Affirmed and Memorandum Opinion filed April 25, 2017.

In The

Fourteenth Court of Appeals

NO. 14-16-00283-CR
NO. 14-16-00284-CR

TED DAHL, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Court at Law No. 4
Brazoria County, Texas
Trial Court Cause Nos. 217896 & 217897

M E M O R A N D U M O P I N I O N

A jury convicted appellant Ted Dahl of two Class C misdemeanors for violating city ordinances of the City of Freeport: enlarging a plumbing system without a permit and enlarging an electrical system without a permit. Appellant challenges the sufficiency of the evidence to support his convictions. We affirm.

I. SUFFICIENCY OF THE EVIDENCE

Appellant contends that there is legally insufficient evidence (1) of the ordinances under which he was convicted and (2) that appellant was acting "as an agent for the owner, Tina Dahl," as alleged in the complaints. The State asks this court to take judicial notice of the ordinances, and the State contends that any variance between the allegations and proof concerning who owned the real property—upon which the plumbing and electrical systems were enlarged—was immaterial.

First, we recite the standard of review for legal sufficiency. Then, we take judicial notice of the ordinances under which appellant was convicted so that we may evaluate the sufficiency of the evidence under the hypothetically correct jury charge. Ultimately, we hold that the evidence is legally sufficient to support appellant's conviction regardless of any variance concerning ownership of the real property.

A. Standard of Review

When a defendant challenges the sufficiency of the evidence, we must determine whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *See Thomas v. State*, 444 S.W.3d 4, 8 (Tex. Crim. App. 2014); *Geick v. State*, 349 S.W.3d 542, 545 (Tex. Crim. App. 2011). To determine the essential elements of the crime and whether the State has met its burden of proof, we look to the hypothetically correct jury charge. *See Thomas*, 444 S.W.3d at 8; *Geick*, 349 S.W.3d at 545. Generally, the hypothetically correct jury charge includes the statutory elements of the offense as modified by the charging instrument. *See Thomas*, 444 S.W.3d at 8; *Johnson v. State*, 364 S.W.3d 292, 294

(Tex. Crim. App. 2012); *Gollihar v. State*, 46 S.W.3d 243, 254–55 (Tex. Crim. App. 2001).

B. Judicial Notice

Appellant contends that this court cannot "perform a meaningful review of the convictions" because the record does not contain the ordinances under which appellant was charged. We agree with appellant that we must review the ordinances to determine whether the evidence is legally sufficient under the hypothetically correct jury charge.

But appellant acknowledges that "the actual ordinance need not be placed in the record if the trial court, appellate court, and the accused can just as easily access the official municipal ordinance via so [sic] other reliable source other than an actual hard copy being placed into the evidence in front of the jury." The State asks this court to take judicial notice of the ordinances under Rule 204 of the Texas Rules of Evidence.[1]

Rule 204 governs judicial notice of Texas municipal and county ordinances. Tex. R. Evid. 204(a). A court, not a jury, must determine municipal ordinances. Tex. R. Evid. 204(d). Taking judicial notice of municipal ordinances is a question of law. *See id.* A court may take judicial notice on its own. Tex. R. Evid. 204(b)(1).

The State charged appellant by separate complaints for enlarging electrical and plumbing systems. The complaints appear as follows, with emphasis added for the language that is different for each complaint:

> [O]n or about the 1 day of June, 2015, and before the making and filing of this complaint TED DAHL, the Defendant herein, within the territorial limits of the City of Freeport, Brazoria County, Texas, did then and there intentionally ENLARGE **an electrical** system

[1] Appellant did not file a reply brief or otherwise disagree with the State's request.

regulated by the International Building Code on a premises with structures located at 225 West Broad and comprised of Lots 2, 3, 4, 5, 6, 8, 9, 10, 11 and 12 of Block 48 of the Freeport Townsite, as agent for the owner, TINA DAHL, without first obtaining a work permit from the City; in violation of Section **105.1** of the International **Building** Code, 2009 Edition, which, as adopted by Section **150.001** of the Code of Ordinances of the City of Freeport, Texas, by Ordinance 2012-2298 passed on 1-17-12, provides that it shall be unlawful for any owner or authorized agent who intends to construct, enlarge, alter, repair, move, demolish, or change the occupancy of a building or structure, or to erect, install, enlarge, alter, repair, remove, convert or replace any **electrical** system, the installation of which is regulated by the International **Building** Code, 2009 Edition, or to cause any such work to be done, shall first make application to the building official and obtain the required permit; Contrary to said ordinance and against the peace and dignity of the State.

