Affirmed and Memorandum Opinion filed June 10, 2010.

In The

Fourteenth Court of Appeals

NO. 14-09-00056-CR

JEFFERY WHEATLEY, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 52nd District Court
Coryell County, Texas
Trial Court Cause No. FO-07-19168

MEMORANDUM OPINION

Appellant Jeffery Wheatley was convicted of harassment by persons in certain correctional facilities and sentenced to life imprisonment. Appellant raises six issues on appeal. We affirm the judgment of the trial court.

FACTUAL AND PROCEDURAL BACKGROUND

At the time of the offense, appellant was incarcerated in the Alfred D. Hughes Unit (the "Hughes Unit") of the Texas Department of Criminal Justice, Institutional Division (the "TDCJID"). Appellant was housed in the Hughes Unit's administrative

segregation area and was on container restriction.[1] Officer Ian Siverly testified that he and Officer Luis Maldonado were escorting inmate Billy Fisher from a shower to Fisher's cell. To reach Fisher's cell ("Cell 77"), they had to pass inmate David Duran ("Cell 74"), appellant ("Cell 75"), and inmate Charlie Benjamin ("Cell 76"). As Siverly and Fisher passed between Cells 74 and 75, they were squirted with a substance shown by the evidence to be human or animal feces. Neither Siverly nor Maldonado saw who sprayed the feces, but they each testified there was a trail of feces leading from Cell 75's food slot and door to where Siverly and Fisher were standing. In a statement given to an inmate counselor, Fisher acknowledged seeing feces trickling down Cell 75's food slot and door but stated he did not see who sprayed the feces. At trial, Fisher testified that he identified appellant as the culprit immediately after the incident, but stated he only did so because he and appellant were arguing at the time. Siverly testified Fisher never identified appellant as the culprit and also stated he was one hundred percent sure the feces came from Cell 75. After being informed of the incident, Lieutenant Michael Miller responded to the cell-block and searched Cells 75 and 77 for containers of feces but found none. Miller also noted the presence of feces on Cell 75's door and the ground in front of the cell.

Inmates Duran and Benjamin testified for the defense. Duran stated the feces were sprayed from Cell 76, not Cell 75. Benjamin, Duran, and Fisher each testified that Fisher and Benjamin were arguing on the day of the offense over the amount of noise Fisher made while Benjamin slept. Benjamin stated he used a shampoo bottle filled with feces to spray Fisher because of this argument and that the bottle was found in front of Cell 75 after Benjamin rolled it through a hole between the ground and his cell door. Benjamin also stated that he told prison officers appellant did not spray the feces. Miller testified

[1] According to the testimony at trial, inmates housed in administrative segregation are confined in single-person cells for twenty-three hours per day and are not allowed to leave their cells unless strip-searched, handcuffed, and escorted by two correctional officers. Inmates on container restriction are prohibited from keeping any containers in their cells. Inmates are typically placed on container restriction for using containers to assault another person.

that no container was found in or near Cell 75 and that Benjamin never informed anyone appellant was not the culprit. Benjamin, Duran, and Fisher also testified that Maldonado was not with Siverly when the incident occurred.

Appellant was subsequently charged by indictment with two counts of felony harassment by persons in certain correctional facilities. The first count alleged that appellant, with intent to harass, alarm, or annoy, caused Siverly to come into contact with human or animal urine. The second count alleged that appellant, with intent to harass, alarm or annoy, caused Siverly to come into contact with human or animal feces. Appellant pleaded "not guilty" to both counts. After both sides rested at trial, the State decided to proceed with only the second count. The jury found appellant guilty of the offense. The indictment also included two enhancement paragraphs alleging that appellant had two prior felony convictions. Appellant pleaded "not true" to both of the enhancements. At the conclusion of the punishment phase, the jury found both enhancements "true." Appellant was sentenced to life imprisonment.

