial. She did not include an express request for a hearing within the text of her motion; nor does the record contain any other filing in which

Appellant asked the trial court for a hearing.[2] We hold that Appellant did not adequately advise the trial court of her desire to have a hearing. *See Rozell*, 176 S.W.3d at 231. Thus, she has not preserved her complaint regarding the trial court's failure to conduct a hearing on her motion for new trial. *See id.*

We overrule Appellant's second issue.

C**onclusion**

We affirm the judgment of the trial court.

Laura Carter Higley
Justice

Panel consists of Justices Higley, Bland, and Brown.

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[2] We note that the word "hearing" appears twice in the motion for new trial as follows: (1) "A hearing must be commenced before the 75th day after the sentence, which is January 30, 2016, or this motion is overruled by operation of law"; and (2) "For the foregoing reasons, and for such other reasons that may arise on the hearing of this Motion, Defendant requests a new trial." Neither of these statements are a request for a hearing. In another case involving the same language in a motion for new trial, the court determined the two statements were not a request for a hearing. The court wrote, "The first statement establishes the timeline for the motion, and the second presumes a hearing will be conducted." *See Melendez v. State*, No. 14-08-00513-CR, 2009 WL 3365876, at *2 n.4 (Tex. App.—Houston [14th Dist.] Sept. 10, 2009, no pet.) (mem. op., not designated for pub.). We also note that at the end of the motion in this case, following the certificate of service, appears the heading "Order For Setting"; however, there is no text below the heading. *Cf. Gardner v. State*, 306 S.W.3d 274, 305–06 (Tex. Crim. App. 2009) ("Although the motion contains a document titled 'Order for a Setting,' that document does not suffice as a request to hold a hearing on the motion.").

Do not publish. TEX. R. APP. P. 47.2(b).