In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-09-00174-CR

CORY DEWAYNE THIBODEAUX, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Court at Law No. 2
Jefferson County, Texas
Trial Cause No. 271,112

MEMORANDUM OPINION

Appellant Cory Dewayne Thibodeaux appeals his conviction for the misdemeanor offense of indecent exposure. On appeal, Thibodeaux argues in issues one and two that the trial court erred in denying his motion for an instructed verdict and in issue three that the trial court further erred in overruling his objection to the trial court's "on or about" instruction in the jury charge. We affirm.

BACKGROUND

On May 15, 2008, the State charged Thibodeaux by information with the offense of indecent exposure under section 21.08 of the Texas Penal Code. The information alleged that:

> [O]n or about April 26, 2008, [Thibodeaux] did then and there unlawfully intentionally and knowingly expose his genitals with the intent to arouse and gratify the sexual desire of any person, and the Defendant was reckless about whether another person, namely [the victim] was present who would be offended and alarmed by . . . [Thibodeaux]'s act, to wit: exposing his penis[.]

Thereafter, on March 9, 2009, Thibodeaux pled not guilty and the cause went to trial by jury.

At trial, the victim, K.A., testified that she was employed part time at a snow cone stand in April 2008. K.A. testified that "about the beginning, middle of April[,]" Thibodeaux pulled up to the stand and ordered a snow cone. He left after completing his order, but returned about five minutes later and asked for a replacement snow cone because he had dropped his. K.A. explained to Thibodeaux that the store policy did not allow her to replace the snow cone free of charge. Thibodeaux reiterated that he "spilled his [snow cone] and that he needed to change his pants." K.A. testified to the following exchange:

> He told us to look away, because he had spilled it on his pants, and that he didn't want us to look. So, me and my friend who I was working with, [K.P.], she – we looked away. And he said, "Don't look." And when

> he said it was okay to look again, he had his penis out in the open for us to see.

She indicated that Thibodeaux had an erection while he was exposed. K.A. testified that Thibodeaux returned multiple times during the next couple of weeks. He came by "[p]retty much every day [she] was working." During these return visits, K.A. testified that Thibodeaux talked to her "[i]n a dirty way." Specifically, she testified he asked her to "to talk dirty to him, show him [her] breasts" and to "come to the Jacuzzi suite with [him]." She reported the incident to the police on April 26, 2008. K.A. was able to obtain Thibodeaux's license plate number on May 8, 2008.

On cross-examination, K.A. testified that her first encounter with Thibodeaux was when he exposed himself to her, which she "guess[ed]" was between April 12 and April 26. She explained that the encounter could have happened before the 12th; she could not be certain of the exact day.

K.P., a coworker of K.A.'s at the snow cone stand, also testified that Thibodeaux came to the snow cone stand in the middle of April 2008. She testified that Thibodeaux had been coming to the snow cone stand before K.A. started working there. K.P. testified that in mid-April, she was training K.A. when Thibodeaux drove up and ordered a snow cone. She recalled:

> [Thibodeaux] was just talking to us. And then he told us to -- not to look because he spilled his snow cone. He was taking off his pants. So, we didn't look. And then he was, like, "Okay, now it's good." We turned around, and he had his penis out of his pants.

K.P. also testified that Thibodeaux had an erection. She testified that Thibodeaux came back to the stand almost every time she was working by herself. She recalled Thibodeaux asked her "to . . . flash him, like, over and over again." She recalled that Thibodeaux "said a bunch of nasty things" to her.

At the close of the State's case, Thibodeaux moved for an instructed verdict. Specifically, Thibodeaux argued that the information alleged that the offense occurred April 26, 2008, but the probable cause affidavit and the State's witnesses testified that the indecent exposure occurred two weeks prior to the 26th. Thibodeaux argued that this variance failed to give him fair notice to prepare a defense, because he based his defense on the April 26, 2008, date and could not prepare a defense without a specific date alleged. Thibodeaux did not ask for a continuance, but rather asked the trial court for an instructed verdict. In support of his motion for instructed verdict, Thibodeaux argued that the information must be supported by the probable cause affidavit, the evidence produced in trial must conform to the charging instrument, and it was impossible for him to provide a defense without notice of the date the offense occurred. Finding that the information read "on or about the 26th," the trial court denied the motion.