Appellant raises six issues on appeal, contending that the evidence is legally and factually insufficient to support his conviction, the trial court erred by refusing to give the jury a limiting instruction after a witness invoked the Fifth Amendment in the jury's presence, the trial court erred in admitting an unauthenticated copy of a document relating to one of the enhancement offenses, the evidence is legally insufficient to support the jury's finding that appellant is a habitual or repeat offender, and there is a fatal variance between the final conviction date for the first enhancement offense as alleged in the indictment and the date proved at trial.[2]

[2] This appeal was transferred to this court from the Tenth Court of Appeals. In cases transferred from one court of appeals to another, the transferee court must decide the case in accord with the precedent of the transferor court if the transferee court's decision would have been inconsistent with the precedent of the transferor court. *See* TEX. R. APP. P. 41.3.

LEGAL AND FACTUAL SUFFICIENCY OF THE EVIDENCE

In his third and fourth issues, appellant argues the evidence is legally and factually insufficient to establish his guilt. To support a conviction, the State is required to prove beyond a reasonable doubt that appellant, while imprisoned or confined in a correctional facility and with intent to harass, alarm, or annoy, caused Siverly to come into contact with human or animal feces. *See* Act of May 16, 2003, 78th Leg., R.S., ch. 878, § 1, 2003 Tex. Gen. Laws 2688, 2688 (amended 2005) (current version at TEX. PENAL CODE ANN. § 22.11(a) (Vernon Supp. 2009)). Appellant contends only that the evidence does not show he caused Siverly to come into contact with feces.

a) Standards of Review

In reviewing the legal sufficiency of the evidence, we view the evidence in the light most favorable to the verdict and determine whether a rational trier of fact could find the essential elements of an offense beyond a reasonable doubt. *Salinas v. State*, 163 S.W.3d 734, 737 (Tex. Crim. App. 2005). As the trier of fact, the jury "is the sole judge of the credibility of the witnesses and of the strength of the evidence." *Fuentes v. State*, 991 S.W.2d 267, 271 (Tex. Crim. App. 1999). The jury may choose to believe or disbelieve any portion of the testimony at trial. *Sharp v. State*, 707 S.W.2d 611, 614 (Tex. Crim. App. 1986). Additionally, the jury may draw reasonable inferences from basic facts to ultimate facts. *Clewis v. State*, 922 S.W.2d 126, 133 (Tex. Crim. App. 1996). When faced with conflicting evidence, we presume the trier of fact resolved conflicts in the prevailing party's favor. *Turro v. State*, 867 S.W.2d 43, 47 (Tex. Crim. App. 1993). However, our duty as a reviewing court requires us to ensure that the evidence presented actually supports a conclusion that the defendant committed the crime charged. *Williams v. State*, 235 S.W.3d 742, 750 (Tex. Crim. App. 2007). It is not necessary for every fact to point directly and independently to the accused's guilt, so long as the cumulative force of all the incriminating circumstances is sufficient to support the conviction. *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007). Circumstantial

evidence is as probative as direct evidence in establishing an accused's guilt and is alone sufficient to support a conviction. *Guevara v. State*, 152 S.W.3d 45, 49 (Tex. Crim. App. 2004).

While conducting a factual sufficiency review, we view all the evidence in a neutral light and will set aside the verdict only if we are able to say, with some objective basis in the record, that the conviction is clearly wrong or manifestly unjust because the great weight and preponderance of the evidence contradicts the jury's verdict. *Watson v. State*, 204 S.W.3d 404, 414–17 (Tex. Crim. App. 2006). We cannot declare that a conflict in the evidence justifies a new trial simply because we disagree with the jury's resolution of that conflict, and we do not intrude upon the fact-finder's role as the sole judge of the weight and credibility of any witness' testimony. *See id.* at 417; *Fuentes*, 991 S.W.2d at 271. The fact-finder may choose to believe all, some, or none of the testimony presented. *Cain v. State*, 958 S.W.2d 404, 407 n.5 (Tex. Crim. App. 1997); *Chambers v. State*, 805 S.W.2d 459, 461 (Tex. Crim. App. 1991). In our review, we discuss the evidence appellant claims is most important in allegedly undermining the jury's verdict. *Sims v. State*, 99 S.W.3d 600, 603 (Tex. Crim. App. 2003). If we determine the evidence is factually insufficient, we must explain in exactly what way we perceive the conflicting evidence to greatly preponderate against conviction. *Watson*, 204 S.W.3d at 414.

