Affirmed and Memorandum Opinion filed February 8, 2011.

In The

Fourteenth Court of Appeals

NO. 14-09-00936-CR

ELONDA JAVETTE CALHOUN, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 337th District Court
Harris County, Texas
Trial Court Cause No. 1177242

MEMORANDUM OPINION

A jury found appellant, Elonda Javette Calhoun, guilty of impersonating a public servant. Appellant pleaded true to two enhancement paragraphs in the indictment, the jury assessed punishment at twenty-six years' confinement, and the trial court sentenced appellant accordingly. In four issues, appellant challenges the legal and factual sufficiency of the evidence and alleges error in the indictment and jury instruction. We affirm.

I. FACTUAL BACKGROUND

Appellant and Keisha Cobb worked in the same building in the past and were friends. One night, appellant called Cobb to get something to eat with her. Cobb met appellant in a parking lot and left with her in a rental car. Instead of driving to a restaurant, appellant told Cobb they were "going to make big bucks" and to "just follow [her] lead." Cobb observed two hats in the back of the car—one with "Sheriff" written on it; and the other, with "FBI." Cobb also saw handcuffs and gloves in the backseat.

The same evening, Arturo Vasquez and three other men had left a flea market in Vasquez's truck and were entering the parking lot of an apartment complex. Appellant followed them and flashed her bright lights towards the truck. Appellant told Cobb to approach the passenger side of the truck and tell the men to step out and empty their pockets onto the hood of the truck. According to both Vasquez and Cobb, appellant wore a "Sheriff" hat and Cobb wore an "FBI" hat. Both women also had badges. Appellant approached the driver side of the truck while Cobb approached the passenger side. As appellant shined a flashlight on Vasquez, he noticed she had handcuffs with her. Both women told the men to get out of the truck and place the contents of their pockets on the hood of the truck. After the men complied, appellant told them to get back into the truck. When the men saw appellant and Cobb take the items off the hood and put them in their pockets, the men realized they were being robbed.

After struggling with the men, appellant called 911 and reported that she and Cobb were robbed. When an officer arrived, the women told him a group of Hispanic men tried to rob them. The men, however, told the officer the women tried to rob them. The officer located an "FBI" hat, handcuffs, a silver badge, and gloves in the back of appellant's rental car, and a "Sheriff" hat several feet away from the rental car. Appellant had $320 in cash that the officer believed belonged to one of the men (not Vasquez), who reported that exact amount had been taken by the women.

Appellant was indicted for "intentionally impersonat[ing] a public servant, namely, a peace officer, FROM THE FEDERAL BUREAU OF INVESTIGATIONS, with intent to induce ARTURO VASQUEZ to submit to his [sic] pretended official authority and to rely on his [sic] pretended official acts, by DETAINING ARTURO VASQUEZ AND REMOVING PROPERTY FROM HIS PERSON." Appellant did not move to quash the indictment. The State subsequently amended the indictment and deleted the reference to removal of property from Vazquez's person.

Appellant pleaded not guilty, and trial was to a jury. In addition to Vasquez, the following witnesses testified for the State: Teofilo Perez, the Houston police officer who was dispatched to the scene; and Keisha Cobb. Vasquez and Cobb testified appellant was wearing the "Sheriff" hat.

At the close of the State's case, appellant moved for a directed verdict, arguing that "according to the indictment, the State failed to prove through any of their witnesses that Ms. Calhoun impersonated a police officer when she said she was from the Federal Bureau of Investigations." Appellant also referred to Vasquez's negative response when cross-examined about whether appellant ever told him she was from the FBI. Finally, appellant argued that the testimony established only that appellant was wearing a hat that said "Sheriff," and the State "specifically named an agency that says 'Federal Bureau of Investigations.' Therefore, they have failed to prove the elements of this crime." The court denied the motion, stating the law of parties "covers that."

Appellant called Perez and Richard White, an officer on probation who was riding with Perez. White's testimony conflicted with Perez's with regard to the number of officers at the scene and whether the police had their own interpreter.

The trial court's jury charge contained the following instructions relevant to our disposition:

The defendant, Elonda Javette Calhoun, stands charged by indictment with the offense of impersonating a public servant. . . .

Our law provides that a person commits an offense if she impersonates a public servant with intent to induce another to submit to her pretended official authority or to rely on her pretended official acts. A peace officer is a public servant.

"Public servant" means a person elected, selected, appointed, employed, or otherwise designated as an officer, employee, or agent of government, even if she has not yet qualified for office or assumed her duties and includes an officer, employee, or agent of government.

