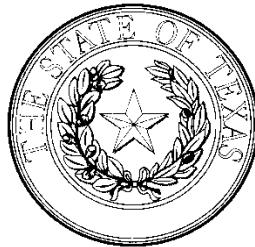


Opinion issued June 30, 2011



In The
Court of Appeals
For The
First District of Texas

NO. 01-10-00310-CR

ERIN ASHLYN MOFFATT, Appellant
v.
THE STATE OF TEXAS, Appellee

**On Appeal from the 405th District Court
Galveston County, Texas
Trial Court Case No. 08CR3041**

MEMORANDUM OPINION

A jury found Erin Ashlyn Moffatt guilty of the first degree felony offense of murder of her mother, Jana Moffatt, and assessed punishment at 50 years'

confinement.¹ On appeal, Erin contends that the evidence is legally insufficient to support the jury's guilt finding because a fatal variance exists between the indictment and the evidence at trial. Erin specifically asserts that the indictment alleges strangulation by use of a cord, but that the evidence at trial indicated strangulation by hand as the cause of death.

We affirm.

Background

Dina Sparkman, Jana's sister, reported Jana missing to police. Seven days later and two days after Hurricane Ike made landfall in the surrounding area, officers from the Brazoria County Sheriff's Department discovered a body in an open field. A plastic trash bag had been tied over a portion of the body which had undergone significant decomposition. In the days before reporting her sister missing, Sparkman had repeatedly called Erin about Jana's disappearance. At one point, Erin asked Sparkman, “[W]hat do you want me to do? Go out there and look for my mother with a shovel.” Erin did not respond when Sparkman questioned why she needed a shovel.

An officer with the League City Police Department went to the trailer Jana shared with Erin. Erin told the officer that she had last seen her mother on September 2, when they had fought and Erin had refused to buy her mother

¹ See TEX. PENAL CODE ANN. §19.02(b)(1) (West 2003).

methamphetamines. Detective Beyer of the League City Police Department later took a formal statement from Erin, at which time she continued to deny any knowledge of her mother's whereabouts. Erin told Detective Beyer that while she did not know her mother's location, she had a bad feeling and admitted that she told another person that she believed her mother was dead.

Based on his interviews with Erin and several other subjects, Detective Beyer sought and received a search warrant for Erin's trailer. The officers seized several feet of carpet from the trailer that had a conspicuous red stain. The day after officers executed the search warrant, Detective Beyer interviewed Michael Cory Lewis, Erin's boyfriend at the time of her mother's disappearance. Lewis told Detective Beyer that Erin had strangled her mother and that he had helped her dispose of the body in a field. Lewis accompanied Detective Beyer to the field where police found the body.

Detective Beyer issued a warrant for Erin's arrest. Upon her arrest, Erin made a recorded confession to police that she had killed her mother. Erin claimed to have blocked the incident from her memory, but stated that she had grabbed her mom and hurt her. She stated, "I strangled my mom," and when asked with what she stated, "A f—ing cord," indentifying a white extension cord from the trailer. She further stated, "I pulled this cord, and I don't know what the hell . . . I pulled it until she stopped breathing."

She told police that Lewis had helped her by holding Jana down while Erin strangled her. Believing that inserting air into a person's blood stream killed them faster, Erin admitted that she stabbed her mother in the neck with a syringe. Erin described how Jana bit her tongue almost completely off, causing her to bleed on the carpet. After Jana stopped breathing, Erin stated they covered her head in a black trash bag, wrapped her in a rug, and loaded her into the trunk of a car. They drove to an open grassy area and Lewis dumped Jana's body.

At trial, the medical examiner, Dr. Steven Pustilnik, testified that the body had decomposed significantly and that he could not discern any evidence of trauma from an external examination of the body. Dr. Pustilnik, however, identified a fracture to the maxilla, which is the facial bone to the left of the nose, and a fracture to the hyoid bones, which are two bones in the neck or voice box. Dr. Pustilnik testified that a break in the hyoid bones, which form a horseshoe shape, results from strangulation by squeezing the neck by hand. When asked if strangulation by a cord or rope would cause this type of injury, Dr. Pustilnik responded:

A cord or rope generally does not, does not exert the pressure by moving the end of the hyoid this way and the end of the hyoid this way. It is a circumferential ligature. So, you see different injuries for those. You see basically soft tissue injuries. And you don't see fractures of bones from a ligature [cord or similar strangulation method] being put around somebody's neck.