b) Analysis

Appellant argues the jury's verdict is not supported by the evidence because it is supported mainly by circumstantial, and not direct, evidence. This argument fails, however, because circumstantial evidence alone is sufficient to establish guilt. *Hooper*, 214 S.W.3d at 15; *Guevara*, 152 S.W.3d at 49. Appellant further contends the jury was forced to rely on speculation and "guess" whether appellant, Benjamin, or Duran committed the offense because no one saw who sprayed Siverly with feces. *See Hooper*, 214 S.W.3d at 16 (stating juries are not permitted to draw conclusions based on

speculation). So long as other evidence establishes guilt for the offense, eyewitness testimony is not necessary. *See Greene v. State*, 124 S.W.3d 789, 792 (Tex. App.—Houston [1st Dist.] 2003, pet. ref'd); *see also Hooper*, 214 S.W.3d at 14 ("[D]irect evidence of the elements of the offense is not required."); *Martin v. State*, 246 S.W.3d 246, 261 (Tex. App.—Houston [14th Dist.] 2007, no pet.) (same). The jury is entitled to draw reasonable inferences from the evidence presented at trial. *See Hooper*, 214 S.W.3d at 14; *Martin*, 246 S.W.3d at 261.

The undisputed evidence at trial shows that Cell 75's food slot and door, as well as the ground in front of Cell 75, were splattered with feces. Several witnesses testified that there was a trail of feces leading directly from Cell 75 to Siverly, and Siverly testified he was positive the feces came from Cell 75. Appellant was the sole occupant of Cell 75. There is no evidence of fecal matter being present on any cell other than Cell 75, or of a trail of feces leading to Siverly from any cell other than Cell 75. From these facts the jury could reasonably infer that appellant sprayed the feces from Cell 75. *See Hooper*, 214 S.W.3d at 14; *Martin*, 246 S.W.3d at 261. The jury was not required to "guess" to reach a conclusion that appellant committed the offense.

Appellant also contends evidence the evidence is legally and factually insufficient because appellant was on container restriction at the time of the offense, while Benjamin and Duran were not, and no feces-filled container was found during officers' search of Cell 75. In addition to this evidence, the jury also heard testimony that inmates on container restriction still manage to collect containers, containers are often flushed into the prison sewer system, and it is not rare for investigators to be unable to find containers used by inmates to spray various substances on other individuals. We presume the jury resolved this evidentiary conflict in the State's favor. *See Turro*, 867 S.W.2d at 47; *State v. Moreno*, 297 S.W.3d 512, 522 (Tex. App.—Houston [14th Dist.] 2009, pet. ref'd). Appellant also argues that Benjamin's statement that he sprayed the feces, in conjunction with statements by Duran and Fisher that appellant was not the culprit, show appellant is

not guilty of the offense. As the sole judge of witness credibility, the jury was free to believe or disbelieve Benjamin's admission, as well as the testimony of Duran and Fisher. *See Fuentes*, 991 S.W.2d at 271; *Chambers*, 805 S.W.2d at 461. Based on the verdict, the jury chose not to believe the testimony of Benjamin, Duran, or Fisher. We may not substitute the jury's determinations with our own, especially when dealing with the weight and credibility of the evidence. *See Johnson v. State*, 23 S.W.3d 1, 9 (Tex. Crim. App. 2000).

Viewing the evidence in the light most favorable to the verdict, we find that a rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *See* Act of May 16, 2003, 78th Leg., R.S., ch. 878, 2003 Tex. Gen. Laws 2688 (amended 2005); *Salinas*, 163 S.W.3d at 737. Thus, the evidence is legally sufficient to support appellant's conviction. We also find that the evidence is factually sufficient to support the jury's verdict because, after neutrally reviewing the record, we cannot say the great weight and preponderance of the evidence contradicts the jury's verdict. *See Watson*, 204 S.W.3d at 414–17. We therefore overrule appellant's third and fourth issues.

