In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-16-00044-CR

ANDREA CHRISTINE FOLKERS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Court at Law No. 4
Montgomery County, Texas
Trial Cause No. 15-303511

MEMORANDUM OPINION

Andrea Christine Folkers was charged by complaint and information with theft of property of a value of $50 or more but less than $500. *See* Act of May 29, 2011, 82nd Leg., R.S., ch. 1234 § 21, 2011 Tex. Sess. Law Serv. 3301, 3309-10 (amended 2015) (current version at Tex. Penal Code § 31.03). Folkers pleaded not guilty to the charge. A jury found Folkers guilty and the trial court assessed a punishment of 180 days of confinement in jail, probated for 18 months. In three issues, Folkers argues the trial court abused its discretion: (1) by granting the State's

motion to amend the information over the objection of the defense; (2) by denying Folkers' motion for a continuance after granting the State's motion to amend; and (3) by denying Folkers' request for a lesser-included offense instruction on theft in an amount less than $50. We affirm the trial court's judgment.

Amendment or Abandonment

In her first issue, Folkers argues that the trial court abused its discretion by allowing the State to amend the information on the day of the trial over her objection. *See* Tex. Code Crim. Proc. Ann. art. 28.10 (West 2006). The Texas Code of Criminal Procedure states that "[a]ll amendments of an indictment or information shall be made with the leave of the court and under its direction." *Id.* art. 28.11 (West 2006). Article 28.10 states that the indictment may be amended on form or substance *before* trial. *Id.* art. 28.10(a). But on the request of the defendant, the defendant shall be given no less than ten days, or a shorter period if requested by the defendant, to respond to such amendments. *Id.* An indictment may also be amended *after* trial begins if the amendment is not objected to by the defendant. *Id.* art. 28.10(b). To constitute an amendment, there must be an alteration of the charging instrument that affects its actual substance. *Ward v. State*, 829 S.W.2d 787, 793-94 (Tex. Crim. App. 1992); *Eastep v. State*, 941 S.W.2d 130, 132 (Tex. Crim. App. 1997), *overruled on*

other grounds by Riney v. State, 28 S.W.3d 561 (Tex. Crim. App. 2000); *overruled in part by Gollihar v. State*, 46 S.W.3d 243 (Tex. Crim. App. 2001).

An alteration not affecting the substance is considered abandonment. *Eastep*, 941 S.W.2d at 133. The mere deletion of unnecessary or irrelevant language from an information or indictment does not affect the defendant's ability to receive proper notice of the charges against her. The State may plead conjunctively then abandon an allegation in a charging instrument without implicating article 28.10. *Id.* at 132-34.

In this case, the information alleged, in part, that:

> on or about January 16, 2015, in Montgomery County, Texas, Andrea Christine Folkers, with intent to deprive the owner, namely Kristen Hunter/Walmart, of property, did appropriate property, to-wit: pants, panties, Almay primer and cream, powder, KY lube, razors, of the value of $50.00 or more, but less than $500.00, without the effective consent of Kristen Hunter/Walmart[.]

The information was never physically amended, but before the trial began the prosecutor announced the State intended to abandon the allegation of Kristen Hunter as owner of the property. Noting that the abandoned allegation was surplusage, the trial court overruled Folkers' objection to lack of notice, then overruled her request for a continuance "to prepare a defense based on the new information we're receiving."

The name of the owner is not a substantive element of theft, but the Code of Criminal Procedure requires the State to allege the name of the owner of the property in its charging instrument. *Byrd v. State*, 336 S.W.3d 242, 251 (Tex. Crim. App. 2011); *see also* Tex. Code Crim. Proc. Ann. art. 21.08 (West 2009) ("Where one person owns the property, and another person has the possession of the same, the ownership thereof may be alleged to be in either. Where property is owned in common, or jointly, by two or more persons, the ownership may be alleged to be in all or either of them."). The term "owner" has an expansive definition in the Penal Code, allowing the State to allege the owner to be any person with a greater right to the actual care, custody, control, or management of the property than the defendant. *Alexander v. State*, 753 S.W.2d 390, 392 (Tex. Crim. App. 1988); *see also* Tex. Penal Code Ann. § 1.07(a)(35) (West Supp. 2016). The provisions of article 21.08 "apply alike to special owners as well as general owners[,]" allowing the State to allege ownership to be in all or either of them. *Walling v. State*, 437 S.W.2d 563, 564 (Tex. Crim. App. 1969). Furthermore,