Thibodeaux proceeded with his defense. Jasmine White, Thibodeaux's cousin, testified that the Thibodeaux's children attended a cheerleading camp she taught on April 26, 2008. She recalled that Thibodeaux and his wife attended their children's

performance that afternoon, which started between 2:45 p.m. and 3 p.m. The performance and awards ceremony ended at 4:30 p.m. She testified to speaking with Thibodeaux and his wife after the event and that they left between 4:45 p.m. and 5 p.m. On cross-examination, White admitted that she did not know where Thibodeaux was during the two weeks before April 26.

Michael Malveaux, Thibodeaux's friend and former co-worker, also testified on Thibodeaux's behalf. He testified that Thibodeaux was experiencing neck pain in March 2008. Thibodeaux had neck surgery on April 1, 2008, and Malveaux visited him in the hospital that night. He testified that Thibodeaux was released from the hospital April 3. He testified that he understood Thibodeaux could not drive a car following his surgery. He picked up Thibodeaux on April 12, 2008, at approximately 3:20 p.m., and they were together until he dropped him back off at home at 7:20 p.m. He testified that they never went by the snow cone stand during this time. On cross-examination, Malveaux admitted that Thibodeaux was not with him from the April 13 through April 17. He also testified that he understood Thibodeaux's doctor cleared Thibodeaux to drive on April 17, 2008. After Malveaux's testimony, the defense rested.

The trial court submitted the charge, including paragraph three, which stated:

> You are instructed that the State is not bound by the date of April 26, 2008, alleged in the information and the defendant may be convicted if you believe beyond a reasonable doubt that he committed the offense alleged within a period of two years preceding the filing of the information.

In this case, the information was filed May 15, 2008.

Thibodeaux objected to the inclusion of these paragraphs on the grounds that they would mislead the jury. He further argued that it violated his due process rights to notice under the United States and Texas constitutions because the variance between the information and the proof elicited at trial combined with the contents of the probable cause affidavit is "too far removed to allow this particular instruction." The court overruled Thibodeaux's objection and submitted the charge to the jury.

The jury returned a verdict of guilty. Thereafter, Thibodeaux re-urged his motion for an instructed verdict, which the trial court denied. The court sentenced Thibodeaux to sixty days in jail, but suspended the sentence for one year.

APPLICABLE LAW AND ANALYSIS

Sufficiency of Evidence

Thibodeaux challenges the trial court's denial of his motion for an instructed verdict in two separate issues. '"A challenge to the trial judge's ruling on a motion for instructed verdict is in actuality a challenge to the [legal] sufficiency of the evidence to support the conviction.'" *Howk v. State*, 969 S.W.2d 46, 48 (Tex. App.—Beaumont 1998, no pet.) (quoting *Madden v. State*, 799 S.W.2d 683, 686 (Tex. Crim. App. 1990)). "The relevant appellate inquiry for assessing legal sufficiency is whether, after viewing the evidence in the light most favorable to the verdict, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Sanders v. State*,

119 S.W.3d 818, 820 (Tex. Crim. App. 2003) (citing *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979)).

Thibodeaux argues that there was a material, harmful variance between the date of the offense alleged in the information and the proof adduced at trial. Thibodeaux argues that he was surprised and misled by the variance, which is evidenced by his presentation of an "alibi" defense and lack of preparedness in defending himself against other alleged dates.

"A 'variance' occurs when there is a discrepancy between the allegations in the charging instrument and the proof at trial." *Gollihar v. State*, 46 S.W.3d 243, 246 (Tex. Crim. App. 2001). If a variance exists between the charging instrument and the proof offered at trial, the variance may render the evidence insufficient to sustain the conviction. *Wray v. State*, 711 S.W.2d 631, 633 (Tex. Crim. App. 1986). However, if a court finds a variance between the charging instrument and the proof offered at trial, but finds that the variance is not prejudicial to a defendant's "substantial rights," then the variance is immaterial. *Gollihar*, 46 S.W.3d at 248. The determination of whether a variance has prejudiced a defendant's substantial rights and is therefore material is based on '"whether the indictment, as written, informed the defendant of the charge against him sufficiently to allow him to prepare an adequate defense at trial, and whether prosecution under the deficiently drafted indictment would subject the defendant to the risk of being prosecuted later for the same crime.'" *Id*. (quoting *United States v. Sprick*, 233 F.3d 845,