TRIAL COURT'S FAILURE TO PROVIDE A NO-ADVERSE-INFERENCE LIMITING INSTRUCTION

In his fifth issue, appellant alleges that the trial court erred by refusing to give the jury a limiting instruction that it could not draw an adverse inference against appellant based on Duran's invocation of his Fifth Amendment right against self-incrimination. During the State's cross-examination of Duran, the prosecutor asked Duran why he was serving time in prison. Appellant objected to this question, arguing that the probative value of Duran's prior conviction was outweighed by its prejudicial value. *See* TEX. R. EVID. 609. The jury was removed from the courtroom, and Duran stated he had been convicted of aggravated sexual assault of a child. The trial court overruled appellant's objection but agreed to instruct the jury that it could only consider Duran's prior

conviction for the purpose of evaluating his credibility after Duran answered the State's question in front of the jury. When the jury returned, the following exchange occurred:

> [Prosecutor]: Have you been convicted of a felony?
>
> [Duran]: I would like to tell the Court that this Court doesn't have jurisdiction over me under article 1, 2, 3, and I plead the Fifth because you do not have no [sic] subject [sic] over me. I am not part of your compact, and you cannot prove I'm part of your compact or your constitution. You cannot subject me to anything.
>
> [The Court]: All right. You'll answer the question.
>
> [Duran]: You don't have no [sic] jurisdiction over me.
>
> [The Court]: I actually do have jurisdiction over you. You'll answer the question. I'm directing you to answer the question.
>
> [Duran]: I don't recall. Could you please refresh my memory. I would like some type of proof that this is a final conviction. Do you have any documents showing—
>
> [The Court]: All right. Will you answer the question or not answer the question?
>
> [Duran]: I don't recall. That was my answer.
>
> [The Court]: All right. Proceed.
>
> [Prosecutor]: I don't have any further questions.

Then, at appellant's request, the jury was again removed from the courtroom and appellant asked the trial court to instruct the jury that it could not draw an adverse inference against appellant because Duran invoked his Fifth Amendment privilege. In denying appellant's request, the trial court stated "I did not hear an assertion of the right against self-incrimination." Appellant contends that the trial court abused its discretion in denying the requested instruction.

a) Standard of Review

Generally, the jury is not permitted to view a witness, other than the accused, invoke the Fifth Amendment and decline to testify. *See Ellis v. State*, 683 S.W.2d 379, 382–83 (Tex. Crim. App. 1984); *Williams v. State*, 800 S.W.2d 364, 367 (Tex. App.—Fort Worth 1990, pet. ref'd). If a witness invokes a claim of privilege in the jury's presence, a party "against whom the jury might draw an adverse inference" is entitled to, upon request, an instruction that the jury not draw any adverse inference from the witness's claim of privilege. *See* TEX. R. EVID. 513(d); *Benitez v. State*, 5 S.W.3d 915, 919 (Tex. App.—Amarillo 1999, pet. ref'd). The record shows that Duran invoked the Fifth Amendment by stating "I plead the Fifth"; therefore, the trial court erred in refusing to provide appellant's requested no-adverse-inference instruction.

When reviewing a trial court's refusal to grant a limiting instruction, we conduct a harmless error analysis pursuant to Texas Rule of Appellate Procedure 44.2(b). *See Jones v. State*, 944 S.W.2d 642, 653 (Tex. Crim. App. 1996); *Lemmons v. State*, 75 S.W.3d 513, 524–25 (Tex. App.—San Antonio 2002, pet. ref'd). We must disregard non-constitutional errors that do not affect a criminal defendant's substantial rights. *See* TEX. R. APP. P. 44.2(b); *Garcia v. State*, 126 S.W.3d 921, 927 (Tex. Crim. App. 2004). A substantial right is affected when an error has a substantial and injurious effect or influence on the jury's verdict. *See Garcia*, 126 S.W.3d at 927; *Austin v. State*, 222 S.W.3d 801, 812 (Tex. App.—Houston [14th Dist.] 2007, pet. ref'd). We must examine the entire record to determine if the error had no influence on the jury or had but a slight effect. *Casey v. State*, 215 S.W.3d 870, 885 (Tex. Crim. App. 2007); *Austin*, 222 S.W.3d at 812. We consider the nature of the evidence supporting the verdict, the character of the alleged error, how the error might be considered in connection with other evidence in the case, and whether the State emphasized the error. *See Bagheri v. State*, 119 S.W.3d 755, 763 (Tex. Crim. App. 2003); *Austin*, 222 S.W.3d at 812; *see also Martinez v. State*, 188 S.W.3d 291, 293 (Tex. App.—Waco 2006, pet. ref'd).