[O]n or about the 1 day of June, 2015, and before the making and filing of this complaint TED DAHL, the Defendant herein, within the territorial limits of the City of Freeport, Brazoria County, Texas, did then and there intentionally ENLARGE **a plumbing** system regulated by the International Building Code on a premises with structures located at 225 West Broad and comprised of Lots 2, 3, 4, 5, 6, 8, 9, 10, 11 and 12 of Block 48 of the Freeport Townsite, as agent for the owner, TINA DAHL, without first obtaining a work permit from the City; in violation of Section **106.1** of the International **Plumbing** Code, 2009 Edition, which, as adopted by Section **150.045** of the Code of Ordinances of the City of Freeport, Texas, by Ordinance 2012-2298 passed on 1-17-12, provides that it shall be unlawful for any owner or authorized agent who intends to construct, enlarge, alter, repair, move, demolish, or change the occupancy of a building or structure, or to erect, install, enlarge, alter, repair, remove, convert or replace any **plumbing** system, the installation of which is regulated by the International **Plumbing** Code, 2009 Edition, or to cause any such work to be done, shall first make application to the building official and obtain the required permit; Contrary to said ordinance and against the peace and dignity of the State.

(emphasis added).

Respectively, the complaints allege violations of Sections 150.001 and 150.045 of the Code of Ordinances of the City of Freeport. The State does not provide this court with copies of the ordinances, but the State provides a hyperlink to the City of Freeport's municipal code.[2] Appellant does not dispute the accuracy of the code. We take judicial notice of the relevant sections, which appear respectively as follows:

> The International Building Code, 2009 Edition, published by the International Code Council, Inc., together with all amendments thereto, save and except such portions as are inconsistent with the provisions of this subchapter, is hereby adopted and incorporated and made a part of this chapter as fully as if set forth at length herein. One copy of such code shall be maintained at all times in the office of the City Secretary. Any person violating such code shall be guilty of a misdemeanor and on conviction punished as provided in § 10.99.

City of Freeport, Tex., Code of Ordinances ch. 150, § 150.001 (2016).

> The International Plumbing Code, 2009 Edition, published by the International Code Council, Inc., together with all amendments thereto, save and except such portions as are inconsistent with the provisions of this subchapter, is hereby adopted and incorporated and made a part of this chapter as fully as if set forth at length herein. One copy of such code shall be maintained at all times in the office of the City Secretary. Any person violating such code shall be guilty of a misdemeanor and on conviction punished as provided in § 10.99.

City of Freeport, Tex., Code of Ordinances ch. 150, § 150.045 (2016).

As a home-rule city, the City of Freeport may adopt international codes in this fashion. *See State v. Cooper*, 420 S.W.3d 829, 832 (Tex. Crim. App. 2013) (approving the City of Plano's incorporation of the International Property Maintenance Code published by the International Code Council; noting that

[2] *See* City of Freeport, Tex., Code of Ordinances (2016), http://www.amlegal.com/codes/client/freeport_tx/.

international codes "give local governments the ability to adopt more thorough and well-researched codes at lower costs to their taxpayers"). Because these ordinances incorporate the 2009 editions of the International Building Code (IBC) and International Plumbing Code (IPC) published by the International Code Council, we will also take judicial notice of these codes. Section 105.1 of the IBC and Section 106.1 of the IPC, referenced in the complaints, appear as follows:

> Any owner or authorized agent who intends to construct, enlarge, alter, repair, move, demolish, or change the occupancy of a building or structure, or to erect, install, enlarge, alter, repair, remove, convert or replace any electrical, gas, mechanical or plumbing system, the installation of which is regulated by this code, or to cause any such work to be done, shall first make application to the building official and obtain the required permit.

International Code Council, Inc., *International Building Code* § 105.1 (2009 ed.) (emphasis omitted), *available at* http://legacycodes.iccsafe.org/app/book/toc/2009/I-Codes/2009%20IBC%20HTML/index.html.

> Any owner, authorized agent or contractor who desires to construct, enlarge, alter, repair, move, demolish or change the occupancy of a building or structure, or to erect, install, enlarge, alter, repair, remove, convert or replace any plumbing system, the installation of which is regulated by this code, or to cause any such work to be done, shall first make application to the code official and obtain the required permit for the work.