"Peace Officer" means a person elected, employed or appointed as a peace officer under Article 2.12, Code of Criminal Procedure, Section 51.212 or 51.214, Education Code, or other law, and includes sheriffs and their deputies, constables and their deputies, and marshals or police officers of an incorporated city, town, or village.

. . .

All persons are parties to an offense who are guilty of acting together in the commission of the offense. A person is criminally responsible as a party to an offense if the offense is committed by her own conduct, by the conduct of another for which she is criminally responsible, or by both.

A person is criminally responsible for an offense committed by the conduct of another if, acting with intent to promote or assist the commission of the offense, she solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense. Mere presence alone will not constitute one a party to an offense.

Now, if you find from the evidence beyond a reasonable doubt that in Harris County, Texas, the defendant, Elonda Javette Calhoun, heretofore on or about the 2nd day of August, 2008, did then and there unlawfully, intentionally impersonate a public servant, namely, a peace officer, from the Federal Bureau of Investigations, with intent to induce Arturo Vasquez to submit to her pretended official authority or to rely on her pretended official acts, by detaining Arturo Vasquez; or if you find from the evidence beyond a reasonable doubt that in Harris County, Texas, Keisha Cobb, heretofore on or about the 2nd day of August, 2008, did then and there unlawfully, intentionally impersonate a public servant, namely, a peace officer, from the Federal Bureau of Investigations, with intent to induce Arturo Vasquez to

> submit to her pretended official authority or to rely on her pretended official acts, by detaining Arturo Vasquez and that the defendant, Elonda Javette Calhoun, with the intent to promote or assist the commission of the offense, if any, solicited, encouraged, directed, aided or attempted to aid Keisha Cobb to commit the offense, if she did, then you will find the defendant guilty of impersonating a public servant, as charged in the indictment.

Neither party objected to the jury charge.

The jury found appellant guilty of impersonating a public servant as charged in the indictment and assessed punishment at twenty-six years' confinement. The trial court entered judgment accordingly, and appellant filed a motion for new trial, which was overruled by operation of law.

II. ANALYSIS

Appellant raises four issues. In issues one and two, respectively, she argues the evidence was legally and factually insufficient to sustain her conviction for impersonating a public servant. In issue three, she argues the indictment was fundamentally defective because it failed to allege an offense. In issue four, she contends the jury charge was fundamentally defective and authorized the jury to convict her of a non-existent offense. A single theme runs throughout appellant's brief—by statute an FBI agent is not a "peace officer" and appellant was therefore charged with, and convicted of, a non-existent offense.

We begin with a description of the statute that defines the charged offense and the premises and statutes on which appellant relies.

A. Impersonating a Public Servant

A person commits the charged offense if she "impersonates a public servant with intent to induce another to submit to [her] pretended official authority or to rely on [her] pretended official acts . . . ." Tex. Penal Code Ann. § 37.11(a)(1) (West 2003). "'Public servant' means a person elected, selected, appointed, employed, or otherwise designated as one of the following, even if he has not yet qualified for office or assumed his duties . . . an officer, employee, or agent of government . . . ." *Id.* § 1.07(a)(41)(A) (West Supp. 2009).

"'Government' means: (A) the state; (B) a county, municipality, or political subdivision of the state; or (C) any branch or agency of the state, a county, municipality, or political subdivision." *Id.* § (a)(24).

Appellant's first, third and fourth issues rest on the indictment's description of the public servant appellant allegedly impersonated, *i.e.*, a "peace officer, from the Federal Bureau of Investigations." Appellant contends impersonating an FBI agent does not constitute the offense of impersonating a public servant. In support, appellant relies on Penal Code section 1.07(a)(36) and Code of Criminal Procedure articles 2.12 and 2.122.

Section 1.07(a)(36) defines "peace officer" as "a person elected, employed, or appointed as a peace officer under Article 2.12, Code of Criminal Procedure, Section 51.212 or 51.214, Education Code, or other law." Tex. Penal Code Ann. § 1.07(a)(36). Code of Criminal Procedure Article 2.12 lists thirty-six categories of "peace officer," and FBI agents are not among them. Tex. Code Crim. Proc. Ann. art. 2.12 (West Supp. 2009). Article 2.122 provides in relevant part: "The following named criminal investigators of the United States shall not be deemed peace officers, but shall have the powers of arrest, search and seizure as to felony offenses only under the laws of the State of Texas . . . Special Agents of the Federal Bureau of Investigation . . . ." *Id.* art. 2.122(a)(1).