b) Analysis

After reviewing the record as a whole, we find that the trial court's failure to provide a no-adverse-inference limiting instruction was harmless. As discussed above, the jury heard sufficient evidence to support appellant's conviction. Even if the jury disbelieved Duran's testimony because he invoked the Fifth Amendment, appellant was still able to present evidence of a defensive theory through Benjamin's claim that he committed the offense and Fisher's testimony that appellant did not spray the feces. *See Martinez*, 188 S.W.3d at 293 (listing defensive theories as a factor to consider when conducting a harm analysis). Additionally, the State did not emphasize Duran's invocation of the Fifth Amendment after Duran's testimony or during closing argument. *See id.* Furthermore, Duran's informing the jury that he had been convicted of aggravated sexual assault of a child would not incriminate appellant because it does not show appellant was involved in spraying Siverly with feces. *See, e.g.*, *Triplett v. State*, 292 S.W.3d 205, 210 n.10 (Tex. App.—Amarillo 2009, pet. ref'd) (stating an incriminating statement is one that tends to establish the guilt of an accused).

The trial court's failure to provide a no-adverse-inference limiting instruction had no influence on the jury or had but a slight effect. *See Austin*, 222 S.W.3d at 812.[3] Therefore, the trial court did not err in failing to grant appellant's requested instruction. We overrule appellant's fifth issue.

[3] *Cf. Hudnall v. State*, No. 01-07-00858-CR, 2008 WL 2985435, at *9–10 (Tex. App.—Houston [1st Dist.] July 31, 2008, pet. ref'd) (mem. op., not designated for publication) (finding appellant's substantial rights were affected where trial court failed to give limiting instruction after co-defendant repeatedly invoked his Fifth Amendment rights and refused to testify concerning his involvement in an aggravated kidnapping because co-defendant's refusal to testify left the jury with the "indelible impression" that appellant participated in the offense); *Torres v. State*, 137 S.W.3d 191, 197–99 (Tex. App.—Houston [1st Dist.] 2004, no pet.) (reversing appellant's conviction for trial court's failure to include a no-adverse-inference jury instruction and stating that a co-defendant's invocation of the Fifth Amendment could be used to incriminate appellant, who was charged as a party to possession with intent to deliver cocaine with the co-defendant).

PUNISHMENT PHASE FACTUAL AND PROCEDURAL BACKGROUND

Appellant's remaining issues are related to the evidence presented during the punishment phase of trial. The indictment contains the following enhancement paragraphs:

> And it is further presented in and to said Court that, prior to the commission of the aforesaid offense (hereafter styled the primary offense), on the 5th day of October 1987, in Cause # 462089 in the 178th District Court of Harris County, Texas, the defendant was convicted of the felony offense of Aggravated Robbery.
>
> And it is further presented in and to said Court that, prior to the commission of the primary offense and after the conviction in Cause # 462089 was final, the defendant committed the felony offense Harassment by a person in Certain Correctional Facilities and was convicted on the 5th day of August 2002, in Cause # F0-01-16,172 in the 52nd Judicial Court of Coryell County Texas.

During the punishment phase, the State introduced a copy of appellant's penitentiary packet into evidence ("State's Exhibit 20"). State's Exhibit 20 contains copies of appellant's photograph, the judgments in cause numbers 462089 and F0-01-16,172, appellant's fingerprints, and affidavits attesting that State's Exhibit 20 represents a true and correct copy of appellant's records on file with the TDCJID. Israel Brionez, a certified fingerprint examiner, testified that the fingerprints contained in State's Exhibit 20 matched those he took from appellant during trial. During cross-examination, appellant's counsel introduced a mandate from the First Court of Appeals ("Defendant's Exhibit 10") reversing and remanding appellant's conviction in cause number 462089. Nothing in State's Exhibit 20 indicates this reversal.