Dr. Pustilnik went on to say that he “possibly” saw soft tissue injuries on the body, but could not be entirely sure because of the extent of decomposition. Dr. Pustilnik also testified that the damage to the thyroid cartilage was caused by something sharp cutting across the voice box and that hypothetically a hypodermic needle could cause such an injury.

Dr. Joan Bytheway testified as a forensic anthropologist trained to identify injury patterns in skeletal remains. Dr. Bytheway testified that the “number one cause of hyoid fractures is manual strangulation with the second cause being ligature strangulation [use of a cord or other instrument]. . . .” Dr. Bytheway stated that she could not exclude ligature strangulation, by cord or similar instrument, as a cause of the hyoid break. She also testified that she also could not exclude strangulation by hand or arm.

The remaining witnesses at trial included investigating law enforcement officers and several witnesses who testified to statements by Erin that she wanted to get rid of her mother. One witness testified to seeing Erin throw away what she believed to be a white rope in a store parking lot. After Lewis invoked his Fifth Amendment right not to testify, another witness testified to what Lewis told him about the murder and corroborated Erin’s confession to police. Erin’s testimony at trial contradicted her confession, and she stated that Lewis strangled Jana by hand

before she helped him dispose of the body. She also stated she had no memory of confessing to police.

Erin moved for directed verdict at the close of the State's case based on the testimony of Drs. Pustilnik and Bytheway. She asserted that the State had not proved an essential element as alleged in the indictment, strangulation by cord. The trial court denied the motion. The jury found Erin guilty of murder and assessed punishment at 50 years' confinement. Erin timely filed this appeal.

Fatal Variance

In her sole issue, Erin contends that the evidence is legally insufficient to support the jury's guilt finding because a fatal variance exists between the indictment and the evidence presented at trial. Specifically, she asserts the evidence indicates Jana was strangulated by hands instead of strangled with a cord as alleged in the indictment.

A. Standard of Review

This court reviews sufficiency-of-the-evidence challenges applying the same standard of review enunciated in *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979), regardless of whether an appellant raises a legal or a factual sufficiency challenge. *See Brooks v. State*, 323 S.W.3d 893, 912, 927–28 (Tex. Crim. App. 2010); *see also Ervin v. State*, 331 S.W.3d 49, 52–55 (Tex. App.—Houston [1st Dist.] 2010, pet. ref'd). Under this standard, evidence is insufficient

to support a conviction if, considering all the record evidence in the light most favorable to the verdict, no rational fact finder could have found that each essential element of the charged offense was proven beyond a reasonable doubt. *See Jackson*, 443 U.S. at 319, 99 S. Ct. at 2789; *Laster v. State*, 275 S.W.3d 512, 517 (Tex. Crim. App. 2009). The sufficiency-of-the-evidence standard gives full play to the responsibility of the fact finder to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. *See Jackson*, 443 U.S. at 319, 99 S. Ct. at 2789; *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007).

We apply the *Jackson* standard to the hypothetically correct jury charge. *Byrd v. State*, 336 S.W.3d 242, 245 (Tex. Crim. App. 2011). A hypothetically correct jury charge is one that “accurately sets out the law, is authorized by the indictment, does not unnecessarily restrict the State’s theories of liability, and adequately describes the particular offense for which the defendant was tried.” *Id.* at 246 (quoting *Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997)). “But sometimes the words in the indictment do not perfectly match the proof at trial.” *Id.*

B. Fatal Variance

“A ‘variance’ occurs whenever there is a discrepancy between the allegations in the indictment and the proof offered at trial.” *Id.* When a defendant

raises a legal sufficiency claim based upon a variance between the indictment and the evidence, the variance must be material to render the evidence insufficient. *Gollihar v. State*, 46 S.W.3d 243, 257 (Tex. Crim. App. 2001). A material variance is one that is likely to prejudice the defendant's substantial rights by (1) failing to give the defendant notice of the charges or (2) allowing a second prosecution for the same offense. *Byrd*, 336 S.W.3d at 247; *Fuller v. State*, 73 S.W.3d 250, 253 (Tex. Crim. App. 2002). A court must conduct a materiality analysis in all cases "that involve a sufficiency of the evidence claim based upon a variance between the indictment and the proof." *Fuller*, 73 S.W.3d at 253 (quoting *Gollihar*, 46 S.W.3d at 257).