> under the current Penal Code, a corporation may both own and have actual possession of property. Thus it is perfectly permissible, and sometimes preferable, to now allege the corporation—Wal-Mart, for example—as the owner of the property and then call any agent or employee who holds a relevant position in the company to testify that the corporation did not give effective consent for a person to steal or shoplift its property.

Byrd, 336 S.W.3d at 252 (footnotes omitted). At trial, the State must prove the person or entity alleged in the indictment is the same person or entity as shown by the evidence. *Garza v. State*, 344 S.W.3d 409, 412 (Tex. Crim. App. 2011). It is the identity of the owner, not his formal name, which the State must prove at trial. *Byrd*, 336 S.W.3d at 253.

In this case, the information identified the actual owner, Walmart, and a special owner, Hunter. Either allegation would be sufficient. *See* Tex. Code Crim. Proc. Ann. art. 21.08. Therefore, the information described two ways of committing the same offense. *See id.* The State could abandon one and prove the other. *Eastep*, 941 S.W.2d at 132. Issue one is overruled.

Denial of Continuance

In her second issue, Folkers complains that the trial court denied her request for a continuance in light of the State's abandonment of the allegation that Kristen Hunter was an owner of the property and Folkers' appropriation of the property identified in the information was without Hunter's effective consent. She argues the State failed to give her adequate notice of the identity of the complainant. Folkers claims that the defense would have interviewed a witness named Shockley if she had known that Hunter would not appear at trial.

We conclude that the trial court did not err in refusing to grant Folkers a continuance. Folkers was not entitled to ten days' notice because the State did not amend the information. *See Ji Chen v. State*, 410 S.W.3d 394, 396 (Tex. App.—Houston [1st Dist.] 2013, pet. ref'd); *see also* Tex. Code Crim. Proc. Ann. art. 28.10. Furthermore, to the extent Folkers is complaining about the unavailability of a witness, to obtain a continuance based upon unavailability of a witness, Folkers had to file a written motion. *See* Tex Code Crim. Proc. Ann. arts. 29.03, 29.13 (West 2006). Our review of the record indicates that Folkers did not file a written motion. We overrule issue two.

Lesser-Included Offense

In her third issue, Folkers argues the trial court abused its discretion by denying her request for a jury instruction on the lesser-included offense of theft in an amount less than $50. A two-step test determines whether lesser included offense instruction should be given to the jury. *Bullock v. State*, 509 S.W.3d 921, 924 (Tex. Crim. App. 2016); *Hall v. State*, 225 S.W.3d 524, 535-36 (Tex. Crim. App. 2007). First, the trial court must determine "whether the requested instruction pertains to an offense that is a lesser-included offense of the charged offense, which is a matter of law." *Bullock*, 509 S.W.3d at 924. Where, as here, the requested offense is established by proof of the same or less than all the facts required to establish the

offense charged, the first step is satisfied. *See id*.; *see also* Tex. Code Crim. Proc. Ann. art. 37.09 (West 2006).