The following day, the trial court admitted a second penitentiary packet into evidence ("State's Exhibit 26"), and Brionez testified that appellant's fingerprints taken during trial matched those found in State's Exhibit 26. State's Exhibit 26 contains a copy of the judgment on remand of cause number 462089; however, this judgment contains a notation that appellant filed a notice of appeal following judgment on remand. State's

Exhibit 26 does not show the disposition of this appeal. The State also attempted to admit a separate facsimile copy of a mandate issued by the Eighth Court of Appeals ("State's Exhibit 23") on August 8, 1990, affirming the judgment after remand in cause number 462089. The trial court admitted State's Exhibit 23 over appellant's objection that the State failed to show it was a properly authenticated facsimile copy of the original mandate.

ADMISSIBILITY OF STATE'S EXHIBIT 23

In his first issue, appellant argues that the trial court erred in admitting State's Exhibit 23 into evidence because the State failed to show (1) that it exercised reasonable diligence in attempting to obtain a non-facsimile version of a properly authenticated copy of the mandate or (2) that the facsimile copy of the mandate met the admissibility requirements of the Texas Rules of Evidence 902 ("Self-Authentication"), 1003 ("Admissibility of Duplicates"), and 1005 ("Public Records"). In response, the State contends that State's Exhibit 23 was properly admitted because the trial court could have believed a reasonable juror could find State's Exhibit 23 had been authenticated or identified. *See* TEX. R. EVID. 901(a) ("Requirement of Authentication or Identification"); *Druery v. State*, 225 S.W.3d 491, 502 (Tex. Crim. App. 2007).

a) Standard of Review

We apply an abuse of discretion standard when reviewing a trial court's decision to admit or exclude evidence. *See Ramos v. State*, 245 S.W.3d 410, 417–18 (Tex. Crim. App. 2008); *Oprean v. State*, 201 S.W.3d 724, 726 (Tex. Crim. App. 2006). A trial court's evidentiary ruling will be upheld so long as it is within the "zone of reasonable disagreement" and correct under any legal theory applicable to the case. *See Winegarner v. State*, 235 S.W.3d 787, 790 (Tex. Crim. App. 2007); *Kacz v. State*, 287 S.W.3d 497, 501–02 (Tex. App.—Houston [14th Dist.] 2009, no pet); *Johnson v. State*, 263 S.W.3d 405, 419 (Tex. App.—Waco 2008, pet. ref'd).

b) Analysis

A document may be authenticated under either Texas Rule of Evidence 901 or 902 and need not be authenticated under both. *See Reed v. State*, 811 S.W.2d 582, 586 (Tex. Crim. App. 1991) (op. on reh'g); *Hull v. State*, 172 S.W.3d 186, 189 (Tex. App.—Dallas 2005, pet. ref'd). Under rule 901, "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." TEX. R. EVID. 901(a); *see also Druery*, 225 S.W.3d at 502. The rule does not limit the type of extrinsic evidence which may be used. *See Hull*, 172 S.W.3d at 189. Under rule 901(b)(7), public records or reports may be authenticated by "[e]vidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept." TEX. R. EVID. 901(b)(7). Thus, a public record may be authenticated by "showing that the document is from a public office authorized to keep such a record." *Hull*, 172 S.W.3d at 189.

The TDCJID is authorized to keep records such as the mandate affirming appellant's aggravated robbery conviction. *See Reed*, 811 S.W.2d at 587 (stating the TDCJID is authorized to keep inmates' judgment and sentencing records under rule 901, because the TDCJID relies on these records as its basis for admitting prisoners and keeping them in custody); *Hull*, 172 S.W.3d at 189–90 (concluding copies of orders kept by the Hunt County Clerk's Office were admissible under rule 901, because the clerk's office is authorized to keep documents from juvenile courts); *Spaulding v. State*, 896 S.W.2d 587, 590 (Tex. App.—Houston [1st Dist.] 1995, no pet.) (holding certified driver's license report created by Texas Department of Public Safety was sufficient extrinsic evidence that a photograph of appellant's driver's license entered into evidence was authentic and from official Department of Public Safety records). We need not decide whether the TDCJID is a public office because State's Exhibit 23 is a correct copy

of the document the TDCJID relies upon when compiling inmate records. This "constitutes extrinsic evidence that the records are what the proponent claims them to be." *See Reed*, 811 S.W.2d at 587 (citing TEX. R. EVID. 901(a)); *see also Hull*, 172 S.W.3d at 189–90 (declining to decide whether the Hunt County Clerk's Office is a public office because evidence that the records admitted at trial were relied upon by the clerk's office constituted extrinsic evidence the records were what the proponent claimed).

