Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-14-00904-CR

Jonathan Matthew **ESCOBEDO**,
Appellant

v.

The **STATE** of Texas,
Appellee

From the 81st Judicial District Court, Atascosa County, Texas
Trial Court No. 13-09-0117-CRA
Honorable Donna S. Rayes, Judge Presiding

Opinion by: Rebeca C. Martinez, Justice

Sitting: Sandee Bryan Marion, Chief Justice
Rebeca C. Martinez, Justice
Jason Pulliam, Justice

Delivered and Filed: April 6, 2016

AFFIRMED

Jonathan Matthew Escobedo appeals his conviction for murder, challenging the sufficiency of the evidence based on a fatal variance between the allegations in the indictment and the evidence presented at trial. We affirm the trial court's judgment.

BACKGROUND

In the summer of 2013, Jonathan Matthew Escobedo had recently gotten out of drug rehab and was living on his older brother's property in Atascosa County, Texas. His brother, Oscar Escobedo, and the victim, Louis Antonio Reyes (also known as "Lou"), both resided on the

property. Oscar and Reyes performed contract work for an air conditioning repair company and Jonathan sometimes worked with them. At about 5:00 a.m. on August 10, 2013, Oscar noticed his work van was missing. Oscar had allowed Jonathan to drive the van the night before to take Reyes to cash his pay check; according to Jonathan, Reyes also bought drugs that night. When Jonathan returned with the van at about 9:00 a.m., Oscar was upset because he was late for work and told Jonathan to get his stuff together because he needed to find somewhere else to live. Oscar then directed Jonathan to go to Reyes' trailer and retrieve the keys to a different, broken-down work van. Jonathan retrieved the keys from Reyes and gave them to Oscar at his home and then walked back outside. Oscar noticed that Jonathan was still wearing his work clothes from the day before, and still had the duct knife he used for work attached to his belt. According to Oscar, Jonathan returned to Oscar's home approximately thirty minutes later wearing different clothes and looking like he had showered.

Jonathan testified that he went back to Reyes' trailer, where the two men smoked drugs together. An altercation ensued after Reyes mentioned an ex-girlfriend and Jonathan took the pipe away from Reyes. Jonathan stated that Reyes "came at him" and they fought, and he stabbed Reyes a couple of times in self-defense. After Reyes stopped moving, Jonathan felt ashamed of what he had done and covered the body with a blanket. Jonathan rinsed the knife and removed his bloody clothes and showered at Reyes' trailer. He then headed back to Oscar's house where he sat down to breakfast with Oscar and his family. Jonathan handed Oscar a note that read, "God's not talking to me anymore." After Oscar made a retort, Jonathan wrote, "I killed Lou." Upon reading the note, Oscar took Jonathan over to Reyes' trailer, where he found Reyes lying on the floor wrapped in a blanket. Oscar was angry and began yelling at and wrestling with Jonathan. When Oscar went back inside to check if Reyes had a pulse, Jonathan took off running. Oscar told his wife to call 911 and

stated that Jonathan had killed Lou. Officers with the Atascosa County Sheriff's Department found Jonathan later that day and placed him in custody.

Jonathan was indicted for first-degree murder for "intentionally or knowingly causing the death of an individual, namely, Louis Antonio Reyes by cutting him with a knife." Jonathan pled not guilty and proceeded to trial, at which the jury heard testimony from Oscar and his wife, among others. Jonathan testified that he acted in self-defense and provided the jury with his version of the events. Jonathan was convicted of Reyes' murder. Based on the jury's recommendation, the trial court sentenced him to twenty-five years in prison.

DISCUSSION

In his sole issue on appeal, Jonathan argues the evidence is insufficient to support his murder conviction due to a fatal variance between pleading and proof. Specifically, Jonathan asserts the evidence at trial proved that Reyes' death was caused by *stabbing* with a knife, while the indictment alleged that Reyes' death was caused by *cutting* with a knife. The State responds that there is no true variance, and that Jonathan had notice of the charge against him and was not surprised by the trial evidence with respect to the manner of causing the death.