Appellant's argument thus rests on the premise she was charged with impersonating a peace officer. The offense with which appellant was charged, however, was impersonating a public servant. *See* Tex. Penal Code Ann. § 37.11(a)(1). Although the predecessor to current section 37.11 separately referred to impersonating a "peace officer" and increased the penalty for such conduct, the legislature deleted that provision in 1997. *See* Act of May 10, 1997, 75th Leg. R.S., ch. 189, § 7, 1997 Tex. Gen. Laws 1045, 1048. Section 37.11 currently does not contain the term "peace officer." For this reason alone, the definitions of "peace officer" in Code of Criminal Procedure articles 2.12 and 2.122 are arguably not relevant to an interpretation of current section 37.11.

Additionally, the definitions in articles 2.12 and 2.122 are contained in the Code of Criminal Procedure Title 1, Chapter 2, which prescribes the general duties of officers. References to the definitions in article 2.12 occur in statutes that prescribe the powers, duties, or privileges of peace officers in specific contexts. *See*, *e.g.*, Tex. Educ. Code Ann. § 25.091(a), (b-1), (c)(2) (Supp. 2009); Tex. Gov't Code Ann. §§ 615.103 (a)(2) & (b), 661.918 (a) &(b) (West 2004 & Supp. 2009); Tex. Parks & Wild. Code Ann. § 61.201(e) (West 2002). Thus, the definitions in articles 2.12 and 2.122 relate to the realm of actual—not "pretended"—powers, duties, and privileges. Section 37.11, in contrast, refers to "pretended" official authority and acts. *See* Tex. Penal Code Ann. § 37.11(a)(1).

Finally, the general purpose of section 37.11 is to protect the public from being "placed at risk of submitting to the pretended authority of an individual impersonating an agent of a 'governmental unit' . . . ." *Rice v. State*, 195 S.W.3d 876, 881 (Tex. App.—Dallas 2006, pet. ref'd). Given this purpose, the *Rice* court rejected a defendant's argument that section 37.11 applied only when a person represented he was an official of the State of Texas, as opposed to representing himself as an official of the State of Louisiana, a fact he conceded. *Id*. The court cited the definition of "public servant," which included an "agent of government," and the definition of government, which included "the state." *Id.* The court then reasoned:

> The penal code does not define the phrase "the state"; therefore, we interpret this statute by seeking "to effectuate the 'collective' intent or purpose of the legislators who enacted the legislation." *Boykin v. State*, 818 S.W.2d 782, 785 (Tex. Crim. App. 1991). If the "meaning of the statutory text, when read using the established canons of construction relating to such text, should have been plain to the legislators who voted on it, we ordinarily give effect to that plain meaning." *Boykin*, 818 S.W.2d at 785. In other words, we "interpret a statute in accordance with the plain meaning of its language unless the language is ambiguous or the plain meaning leads to absurd results." *Jordan v. State*, 36 S.W.3d 871, 873 (Tex. Crim. App. 2001). "State" is defined as "a body politic organized for civil rule and government," a "political organization that has supreme civil authority and political power and serves as the basis of government," or "any of the bodies politic or political units that together make up a federal union, as in the

> United States of America." *See* WEBSTER'S COLLEGE DICTIONARY 1306 (1991); WEBSTER'S 3D NEW INT'L DICTIONARY 2228 (1981). Thus, a person commits an offense if he impersonates an officer, employee, or agent of a political body, organization, or unit organized for civil rule and government. *See* TEX. PEN.CODE ANN. §§ 1.07(a)(24)(A), (41)(A), 37.11(a)(1).

Id.

Similar reasoning would allow the definition of "state" to include the federal government. Thus, even if an FBI agent is not a "peace officer," an FBI agent may be considered a "public servant."

B. The Issues

1. Allegedly defective indictment.

In issue three, appellant contends the indictment was fundamentally defective because special agents of the FBI are not peace officers and the indictment therefore failed to set forth an offense. As set forth above, the charging instrument alleged (1) appellant (2) committed the offense of impersonating a public servant. It therefore met the constitutional definition of an indictment. *See Cook v. State*, 902 S.W.2d 471, 477 (Tex. Crim. App. 1995) ("[T]o comprise an indictment within the definition provided by the constitution, an instrument must charge: (1) a person; (2) with the commission of an offense.").