State's Exhibit 23 consists of (1) a partial certification and signature of the Harris County District Clerk, (2) a partial seal of the State of Texas, (3) a stamp showing the document was filed in the Harris County District Clerk's office, (4) the signature of the Deputy Clerk of the Eighth Court of Appeals, and (5) the sworn affidavit of an Administrative Assistant to the TDCJID's State Classification Committee stating the document is a correct representation of the mandate on file with the TDCJID. The mandate also identifies appellant, the trial court that entered judgment on remand, and the cause number for appellant's aggravated robbery conviction. We conclude that this is sufficient evidence from which a reasonable juror could find State's Exhibit 23 had been properly authenticated or identified. *See* TEX. R. EVID. 901; *Druery*, 225 S.W.3d at 502. Because State's Exhibit 23 was admissible under rule 901, the trial court did not abuse its discretion by admitting it into evidence. *See Winegarner*, 235 S.W.3d at 790; *Kacz*, 287 S.W.3d at 501–02; *Johnson*, 263 S.W.3d at 419. Because we conclude State's Exhibit 23 was properly authenticated under rule 901, we need not discuss appellant's argument that it was not properly authenticated under rules 902, 1003, and 1005. *See Reed*, 811 S.W.2d at 586; *Hull*, 172 S.W.3d at 190. We overrule appellant's first issue.[4]

[4] Appellant contends in his second issue that the evidence is legally insufficient to support punishing appellant as a habitual or repeat offender because the State failed to prove the finality of the convictions alleged in the enhancement paragraphs in the proper sequence. *See* TEX. PENAL CODE ANN. § 12.42(d) (Vernon Supp. 2009). Appellant's argument is predicated on his contention that State's Exhibit 23 was inadmissible at trial; appellant presents no legal argument or factual analysis unrelated to the admissibility of State's Exhibit 23. Because we have determined that State's Exhibit 23 is admissible, we need not address appellant's second issue. Further, we note that we consider all of the evidence in the

VARIANCE BETWEEN INDICTMENT AND PROOF AT TRIAL

In his sixth issue, appellant contends there is a material and fatal variance between the final conviction date for appellant's prior aggravated robbery conviction as proven at trial (August 8, 1990) and as alleged in the indictment and jury charge (October 5, 1987). At trial, appellant presented a motion for instructed verdict that the jury find both enhancement allegations "not true" based on this variance and objected to the inclusion of the 1987 conviction date in the jury instruction. The trial court overruled appellant's motion and objection. Appellant contends the trial court's denial of his motion for instructed verdict requires a reversal of his life sentence.

We view a challenge to a trial court's denial of a motion for instructed verdict as a challenge to the legal sufficiency of the evidence. *See Williams v. State*, 937 S.W.2d 479, 482 (Tex. Crim. App. 1996); *Johnson v. State*, 271 S.W.3d 756, 757–58 (Tex. App.—Waco 2008, pet. ref'd); *Mapes v. State*, 187 S.W.3d 655, 658 (Tex. App.—Houston [14th Dist.] 2006, pet. ref'd). When reviewing a claim of legal insufficiency based on a variance between the indictment and the evidence, we first consider the materiality of the variance. *See Fuller v. State*, 73 S.W.3d 250, 253 (Tex. Crim. App. 2002); *Rogers v. State*, 200 S.W.3d 233, 236 (Tex. App.—Houston [14th Dist.] 2006, pet. ref'd). A variance will be considered fatal and render the evidence insufficient only if it is material and operated to the defendant's surprise or prejudiced his rights. *See Chavis v. State*, 177 S.W.3d 308, 311–12 (Tex. App.—Houston [1st Dist.] 2005, pet. ref'd). A variance is material if it deprived the defendant of sufficient notice of the charges against him so that he could not prepare an adequate defense. *Rogers*, 200 S.W.3d at 236.[5] The defendant bears the burden of demonstrating the materiality of a variance. *See id.* at 237.

