Opinion issued July 13, 2021

In The

Court of Appeals

For The

First District of Texas

NO. 01-20-00178-CR

J.B. BLACK, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 174th District Court
Harris County, Texas
Trial Court Case No. 1629964

MEMORANDUM OPINION

A grand jury indicted J.B. Black for insurance fraud of $30,000 or more but less than $150,000. *See* TEX. PENAL CODE § 35.02(a), (c)(5). Following his not guilty plea, the case was tried to a jury, which found Black guilty. The trial court sentenced Black to 10 years' confinement. On appeal, Black claims the trial court erred by (1)

denying his motion to set aside the indictment for failing to name an individual complainant and subjecting him to double jeopardy, (2) admitting evidence in violation of his Sixth Amendment right to confront his accuser, and (3) improperly defining "insurer" in the jury charge.

We affirm.

Background

Black bought a 2015 Cadillac Escalade for $98,860.24. He insured it with USAA and filed a claim after reporting his vehicle stolen. Later, the indictment charged Black with insurance fraud:

> The duly organized Grand Jury of Harris County, Texas, presents in the District Court of Harris County, Texas, J.B. Black, hereafter styled the Defendant, heretofore on or about April 4, 2016, did then and there unlawfully, with intent to defraud and deceive an insurer, and in support of a claim of payment of the value of thirty thousand dollars or more, but less than one hundred fifty thousand dollars, under an insurance policy, present and cause to be presented a statement that the Defendant knew to contain false and misleading material information, namely, that the Defendant's Cadillac Escalade was stolen on March 23, 2016, and said statement was presented to an insurer, namely, USAA.

Black moved to set aside the indictment. He argued that the indictment's listing of "USAA" did not sufficiently identify the complainant. He specifically argued that the indictment was "defective" because it "failed to allege with any specificity to whom the statement was presented and which USAA company they worked for."

Black renewed these arguments during the pretrial hearing. The State responded that the indictment complied with Section 35.02 of the Penal Code because it identified USAA as the insurer. Black replied that, although the Section 35.02 references the Insurance Code, the Legislature repealed that particular section of the Insurance Code and never recodified it to update the reference. The trial court denied Black's motion to set aside the indictment. Black pleaded not guilty to the charged offense.

At trial, Houston Police Department Deputy D. Horace testified that Black called her at 3:52 p.m. on March 18, 2016. He reported that his Cadillac Escalade had been stolen a day earlier. He told Deputy Horace that he knew the exact location of his vehicle and requested an officer to retrieve it. Deputy Horace gathered more information and turned it over to the auto theft division to investigate.

Next, Harris County Sheriff's Office Deputy R. Parker testified that he responded to a call for vehicle recovery the same day. He arrived at the address that Black had provided to Deputy Horace. Black told Deputy Parker that he had tracked his vehicle to this location. Black used a key fob he had in his hand to either activate the horn or start the engine. Deputy Parker testified that he could not see the vehicle in the garage, but he "heard something." Deputy Parker went to the front door of the home and knocked on the door, but no one answered. He asked Black to return to the home later. Deputy Parker intended to meet the homeowner and further

investigate the theft. Deputy Parker and another deputy returned to the home later on, but Black did not.

The State called K. Barbier, an investigator for USAA Insurance. Barbier was responsible for "investigating suspicious claims". He testified that USAA is a licensed insurer in the State of Texas.

USAA assigned Barbier as the lead investigator in Black's case. Barbier testified that Black called USAA and added the Cadillac Escalade to his auto insurance policy at 5:41 p.m. the day he reported it stolen to the Sheriff's Office. The policy became effective the next day.

Several weeks later, Black filed an online claim with USAA and reported that his Cadillac Escalade had been stolen on March 23, 2016. USAA assigned the case to a claims adjuster who later spoke with Black about the claim on a recorded call. The claims adjuster requested a police report and noticed a major discrepancy about the date: Black reported to police that his vehicle was stolen on March 17, but he told USAA that the theft had occurred on March 23.

Barbier testified that he suspected that Black had made a false statement to USAA because Black reported his car stolen one day before he insured it and that the date of the theft is a material factor in determining coverage for an insurance claim. He also testified that USAA did not pay his insurance claim after his investigation because Black's vehicle was uninsured at the time of the reported theft.

At the charge conference, neither Black nor the State objected to the jury charge. After closing arguments, the trial court read the charge to the jury. The jury found Black guilty of insurance fraud as alleged in the indictment. After Black pleaded true to the first enhancement paragraph, the trial court assessed punishment at 10 years' confinement in the Texas Department of Criminal Justice.

Motion to Set Aside Indictment

In his first issue, Black contends that the trial court erred by denying his motion to set aside the indictment because the indictment was vague. He specifically contends that the indictment did not adequately notify him of the complainant's identity and he therefore could not "prevent additional prosecutions of the same fraudulent statement should the State accuse" him of "making that same statement to other, unnamed individuals at USAA." Black also contends that he could not prepare a defense without notice of the "specific individual" at USAA to whom the representations were made.