Appellant did not move to quash the indictment. She has therefore forfeited her argument that the indictment failed to allege an offense. *McCoy v. State*, 932 S.W.2d 720, 724 (Tex. App.—Fort Worth 1996, pet. ref'd); *see Teal v. State*, 230 S.W.3d 172, 182 (Tex. Crim. App. 2003) (holding defendant, by waiting to object until after jury empanelled, forfeited right to object to indictment that failed to set forth mens rea element).

We overrule appellant's third issue.

2. Allegedly defective jury charge.

In issue four, appellant contends the jury charge "was fundamentally defective and authorized the jury to convict appellant of a non-existent offense." Appellant's complaint appears to rest on the inclusion of (1) the sentence stating, "A peace officer is a public servant[,]" (2) inclusion of the definition of "peace officer," and (3) the portion of the application paragraph instructing the jury it could find appellant guilty if it found appellant or Cobb "intentionally impersonate[d] a public servant, namely, a peace officer, from the Federal Bureau of Investigations . . . ."

Appellant affirmatively stated she had no objection to the jury charge. Therefore, error, if any, does not require reversal unless it was so egregious and created such harm that appellant was denied a fair trial. *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1984), *overruled on other grounds by Rodriguez v. State*, 758 S.W.2d 787 (Tex. Crim. App. 1988). First, we must determine whether the jury charge was erroneous. *Hutch v. State*, 922 S.W.2d 166, 170 (Tex. Crim. App. 1996). If it was, then we must determine whether the error in the charge resulted in egregious harm. *Id*. at 170–71. In the instant case, we will assume, without deciding, that the equation of a peace officer with an FBI agent was error.

In examining the record for egregious harm, we consider the entire jury charge, the state of the evidence, the final arguments of the parties, and any other relevant information revealed by the record of the trial as a whole. *Olivas v. State*, 202 S.W.3d 137, 144 (Tex. Crim. App. 2006). "Jury charge error is egregiously harmful if it affects the very basis of the case, deprives the defendant of a valuable right, or vitally affects a defensive theory." *Stuhler v. State*, 218 S.W.3d 706, 719 (Tex. Crim. App. 2007).

The entire jury charge. The abstract portion of the charge correctly set forth the offense ("impersonating a public servant") and the elements ("impersonating a public servant with intent to induce another to submit to her pretended official authority or to rely on her pretended official acts"). It correctly stated that a peace officer is a public servant.

It correctly set forth the statutory definitions of "public servant" and "peace officer." The definition of "public servant" provided, in part, "'Public servant' . . . includes an officer, employee, or agent of government." Finally, it correctly set forth the law of parties. Thus, if there were error in the jury charge, that error lay only in a single phrase in the application paragraph equating a peace officer with someone from the Bureau of Investigation.[1] Absent that equation, the application paragraph would have asked the jury to find appellant guilty if she did "unlawfully, intentionally impersonate a public servant, namely, an agent from the Federal Bureau of Investigation,[2] with intent to induce Arturo Vasquez to submit to her pretended official authority or to rely on her pretended official acts, by detaining Arturo Vasquez."

In sum, the charge error, if any, occurred in a single phrase (repeated in relation to the law of parties) in the application paragraph. The abstract portion of the jury instruction correctly and completely set forth the charged offense, the statutory elements, and the relevant definitions.

The state of the evidence. As described more fully below, the evidence established that appellant and Cobb, equipped with badges, handcuffs, and hats indicating "Sheriff" and "FBI," detained Vasquez and successfully demanded that he and his passengers put the contents of their pockets on the hood of Vasquez's truck. It was only when Vasquez and the others saw appellant and Cobb taking the items from the hood and putting them in their own pockets that the men realized they were being robbed.

The final arguments of the parties. Appellant did not testify at trial. Her defense consisted of eliciting inconsistencies in the State's witnesses' testimony, referring to deficiencies in the investigation and the limited number of testifying witnesses given the

[1] The phrase appeared twice in the application paragraph, once referring to appellant and once (in relation to the law of parties) referring to Cobb.

[2] See the discussion of *Rice v. State*, 195 S.W.3d 876 (Tex. App.—Dallas 2006, pet. ref'd), above, regarding the definition of "government" and "state."

number of people at the scene, and implying Cobb was lying to gain favor with the prosecution or for other motives.

Other relevant information. Finally, two aspects of the record of the trial as a whole are noteworthy. First, appellant's complaint about the jury charge is essentially the same as her complaint about the indictment, yet she never moved to quash the indictment. Second, although appellant moved for a directed verdict at the close of the State's case, she argued the State failed to prove she was the person wearing the FBI hat; she did not argue an FBI agent was not a public servant.