International Code Council, Inc., *International Plumbing Code* § 106.1 (2009 ed.) (emphasis omitted), *available at* http://legacycodes.iccsafe.org/app/book/toc/2009/I-Codes/2009%20IBC%20HTML/index.html.

Further, Section 114 of the IBC and Section 108 of the IPC, titled "Violations," describe "unlawful acts":

> **114.1 Unlawful acts.** It shall be unlawful for any person, firm or corporation to erect, construct, alter, extend, repair, move, remove, demolish or occupy any building, structure or equipment regulated by this code, or cause same to be done, in conflict with or in violation of any of the provisions of this code.

IBC § 114.1.

> **108.1 Unlawful acts.** It shall be unlawful for any person, firm or corporation to erect, construct, alter, repair, remove, demolish or utilize any plumbing system, or cause same to be done, in conflict with or in violation of any of the provisions of this code.

IPC § 108.1.

Having taken judicial notice of the ordinances and the incorporated provisions of the international codes, we may address appellant's legal sufficiency arguments.

C. Legally Sufficient Evidence that Appellant Violated Ordinances

Appellant does not dispute that he intentionally enlarged or caused to be enlarged the electrical or plumbing systems at 225 West Broad and did not first obtain the required permits. Appellant testified that he hired someone to perform the work and that the other person was supposed to get the permits.

Appellant contends, however, that the State failed to prove that Tina Dahl was the owner of the property and that appellant was acting as her agent, as alleged in the complaints. He adduced evidence that Tina Dahl had deeded her life estate in the property to an entity, the Houston Land & Cattle Company, about a month before the date alleged in the indictment. He testified that he was acting as an agent for the Company at the time he hired someone to do the electrical and plumbing work.

On appeal, the State does not dispute appellant's assertion that the State failed to prove that Tina Dahl owned the property. But the State contends that any failure of proof was an immaterial variance, which does not render the evidence legally insufficient.

We agree with the State. First, we review general principles for variances. Then, we apply those principles to the offenses for which appellant was convicted. We conclude that the variances regarding ownership of the real property are immaterial.

1. Variance Principles

"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). The hypothetically correct jury charge for assessing the sufficiency of the evidence "need not incorporate allegations that give rise to immaterial variances." *Johnson v. State*, 364 S.W.3d 292, 294 (Tex. Crim. App. 2012) (quoting *Gollihar*, 46 S.W.3d at 256).

There are three types of variances: (1) a variance involving statutory language that defines the offense; (2) a variance involving a non-statutory allegation that describes an allowable unit of prosecution for the offense; and (3) other types of variances involving immaterial non-statutory allegations. *Id.* at 298–99.

The first type of variance is always material, so the variance renders the evidence legally insufficient. *Id.* at 298. For example, the Texas retaliation statute criminalizes threatening a witness or informant; and if the State alleges that the defendant threatened a witness but proves at trial the threatening of an informant, the evidence is legally insufficient. *See id.* at 294.

The second type of variance sometimes renders the evidence legally insufficient, depending upon whether the variance is material. *See id.* at 298–99. These variances are immaterial if they are "'little mistakes' that do not prejudice the defendant's substantial rights." *Id.* at 295. But these variances are material if they actually amount to a "failure to prove the offense alleged"—they are material if "the proof at trial 'shows an entirely different offense' than what was alleged in the charging instrument." *Id.* (quoting *Byrd v. State*, 336 S.W.3d 242, 247 (Tex. Crim. App. 2011)).[3]

The third type of variance never renders the evidence legally insufficient. *See id.* at 299. These variances are non-statutory and do not relate to the allowable unit of prosecution. *See id.* at 296. For example, the method of causing murder—such as poisoning, garroting, shooting, stabbing, or drowning—falls into this category of variance, *see id.*, as does the manner of causing injury in an aggravated assault case, *id.* at 298.

To determine whether a non-statutory variance falls into the second or third category, we must determine whether the allegation is "descriptive of an element of the offense that defines or helps define the allowable unit of prosecution." *See*