We analyze the materiality of the variance and the sufficiency of the evidence by "looking to the essential elements of the particular criminal offense—the gravamen of the offense—and the hypothetically correct jury charge under the specific indictment or information." *Byrd*, 336 S.W.3d at 250. For murder under Penal Code section 19.02(b)(1), "A person commits an offense if he . . . intentionally or knowingly causes the death of an individual." TEX. PENAL CODE ANN. § 19.02(b)(1) (West 2003). The specific indictment against Erin alleges, in relevant part, that she "intentionally or knowingly cause[d] the death of an individual, namely, Jana Moffatt, by strangling that said Jana Moffatt with a cord."

The jury charge echoed the indictment language that Erin strangled Jana with a cord.

Erin asserts that the State failed to prove beyond a reasonable doubt that she strangled her mother with a cord because the evidence at trial indicated strangulation by hand. Erin relies on the Dr. Pustilnik's testimony that a cord or rope would not generally exert the kind of pressure necessary for the hyoid break in Jana's neck. Erin also relies on Dr. Bytheway's testimony that she could not exclude strangulation by cord or hand as a method for causing the injuries at issue.

In addition to the testimony of the medical examiner and forensic anthropologist, however, the trial court admitted the video and audio recordings of Erin's confession to police. In her confession, she stated that she strangled her mom with "A f—ing cord . . . I pulled this cord, and I don't know what the hell . . . I pulled it until she stopped breathing." Erin testified at trial that she had no memory of her confession, but the jury was entitled to evaluate the weight and credibility to give her confession and trial testimony respectively. *See Clayton*, 235 S.W.3d at 778.

Further, Dr. Pustilnik's testimony that "generally" this type of hyoid injury is caused by hand does not conclusively negate Erin's confession or Dr. Bytheway's testimony that she could not exclude a cord as a strangulation method. The jury was free to resolve these conflicts in the evidence. *Edwards v. State*, No.

01-05-00855-CR, 2006 WL 3513635, at *1 (Tex. App.—Houston [1st Dist.] Dec. 7, 2006, no pet.) (holding that jury free to resolve conflicts in evidence when indictment alleged strangulation by hand and medical examiner testified the complainant had been strangled by hand, but other witnesses testified defendant had used a cord).

Erin relies on *Wray v. State*, 711 S.W.2d 631, 633 (Tex. Crim. App. 1986), for the proposition that the State must prove language in an indictment that is legally essential to charge the offense in question. The indictment in *Wray* alleged the offense of aggravated assault by intentionally pointing a deadly-weapon at the complainant, but the evidence at trial demonstrated that the defendant never pointed the shotgun at the complainant. *Id.* The Court found that pointing the deadly-weapon at the complainant was necessary to elevate the assault to aggravated assault and satisfy the element of “threatens another with imminent bodily injury.” *Id.* at 634. Here, the essential elements of murder are “intentionally or knowingly causes the death of an individual.” TEX. PENAL CODE ANN. § 19.02(b)(1). Unlike the threat element of aggravated assault in *Wray*, proof of the specific method of strangulation used to cause death is not an essential element of murder.

We cannot say a variance exists between the indictment and the evidence presented at trial. *See Megas v. State*, 68 S.W.3d 234, 241 (Tex. App.—Houston

[1st Dist.] 2002, pet. ref'd) (holding no fatal variance and not material when indictment alleged death caused by collision with concrete barrier and testimony at trial showed that collision caused car to flip and crush complainant). Even assuming a variance exists, such a variance was not material. *Id.* The indictment fully apprised Erin that the State accused her of murder by strangulation. Nothing in the record indicates Erin did not have notice of the charged offense or that she was surprised by the proof at trial, beyond her testimony that she did not remember making the confession. *See Compton v. State*, No. 01-06-00281-CR, 2007 WL 4462575, at *4 (Tex. App.—Fort Worth Dec. 20, 2007, no pet.) (holding defendant had notice of charges when indictment alleged defendant struck complainant in head causing victim to fall and at trial evidence showed defendant pushed complainant). Finally, such a variance between strangling the same complainant by hand or by cord would not subject Erin to another prosecution for the same offense. *Compare Bailey v. State*, 87 S.W.3d 122, 126, 129 (Tex. Crim. App. 2002) (affirming court of appeals holding that defendant was subject to another prosecution under second indictment after acquittal for fatal variance when second indictment listed a different owner of stolen property), *with Fuller*, 73 S.W.3d at 254 (holding variance would not subject defendant to another prosecution when indictment and jury charge for offense of injury of elderly individual listed “Olen

M. Fuller" as complainant and proof at trial only referred to "Mr. Fuller" or "Buddy").

Conclusion

We overrule Erin's sole issue and affirm the judgment of the trial court.

Harvey Brown
Justice

Panel consists of Chief Justice Radack and Justices Sharp and Brown.

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