853 (5th Cir. 2000) (footnotes omitted)). "The object of the doctrine of variance between allegations of an indictment is to avoid surprise, and for such variance to be material it must be such as to mislead the party to his prejudice." *Plessinger v. State*, 536 S.W.2d 380, 381 (Tex. Crim. App. 1976) (citations omitted). A variance must be both material and prejudicial to the defendant to require reversal. *Human v. State*, 749 S.W.2d 832, 837 (Tex. Crim. App. 1988). The defendant has the burden of showing surprise or prejudice. *Santana v. State*, 59 S.W.3d 187, 194 (Tex. Crim. App. 2001) (citing *Human*, 749 S.W.2d at 837).

Thibodeaux complains only that there is a variance between the date of the offense alleged in the information, "on or about April 26, 2008" and the proof at trial. Thibodeaux correctly acknowledges that the law in Texas does not require the State to allege a specific date in the charging instrument and that the State is not bound by the date alleged in the information. Article 21.21 of the Texas Code of Criminal Procedure provides the necessary components of a sufficient information. TEX. CODE CRIM. PROC. ANN. art. 21.21 (Vernon 2009). The sixth component of an information, which requires "[t]hat the time mentioned be some date anterior to the filing of the information, and that the offense does not appear to be barred by limitation[,]" is at issue here. TEX. CODE CRIM. PROC. ANN. art. 21.21 (6). "It is well settled that the 'on or about' language of an indictment allows the State to prove a date other than the one alleged in the indictment as long as the date is anterior to the presentment of the indictment and within the statutory

limitation period." *Sledge v. State*, 953 S.W.2d 253, 256 (Tex. Crim. App. 1997). The Texas Court of Criminal Appeals has held that an indictment need not "specify the precise date when the charged offense occurred," nor must the indictment narrow the window of time within which it must have occurred to satisfy the constitutional notice requirement. *Garcia v. State*, 981 S.W.2d 683, 685-86 (Tex. Crim. App. 1998). The Court reaffirmed its prior holdings that "it is not error, constitutional or otherwise, for an indictment to allege an 'on or about' date for the charged offense." *Id*. at 686.

A person commits the offense of indecent exposure if "he exposes his anus or any part of his genitals with intent to arouse or gratify the sexual desire of any person, and he is reckless about whether another is present who will be offended or alarmed by his act." TEX. PEN. CODE ANN. § 21.08 (Vernon 2003). Therefore, the State need not prove a specific date of the offense. *See id; see also Garcia*, 981 S.W.2d at 685-86; *Sledge*, 953 S.W.2d at 256.

The record in this case does not support the existence of a variance between the date alleged in the information and the proof the State offered at trial. The information alleged that the offense occurred "on or about April 26, 2008." The victim and another eyewitness testified that Thibodeaux exposed himself to them sometime in April 2008. Under the Court of Criminal Appeals's construction of article 21.21, the State is allowed to proceed generally at trial that the offense occurred sometime in April 2008, even though the information alleged specifically that the offense occurred "on or about April

26, 2008." Even if the evidence did not conclusively establish that the offense occurred specifically on April 26, 2008, the law is clear that when a charging instrument alleges an offense occurred "on or about" a certain date, the State is not required to prove that the offense occurred on the specific date alleged, but only that the offense occurred before the presentment of the charging instrument and within the limitations period. *See Sledge*, 953 S.W.2d at 256. The State filed its information on May 15, 2008; days and even weeks before April 26, 2008, are clearly within the applicable statute of limitations. *See* TEX. PEN. CODE ANN. art. 21.08 (noting that indecent exposure is a Class B misdemeanor); *see also* TEX. CODE CRIM. PROC. ANN. art. 12.02 (Vernon Supp. 2009) (noting that the statute of limitations for a class B misdemeanor is two years from the commission of the offense).

However, even if there were a variance between the information in this case and the facts proven at trial, the variance is not material and therefore does not warrant an acquittal. Thibodeaux failed to show surprise. The information clearly read "on or about April 26, 2008." The information did not allege that the offense occurred on a specific date. Further, the probable cause affidavit filed in support of the information on May 15, 2008, states, "[o]n April 26th, 2008, a report of Indecent Exposure was made to Beaumont Police Officer. . . by [K.A.] . . ., who reported that approximately two weeks prior to the report, a black male exposed his erect penis to her and coworker, [K.P.] . . . while they were working." This affidavit went on to identify the individual as Cory

Thibodeaux. Clearly, any variance between the information and the proof offered at trial did not operate to Thibodeaux's surprise or prejudice his rights. *Plessinger*, 536 S.W.2d at 381. We hold that a variance, if any, was not material.