Considering the entire jury charge, the state of the evidence, the final arguments of the parties, and the record of the trial as a whole, we conclude appellant has not shown egregious harm. Accordingly, even if there were error in the charge, it is not grounds for reversal.

We overrule appellant's fourth issue.

3. Sufficiency of the evidence.[3]

In issues one and two, appellant challenges the legal and factual sufficiency of the evidence. While this appeal was pending, five judges on the Texas Court of Criminal Appeals held that only one standard should be employed to evaluate whether the evidence is sufficient to support a criminal conviction beyond a reasonable doubt: legal sufficiency. *See Brooks v. State*, 323 S.W.3d 893, 894–95 (Tex. Crim. App. 2010) (plurality op.); *id.* at 926 (Cochran, J., concurring). Accordingly, we review appellant's challenge to factual sufficiency of the evidence under the legal-sufficiency standard. *See Pomier v. State*, 326 S.W.3d 373, 378 (Tex. App.—Houston [14th Dist.] 2010, no pet.) (applying single standard of review required by *Brooks*); *see also Caddell v. State*, 123

[3] In *Smith v. State*, the Waco Court of Appeals refused to address a sufficiency-of-evidence point when appellant was arguing simply that the State had failed to allege an offense and appellant had not filed a motion to quash the indictment until the trial date. 959 S.W.2d 1, 9 (Tex. App.—Waco 1997, pet. ref'd).

S.W.3d 722, 726–27 (Tex. App.—Houston [14th Dist.] 2003, pet. ref'd) (explaining that this court is bound to follow its own precedent).

When reviewing sufficiency of the evidence, we view all the evidence in the light most favorable to the verdict to determine whether the jury was rationally justified in finding guilt beyond a reasonable doubt. *Brooks*, 323 S.W.3d at 899 (plurality op.). Following the admonitions of the Court of Criminal Appeals in *Brooks*, we may not sit as a thirteenth juror and substitute our judgment for that of the fact finder by reevaluating the weight and credibility of the evidence. *See id.* at 899, 901; *Dewberry v. State*, 4 S.W.3d 735, 740 (Tex. Crim. App. 1999); *see also Sharp v. State*, 707 S.W.2d 611, 614 (Tex. Crim. App. 1986) (expressing that jury may choose to believe or disbelieve any portion of the testimony). We defer to the fact finder's resolution of conflicting evidence unless the resolution is not rational. *See Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007). Our duty as a reviewing court is to ensure the evidence presented actually supports a conclusion that the defendant committed the charged crime. *Williams v. State*, 235 S.W.3d 742, 750 (Tex. Crim. App. 2007).

The gravamen of appellant's legal sufficiency complaint is that the State did not prove she impersonated a "peace officer." As discussed above, however, section 37.11(a)(1) does not require the State to prove appellant impersonated a peace officer. Instead, section 37.11(a)(1) requires the State to prove only that appellant (1) impersonated a public servant (2) with intent to induce another to submit to her pretended official authority or to rely on her pretended official acts. Tex. Penal Code Ann. § 37.11(a)(1). Additionally, as discussed above, we have concluded a "public servant" includes an agent of the federal government. The evidence was sufficient to establish appellant impersonated a public servant either as a principal or a party.

Cobb testified appellant drove to an apartment complex where she "proceeded to pull over . . . a truck" by flashing her bright lights. Appellant told Cobb to follow

appellant's lead, to do exactly what appellant did. Appellant was wearing a "Sheriff" hat; and Cobb, an "FBI" hat. Both appellant and Cobb had badges.

Vasquez testified appellant and another woman came up behind his truck and told him they were police officers.[4] The women were dressed like police officers, with caps, shirts, and badges. Appellant had handcuffs and a flashlight, which she shined on Vasquez. Appellant told Vasquez he had run a red light, asked for identification, and asked the men to exit the truck and place their belongings on the truck. The men did so. Vasquez initially believed appellant was a real police officer.

Officers Perez and White found handcuffs, a silver badge, a black "FBI" hat, and a black "Sheriff" hat at the scene. Perez testified the silver badge was similar to the one he wore as a police officer and agreed it could possibly "fool" someone.

The evidence was sufficient to support appellant's conviction of impersonating a public servant. Accordingly, we overrule appellant's first and second issues.

We affirm the trial court's judgment.

/s/ Charles W. Seymore
Justice

Panel consists of Justices Seymore, Boyce, and Christopher.
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[4] Vasquez identified Cobb's photo as that of the other woman.