"The second step in the analysis asks whether there is evidence in the record that supports giving the instruction to the jury." *Bullock*, 509 S.W.3d at 924-25. Under this step, "a defendant is entitled to an instruction on a lesser-included offense when there is some evidence in the record that would permit a jury to rationally find that, if the defendant is guilty, he is guilty only of the lesser-included offense." *Id*. at 925. "The evidence must establish that the lesser-included offense is a valid, rational alternative to the charged offense." *Id*. This step requires "examining all the evidence admitted at trial, not just the evidence presented by the defendant." *Id.* A defendant is entitled to the instruction on anything more than a scintilla of evidence, but "it is not enough that the jury may disbelieve crucial evidence pertaining to the greater offense, but rather there must be some evidence directly germane to the lesser-included offense for the finder of fact to consider before an instruction on a lesser-included offense is warranted." *Id.* When reviewing the trial court's ruling, we cannot consider "the credibility of the evidence and whether it conflicts with other evidence or is controverted." *Id.* Accordingly, "the standard may be satisfied if some evidence refutes or negates other evidence establishing the greater offense or if the evidence presented is subject to different interpretations." *Id.*

Terrell Shockley was working as a loss prevention officer at the Conroe Walmart on January 16, 2015. According to Shockley, the Conroe Walmart's surveillance system had about 400 cameras and at least two plain-clothes loss prevention officers were "on the floor" at all times. Shockley explained that while Folkers was in the store he observed Folkers on the camera surveillance system because Folkers aroused the suspicion of another loss prevention officer, Kristen Hunter. A video that the trial court admitted into evidence and published in part to the jury showed Folkers with a shopping cart "laden down" with merchandise, that Shockley described as "some high dollar merchandise at the top of the cart next to a purse and the cardboard box." Shockley testified that at one point Folkers can be seen on the video meticulously moving items in the cart and rolling up items of clothing. At the "self[-]check-out area[,]" Shockley testified that Folkers wrapped items inside of clothing. And, according to Shockley, Folkers never scanned any of the items in the box before exiting the store.

Shockley and Hunter were watching Folkers on the camera system. Shockley did not see her enter the store, and therefore did not know if she brought the box into the store. Shockley testified that while Folkers was in the grocery section he watched the previously recorded video to identify the items that Folkers took off the shelves, but he did not compile the video that was published to the jury and some of Folkers'

movements that had been recorded by the camera system and observed by Shockley were not included in the exhibit. Shockley testified that Folkers later showed him a receipt that was only for food items.

Officer Mark Frazier of the Conroe Police Department testified that Folkers had a Walmart box. Folkers' mother, Jana Ferguson, told the jury that Folkers was returning items to Walmart for Ferguson. Ferguson testified that she ordered items from Walmart online and they were shipped to her in that box. Ferguson explained that she purchased towel sets and shower curtains online and Folkers returned the towels that day but they are not visible on the video because Folkers had already returned them.

According to Ferguson, Folkers had picked up the lubricant at the Hudson Oaks Walmart near Weatherford. Ferguson claimed that Folkers purchased the creams and primers in Weatherford and Ferguson asked Folkers to return them for her because they were the wrong shade. Ferguson testified that she asked her daughter to return the Almay primer, cover-up cream and powder, and K-Y lubricant. According to Ferguson, Folkers took a receipt to Walmart to return the items and Ferguson did not see the receipt when she picked up Folkers' purse at the Walmart after Folkers was arrested. Ferguson denied purchasing the razors, the underwear, or the pants.

Ferguson's testimony to the effect that Folkers brought previously-purchased primer, concealer, powder, and lubricant into the store provided some evidence from which a jury could find that Folkers did not steal those items, but the combined value of those items was $45.90. The value of the remaining items for which there is no evidence of previous purchase equals $58.11. Folkers argues that there is some evidence refuting her theft of the razors because she is not seen removing the razors from the shelf in the video that was published to the jury, but it was undisputed that the video did not show the entire time Folkers was in the store. Therefore, the lack of video of Folkers removing razors from the shelf is not some evidence that the razors belonged to Folkers because she purchased them before she entered the store. Folkers was not entitled to a lesser-included offense instruction because the contrary evidence did not reduce the value of the stolen items to less than $50. *See Bullock*, 509 S.W.3d at 924-25. We overrule issue three and affirm the trial court's judgment.

AFFIRMED.

LEANNE JOHNSON
Justice

Submitted on October 9, 2017
Opinion Delivered November 15, 2017
Do Not Publish

Before McKeithen, C.J., Horton and Johnson, JJ.