To sustain Thibodeaux's conviction, the jury must only have unanimously found Thibodeaux guilty of exposing his penis with intent to arouse or gratify the sexual desire of any person, and that he was reckless about whether another person was present who would be offended or alarmed by his act. The only complaint on appeal concerns the date the offense occurred, which is immaterial to a legal sufficiency or due process analysis as this date allegation is part of the "manner and means" and not an essential element of the offense. *See Stafford v. State*, 248 S.W.3d 400, 406-07 (Tex. App.—Beaumont 2008, pet. ref'd); *see also Pizzo v. State*, 235 S.W.3d 711, 713-15 (Tex. Crim. App. 2007).

We conclude the evidence was legally sufficient to sustain Thibodeaux's indecent exposure conviction, and we find no abuse of discretion by the trial court in denying Thibodeaux's motion for instructed verdict. We overrule issue one.

Notice

Next, Thibodeaux complains that the information failed to provide him sufficient notice to prepare his defense. To preserve a complaint for appellate review, a party must present to the trial court a timely request, objection, or motion which states the specific grounds for the ruling the party desires the court to make. TEX. R. APP. P. 33.1(a)(1)(A). However, if a defendant

> does not object to a defect, error, or irregularity of form or substance in an indictment or information before the date on which the trial on the merits commences, he waives and forfeits the right to object to the defect, error, or irregularity and he may not raise the objection on appeal or in any other postconviction proceeding.

TEX. CODE. CRIM. PROC. ANN. art. 1.14 (Vernon 2005). A defendant may waive error, including constitutional error, by failing to properly object or otherwise request relief. *Little v. State*, 758 S.W.2d 551, 563-64 (Tex. Crim. App. 1988).

Thibodeaux failed to complain about any defect in the information prior to the commencement of trial. He failed to preserve any complaint that the charging instrument did not provide him fair notice of the charges against him. Additionally, in the "rare instance" when an indictment alleging an "on or about date" causes unfair surprise, a defendant's remedy is to ask for a postponement to meet the charge as presented at trial. *Garcia*, 981 S.W.2d at 686. Thibodeaux did not ask the trial court for a postponement and cannot now complain of unfair surprise. *See id*. We overrule issue two.

"ON OR ABOUT" INSTRUCTION

In Thibodeaux's third issue he argues that the court erred in providing the jury with an "on or about" instruction. "A claim of jury-charge error is reviewed using the procedure set out in *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985)." *Barrios v. State*, 283 S.W.3d 348, 350 (Tex. Crim. App. 2009) The first step of our review is to determine whether there is error in the charge. *Id*. (citing *Ngo v. State*, 175 S.W.3d 738, 743 (Tex. Crim. App. 2005)). Under *Almanza*, if there was error and the

defendant objected to the error at trial, then reversal is required if the error "is calculated to injure the rights of the defendant," which is defined to mean that there is "some harm." *Almanza*, 686 S.W.2d at 171. If the defendant did not object to the error, the error must be "fundamental" and requires reversal only if it was so egregious and created such harm that the defendant "has not had a fair and impartial trial." *Id*.

Thibodeaux argues that the instruction the trial court provided in paragraph three of the charge lessened the State's burden of proof and shifted it to the defendant. He further argues that the instruction is a comment on the weight of the evidence. We hold that the "on or about" instruction the court provided to the jury was a correct statement of the law. We further hold that the factual statement that the information was filed May 15, 2008, is supported by the record.

We hold that the trial court's instruction was proper and an accurate statement of the law in this case, and we therefore find no error. Finding no error in the jury charge, we do not consider whether Thibodeaux was harmed. We overrule issue three. Having overruled each of Thibodeaux's issues, we affirm the trial court's judgment.

AFFIRMED.

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CHARLES KREGER
Justice

Submitted on August 17, 2010
Opinion Delivered September 8, 2010
Do not Publish
Before McKeithen, C.J., Kreger and Horton. JJ.