In response, the State asserts that indictment was sufficient because it tracked the Penal Code language. *See* TEX. PENAL CODE § 35.02. The State further asserts that an indictment need not identify a natural person in an insurance fraud case because the insurance company is the complainant. The State also asserts that Black's claim that he could not prepare a defense lacked merit because the State provided Black with his recorded statements to USAA before trial.

A. Standard of review

We review a trial court's denial of a motion to set aside an indictment de novo. *State v. Ross*, 573 S.W.3d 817, 820 (Tex. Crim. App. 2019).

B. Applicable law

A person accused of a crime is constitutionally entitled to notice of the charges against him as a matter of due process. *See Smith v. State*, 297 S.W.3d 260, 267 (Tex. Crim. App. 2009); U.S. CONST. AMEND. VI; TEX. CONST. art. I, § 10. An indictment must comply with the guidelines provided in the Texas Code of Criminal Procedure. *See* TEX. CODE CRIM. PROC. arts. 21.03, 21.04, 21.11. Thus, an indictment must be "specific enough to inform the accused of the accusation against him so that he may prepare a defense." *State v. Moff*, 154 S.W.3d 599, 601 (Tex. Crim. App. 2004). An indictment that tracks the statutory language is "ordinarily sufficient." *Beck v. State*, 682 S.W.2d 550, 554 (Tex. Crim. App. 1985) (en banc); *see* TEX. CODE CRIM. PROC. art. 21.11.

The accused may move to set aside a vague or indefinite indictment. *See Mungin v. State*, 192 S.W.3d 793, 795 (Tex. App.—Houston [1st Dist.] 2006, no pet.). The trial court may grant the motion to set aside an indictment "where the language concerning the defendant's conduct is so vague or indefinite as to deny the defendant effective notice of the acts he allegedly committed." *Thomas v. State*, 621 S.W.2d 158, 163 (Tex. Crim. App. 1980) (op. on reh'g). The trial court may,

however, deny a motion to set aside an indictment if the accused received "notice of the State's theory against which he would have to defend." *Smith*, 297 S.W.3d at 267. "[T]o prove reversible error, an appellant must show that the omission of the requested information had a deleterious impact on his ability to prepare a defense." *Chambers v. State*, 866 S.W.2d 9, 17 (Tex. Crim. App. 1993) (en banc).

C. Analysis

Section 35.02(a) of the Penal Code provides that a person commits insurance fraud if, with intent to defraud or deceive an insurer, the person, in support of a claim for payment under an insurance policy

> (1) prepares or causes to be prepared a statement that:
>
> > (A) the person knows contains false or misleading material information; and
> >
> > (B) is presented to an insurer; or
>
> (2) presents or causes to be presented to an insurer a statement that the person knows contains false or misleading material information.

TEX. PENAL CODE § 35.02(a).

The indictment alleged that Black committed insurance fraud against the complainant, "an insurer, namely, USAA" and tracked the statutory language in Section 35.02. Black cites no legal authority that prohibits the naming of an insurer as the complainant in an indictment for insurance fraud, and we find none. While it is true that an insurer must act through individuals, an indictment for insurance fraud

need not identify any particular agent or representative of the insurer. *See* TEX. PENAL CODE § 35.02. Rather, Section 35.02 merely requires the indictment to identify "an insurer," which it does.

Black contends that the term "insurer" in the indictment is vague because the legislature repealed the statute defining "insurer." Section 35.01(2) provides that "'insurer' has the meaning assigned by Article 1.02, Insurance Code." TEX. PENAL CODE § 35.01(2). The legislature repealed Article 1.02, and it was no longer in effect after March 31, 2009. The repealed version of Article 1.02(a) of the Insurance Code defined "insurer" as an "insurance company . . . engaged in the business of insurance in this state." TEX. INS. CODE art. 1.02(a).

Even though the legislature did not update the referenced statute in Section 35.01(2), our primary goal is to ascertain and give effect to the legislature's intent. *See* TEX. GOV'T CODE § 312.005; *Dromgoole v. State*, 470 S.W.3d 204, 219 (Tex. App.—Houston [1st Dist.] 2015, pet. ref'd) (op. on reh'g). We review the plain language of the statute to discern its meaning because we "presume that the legislature meant what it said." *State v. Vasilas*, 187 S.W.3d 486, 489 (Tex. Crim. App. 2006). And we give effect to statutes as a whole rather than their isolated provisions. *See Nguyen v. State*, 1 S.W.3d 694, 696 (Tex. Crim. App. 1999) (en banc).