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record, whether admissible or inadmissible, in conducting a legal sufficiency review. *Powell v. State*, 194 S.W.3d 503, 507 (Tex. Crim. App. 2006).

[5] A variance is also material if it would subject the accused to being prosecuted twice for the same offense. *See Rogers*, 200 S.W.3d at 236. This rule does not apply in this case because appellant could not be retried for the primary offense. *See id.*; *see also Jordan v. State*, 256 S.W.3d 286, 292 (Tex.

There was a variance in this case because the indictment and jury charge alleged that appellant was finally convicted in cause number 462089 for aggravated robbery in 1987, while the evidence showed his conviction became final in 1990. Appellant contends he was surprised and prejudiced by this variance because he was not put on notice that he needed to defend himself against a 1990 conviction. We disagree. The State need not allege enhancement convictions with the same particularity required for charging the primary offense. *See Freda v. State*, 704 S.W.2d 41, 42 (Tex. Crim. App. 1986); *Chavis*, 177 S.W.3d at 312. An accused is entitled to a description of the prior judgment that will enable him to find the record and make preparation for trial of the question whether he is the convict named therein. *Villescas v. State*, 189 S.W.3d 290, 293 (Tex. Crim. App. 2006); *Chavis*, 177 S.W.3d at 312. Typically, enhancement allegations should reference the convicting court, the time of the conviction, and the nature of the offense. *See Hollins v. State*, 571 S.W.2d 873, 876 (Tex. Crim. App. 1978); *Chavis*, 177 S.W.3d at 312. However, variances between an indictment and the proof regarding convicting courts, conviction dates, and cause numbers have been held not to be material. *See, e.g.*, *Freda*, 704 S.W.2d at 42–43 (finding variance between name of prior offense alleged and proved was not material variance when prior offense's commission date, cause number, convicting court, location of convicting court, and classification as a felony were the same in indictment and proof); *Simmons v. State*, 288 S.W.3d 72, 80 (Tex. App.—Houston [1st Dist.] 2009, pet. ref'd) ("A variance in dates of conviction is not fatal when there is no surprise or prejudice to the defendant.").

In this case, the indictment informed appellant that the State would use, for enhancement purposes, appellant's prior conviction for felony aggravated robbery in cause number 462089, tried in the 178th District Court of Harris County, Texas. Although the indictment stated an incorrect conviction date, appellant could have easily found evidence of this conviction using the information provided. Additionally,

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Crim. App. 2008) (holding the Double Jeopardy Clause does not bar the use of an improperly proved enhancement conviction during a retrial on punishment).

appellant's introduction of evidence showing the 1987 conviction was not final shows he was not surprised by the incorrect final conviction date. For these reasons, we conclude the variance in this case did not operate to appellant's surprise or prejudice appellant's rights and is, therefore, not material. *See Simmons*, 288 S.W.3d at 80; *Rogers*, 200 S.W.3d at 236.

Because the variance in this case is not material, we need not conduct a further sufficiency analysis. *See Gollihar v. State*, 46 S.W.3d 243, 258 (Tex. Crim. App. 2001) (declining to conduct sufficiency analysis after holding variance between indictment and proof was immaterial); *Rogers*, 200 S.W.3d at 237 (same). We overrule appellant's sixth issue.

CONCLUSION

After reviewing the record and the arguments, we conclude that (1) the evidence is legally and factually sufficient to support appellant's conviction for the charged offense, (2) the trial court did not err by failing to provide a no-adverse-inference limiting instruction following Duran's invocation of the Fifth Amendment, (3) the trial court did not err in admitting State's Exhibit 23 into evidence, and (4) the variance between the date appellant's prior felony aggravated robbery conviction became final as alleged in the indictment and as proven at trial is immaterial.

We affirm the judgment of the trial court.

/s/ Leslie B. Yates
Justice

Panel consists of Justices Yates, Seymore, and Brown.
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