[3] For example, the allowable unit of prosecution for murder is each victim. *Johnson*, 364 S.W.3d at 295. So if the State alleges the killing of Dangerous Dan McGrew but proves the killing of Little Neil instead, the variance is material and renders the evidence legally insufficient. *See Byrd*, 336 S.W.3d at 246–47. But if the State proves the killing of Dan McGrew, Daniel Macgrew, or Dan Magoo, the variance is likely immaterial because it would not be prejudicial by "(1) failing to give [the defendant] notice of who it was he allegedly killed, or (2) allowing a second murder prosecution for killing the same person with a different spelling of his name." *Id.* at 247. Similarly, the allowable unit of prosecution for theft is derived from the property and ownership: "different property taken from different persons are different thefts." *Johnson*, 364 S.W.3d at 297. A variance concerning the model number of a go-cart was immaterial because the State proved only one theft. *See id.*; *Gollihar*, 46 S.W.3d at 258. But a variance concerning the name of the owner—"Mike Morales" versus "Wal-Mart"—was material because the variance was "significant enough that [the court] could not conclude that the State had proved the same theft." *Johnson*, 364 S.W.3d at 297.

id. at 297. We determine the allowable unit of prosecution by ascertaining "the focus or gravamen of the offense," often in the context of double-jeopardy or jury-unanimity cases. *Id.* at 296. Determining the allowable unit of prosecution is a matter of statutory construction. *Harris v. State*, 359 S.W.3d 625, 629 (Tex. Crim. App. 2011).

"One aid in identifying the gravamen of the offense is grammar." *Id.* at 630. We look to the subject, verb, direct object, and prepositional or adverbial phrases that define the circumstances under which the conduct amounts to an offense. *See id.* When the Legislature places limitations on conduct by criminalizing the conduct only in specific circumstances, the grammatical analysis suggests that the act or conduct itself is the focus of the offense. *See id.* (reasoning that the statute of indecency with a child by exposure criminalizes "exposure only in specific circumstances," which indicates that "the act of exposure is the focus of the offense, and thus, the unit of prosecution is each exposure"; holding that the number of children who witnessed the exposure did not define the allowable unit of prosecution).

Another grammatical aid concerning the gravamen of an offense "is that a legislative reference to an item in the singular suggests that each instance of that item is a separate unit of prosecution." *Id.* (quoting *Jones v. State*, 323 S.W.3d 885, 891 (Tex. Crim. App. 2010)). In particular, this grammatical aid is appropriate when the singularity refers to or modifies the direct object of the sentence. *See id.* (distinguishing prior case because the singularity related to the direct object of the statute).

Finally, "another aid in determining the gravamen of an offense is to identify 'the offense element that requires a completed act.'" *Id.* (quoting *Jones*, 323 S.W.3d at 890). For example, the offense of indecency with a child by exposure is

complete once the defendant unlawfully exposes himself in the required circumstances. *Id.* at 631. This factor would suggest that the exposure itself, and not the number of children present, is the unit of prosecution. *Id.*

With these principles in mind, we turn to the variance at issue in this case: an allegation that appellant was acting as an agent of the owner, Tina Dahl, when the evidence showed appellant was acting as an agent for the owner, Houston Land & Cattle Company.

2. Application: Immaterial Variance

The identity of the owner of the regulated system or structure is not part of the statutory language defining the offense, so we must determine whether it falls within the second or third category discussed above. We conclude, after applying the grammatical aids discussed above, that the gravamen of each offense is the conduct of enlarging the regulated system under a particular circumstance, not who owned the property where the system was enlarged. Thus, the variance at issue here falls into the third category and is immaterial.

The IBC and IPC state that it is unlawful for a person to perform an action (e.g., construct, alter, or extend), or cause that action to be done, regarding a direct object (e.g., structure, equipment, electrical or plumbing system), under a particular circumstance (e.g., "in conflict with or in violation of any of the provisions of this code"). *See* IBC § 114.1; IPC § 108.1. Each code includes a provision that requires a person, before enlarging an electrical system or plumbing system, respectively, to obtain a permit for the work to be performed. *See* IBC § 105.1; IPC § 106.1.

These codes proscribe *conduct* under certain *circumstances*: enlarging a particular electrical or plumbing system without first obtaining a permit. This

factor suggests that the allowable unit of prosecution relates to the conduct of altering a particular system, not who owned the system. *See Harris*, 359 S.W.3d at 630. The direct objects are singular, which also suggests the allowable unit of prosecution is altering a system, not the owner of the system. *See id.* And finally, the crime is complete once the defendant acts, regardless of any consequences for the owner. *See id.* The focus or gravamen of each offense is not on the owner of the system.

Because the variance at issue here—the identity of the systems' owner—falls into the third category, it does not render the evidence legally insufficient. Appellant's issues are overruled.

II. CONCLUSION

Having overruled appellant's issues, we affirm the trial court's judgment.

/s/ Ken Wise
Justice

Panel consists of Justices Boyce, Busby, and Wise.
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