The plain language of Section 35.01(2) of the Penal Code defines "insurer" using the Insurance Code's definition. The definition of "insurer" is codified in Section 560.001 of the Insurance Code. The language in Section 560.001 mirrors the language of the former Article 1.02(a), defining "insurer" as an "insurance company . . . engaged in the business of insurance in this state." TEX. INS. CODE § 560.001.

The record does not support Black's claim that he could not anticipate the State's evidence of the named insurer or prepare a defense. Before trial, the State provided Black with a copy of his recorded conversation with the USAA agent and filed a notice of intent to use his statements. The State also provided Black with an exhibit list that included the police report, the USAA claim file request, his USAA online application for automobile insurance, and his USAA insurance policy. When the State submitted the exhibits to the trial court, Black did not object. Along with the evidence, the State also provided Black with a witness list that included Barbier, Deputy Horace, and Deputy Parker.

At trial, the State introduced a copy of Black's online application listing USAA as the insurer. Black did not object to the admission of this evidence. Nor did he object to the admission of the insurance policy listing USAA as the insurer or to the admission of his recorded conversation with the USAA agent. Black's defensive theory was that he mistakenly entered the wrong date on his online application and

that the State's evidence was strewn with many errors. But he never presented evidence contesting USAA as his insurer.

We therefore conclude that Black had sufficient notice of the nature of the offense alleged in the indictment and the State's theory of the case against him, including the identity of the alleged defrauded insurer. *See Kellar v. State*, 108 S.W.3d 311, 313–14 (Tex. Crim. App. 2003) (en banc); *State v. Stukes*, 490 S.W.3d 571, 576–77 (Tex. App.—Houston [14th Dist.] 2016, no pet.) (rejecting defendant's inadequate-notice argument and noting that defendant "had ample notice in addition to that provided by the indictment," because the State provided offense reports and videotapes in support of the allegations in the indictment).

We overrule Black's first issue.

Right to Confrontation

In his second issue, Black contends his Sixth Amendment right to confrontation was violated when the complainant—the insurer—did not appear at trial to testify. He acknowledges that he failed to preserve error for appeal because he did not object on Sixth Amendment grounds. Even so, he argues that he did not have to object to preserve error for appeal because we may take notice of a fundamental error affecting his substantial rights under Rule 103(e) of the Texas Rules of Evidence. The State responds that Black failed to preserve this issue for appeal because he did not to object to evidence based on Confrontation Clause

grounds and Confrontation Clause errors are waived if not properly preserved for appeal. We agree.

A. Applicable law

To preserve error for appeal, the complaining party must make a timely, specific objection. TEX. R. APP. P. 33.1(a)(1); *Turner v. State*, 805 S.W.2d 423, 431 (Tex. Crim. App. 1991) (en banc). An objection is timely if the complaining party objects at the earliest possible opportunity or as soon as the ground of objection becomes apparent. *See Martinez v. State*, 867 S.W.2d 30, 35 (Tex. Crim. App. 1993) (en banc); *see also Gonzalez v. State*, 563 S.W.3d 316, 320–21 (Tex. App.—Houston [1st Dist.] 2018, no pet.). The complaining party must also obtain an adverse ruling from the trial court or object to the trial court's refuse to rule on the objection. TEX. R. APP. P. 33.1(a)(2); *Thierry v. State*, 288 S.W.3d 80, 85 (Tex. App.—Houston [1st Dist.] 2009, pet. ref'd). If the complaining party fails to obtain an adverse ruling from the trial court, then the complained-of error is not preserved. *See Fuller v. State*, 253 S.W.3d 220, 232 (Tex. Crim. App. 2008) ("Failure to preserve error at trial forfeits the later assertion of that error on appeal. In fact, almost all error—even constitutional error—may be forfeited if the appellant failed to object."). The admission of evidence is generally reviewed under the deferential abuse-of-discretion standard. *See Amador v. State*, 275 S.W.3d 872, 878 (Tex. Crim. App. 2009).

In a criminal case, a court may "take notice of a fundamental error affecting a substantial right, even if the claim of error was not properly preserved." TEX. R. EVID. 103(e); *see Blue v. State*, 41 S.W.3d 129, 131 (Tex. Crim. App. 2000) (en banc). There are two categories of constituting a fundamental error: (1) the denial of absolute, systemic requirements and (2) the violation of rights that are "waivable only." *Saldano v. State*, 70 S.W.3d 873, 888 (Tex. Crim. App. 2002) (en banc). "Absolute, systemic rights" include, among other things, jurisdiction over the person and subject matter, a penal statute's compliance with constitutional separation of powers, the constitutional prohibition of ex post facto laws, and certain constitutional restraints on a judge's comments. *Id*. at 888–89. Violations of "waivable-only" rights include the right to assistance of counsel and the right to trial by jury. *Id*. at 888. Because of their nature, those categories of rights, systemic requirements and waivable-only rights, are not subject to the error-preservation requirements of Appellate Rule 33.1. *See* TEX. R. APP. P. 33.1(a); *Mendez v. State*, 138 S.W.3d 334, 342–43 (Tex. Crim. App. 2004) (en banc).

B. Analysis

The State called four witnesses during the guilt-innocence phase of the trial, and Black did not object to their testimony based on Confrontation Clause grounds. Appellate complaints based on potential violations of the Sixth Amendment are waived absent a specific objection on Confrontation Clause grounds. *See Scott v.*

State, 555 S.W.3d 116, 126 (Tex. App.—Houston [1st Dist.] 2018, pet. ref'd). Black has provided no legal authority applying fundamental error principles to the unobjected-to introduction of evidence at trial. Courts have held that a defendant's failure to object on Confrontation Clause grounds at trial waives a Confrontation Clause complaint for appellate review. *See, e.g.*, *Davis v. State*, 313 S.W.3d 317, 347 (Tex. Crim. App. 2010) (holding Confrontation Clause complaints are subject to general error-preservation requirements); *Hernandez v. State*, 508 S.W.3d 752, 757 (Tex. App.—Amarillo 2016, no pet.) (no fundamental error for Confrontation Clause complaint where appellant's counsel agreed to admission of evidence).

We therefore conclude that Black's unobjected-to issues related to a possible Confrontation Clause violation were waived and do not constitute fundamental error. *See Paredes v. State*, 129 S.W.3d 530, 535 (Tex. Crim. App. 2004) (citing TEX. R. APP. P. 33.1).

We overrule Black's second issue.

Jury Charge

In his final issue, Black contends that the trial court erred by impermissibly defining "insurer" in the jury charge.

A. Applicable law

The trial court must provide the jury with a written charge "that accurately sets out the law applicable to the specific offense charged." *Oursbourn v. State*, 259

S.W.3d 159, 179 (Tex. Crim. App. 2008); *see* TEX. CODE CRIM. PROC. art. 36.14. We review jury charge error in a two-step process. *See Barrios v. State*, 283 S.W.3d 348, 350 (Tex. Crim. App. 2009). The first step is to determine whether there is error in the charge. *Id*.; *Ngo v. State*, 175 S.W.3d 738, 743 (Tex. Crim. App. 2005) (en banc). Only if we first find error in a jury instruction do we next consider whether a defendant was harmed by the error. *Taylor v. State*, 332 S.W.3d 483, 489 (Tex. Crim. App. 2011).

If the defendant did not object to the error at trial, then the second step is to review the unpreserved jury charge error under the egregious harm standard of review. *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985) (en banc), *superseded on other grounds by rule as stated in Rodriguez v. State*, 758 S.W.2d 787, 788 (Tex. Crim. App. 1988). The test for egregious harm is whether the defendant has been denied a fair and impartial trial. *See id*. at 172; *Villarreal v. State*, 453 S.W.3d 429, 433 (Tex. Crim. App. 2015). "We consider the extent of any harm 'in light of the entire jury charge, the state of the evidence, including the contested issues and weight of probative evidence, the argument of counsel and any other relevant information revealed by the record of the trial as a whole.'" *Torres v. State*, 408 S.W.3d 400, 404 (Tex. App.—Houston [1st Dist.] 2012, no pet.) (quoting *Saunders v. State*, 817 S.W.2d 688, 690 (Tex. Crim. App. 1991) (en banc)).

B. Analysis

Here, the jury charge defines "insurer" as "a person who engages in the business of insurance in this state." Black's argument mirrors his argument about the term "insurer" in the indictment. He argues that Section 35.02 of the Texas Penal Code does not define "insurer" because the legislature repealed Article 1.02(a) of the Insurance Code and definitions for terms that are not statutorily defined are not considered applicable law under Article 36.14. Thus, it is an error for the trial court to define those terms in the jury instructions.

But, as noted above, the Penal Code assigns "insurer" the definition in the Insurance Code, and that definition is now located in a different section. *See* TEX. PENAL CODE § 35.01(2). Under Section 560.001 of the Insurance Code, "insurer" is an "insurance company . . . engaged in the business of insurance in this state." TEX. INS. CODE § 560.001. The jury instruction here, defining "insurer" as "a person who engages in the business of insurance in this State," tracks the statute. It did not function as an improper comment on the weight of the evidence. *See Celis v. State*, 416 S.W.3d 419, 432 (Tex. Crim. App. 2013) (citing TEX. CODE CRIM. PROC. art. 36.14) (where statutorily permitted, the trial court may instruct on statutorily defined terms). We therefore conclude that the jury charge accurately sets out the law applicable to the case.

We overrule Black's third issue.

Conclusion

We affirm.

Sarah Beth Landau
Justice

Panel consists of Justices Kelly, Landau, and Hightower.

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