Texas law recognizes two types of variances between pleading and proof. *Johnson v. State*, 364 S.W.3d 292, 294 (Tex. Crim. App. 2012). The first type of variance involves the statutory language that defines the elements of the offense and occurs when the statute contains alternative methods of committing the offense, the State pleads one of the alternatives, but proves the unpled method. *Id.* at 294-95 (noting this type of variance is always material and renders the evidence legally insufficient to support the conviction). The second type of variance involves a non-statutory allegation that is descriptive of the offense in some way. *Id*. at 294 (providing an example where the charging instrument pleads the offense was committed with a knife, but the State proves at trial that the offense was committed with a baseball bat). The effect of a non-statutory variance may be

either material or immaterial. *Id*. at 295 (recognizing that the law tolerates some variation between pleading and proof, i.e., "'little mistakes' that do not prejudice the defendant's substantial rights"). Where a variance with respect to a non-statutory allegation is so great that the evidence at trial proves "an entirely different offense" was committed than was alleged in the indictment, it is material. *Id*.; *see also Guerrero v. State*, 964 S.W.2d 32, 38 (Tex. App.—San Antonio 1997, pet. ref'd) (non-statutory variance is immaterial if "it is inconceivable that the accused could have been misled or prejudiced thereby").

The present case involves an alleged non-statutory variance. In his brief, Jonathan concedes the evidence is sufficient to prove he caused Reyes' death by stabbing him with a knife, but contends it amounts to a material variance from the method alleged in the indictment and submitted in the jury charge, i.e., cutting with a knife. Jonathan bases this argument on the medical examiner's testimony that the "cutting" injuries sustained by Reyes did not cause his death; rather, the four "stabbing" injuries penetrated his vital organs and caused his death.

We disagree that a material variance exists in this case. Texas courts have held that the act of stabbing with a knife necessarily includes the act of cutting with a knife. *See Daugherty v. State*, 216 S.W.2d 200, 200-01 (Tex. Crim. App. 1948) (op. on reh'g) ("Evidently a stab with a knife and a cut with a knife mean the same thing, although there might be a difference in the angle upon which the knife penetrated."); *see also Mott v. State*, 543 S.W.2d 623, 626 (Tex. Crim. App. 1976) (rejecting argument of fatal variance where indictment alleged causing bodily injury by "hitting" the complainant with a glass and the evidence showed the injuries occurred as a result of "cutting" with a glass). This court has stated that "it is common knowledge that an individual who is stabbed with a knife is cut." *Guerrero*, 964 S.W.2d at 37. We noted that the dictionary similarly defines the terms "stab" and "cut" as meaning, in part, "to pierce." *Id*. In *Dominguez v. State*, the appellant made the same argument as Jonathan, that the evidence was insufficient to support his murder

conviction because the medical examiner's testimony proved the victim's fatal wounds were caused by "stabbing," but the indictment alleged he killed the victim by "cutting" her. *Dominguez v. State*, 355 S.W.3d 918, 921 (Tex. App.—Fort Worth 2011, pet. ref'd). The court rejected the argument, stating that "[s]tabbing by definition involves cutting." *Id.* (relying on the Merriam-Webster Online Dictionary's definitions of "cut" as "to penetrate with or as if with an edged instrument," and "stab" as "to wound or pierce by the thrust of a pointed weapon"); *see also Arnold v. State*, 686 S.W.2d 291, 294 (Tex. App.—Houston [14th Dist.] 1985), *aff'd*, 742 S.W.2d 10 (Tex. Crim. App. 1987) (rejecting the argument of a fatal variance between "stabbing" and "cutting" based on the technical distinction made by the medical examiner as to the exact manner of causing the victim's death). Therefore, because the two terms essentially have the same meaning, it cannot be said that a material variance exists. Moreover, Jonathan has not shown that he was surprised or prejudiced by the medical examiner's testimony concerning the fatal "stabbing" wounds. *See Daugherty*, 216 S.W.2d at 200-01 (finding that appellant received proper notice of the offense alleged against him and that the proof corresponded with the allegation where the indictment used the word "cut" and the State proved the offense was committed by "stabbing").

Further, as explained in *Johnson*, murder is a result-oriented crime, and the allowable unit of prosecution for the offense of murder is each victim. *Johnson*, 364 S.W.3d at 295-96, 298. "What caused the victim's death is not the focus or gravamen of the offense; the focus or gravamen of the offense is that the victim was killed." *Id.* at 298. A variance involving a non-statutory allegation such as the method used to commit murder, which has nothing to do with the allowable unit of prosecution, cannot be the basis for a finding that the proved offense is different from the pled offense. *See id.* (noting that "stabbing with a knife" and "bludgeoning with a baseball bat" are two possible methods of murdering someone, but they do not constitute separate offenses because there is a single murder victim). Therefore, even if we were to say that a variance exists

between the proof and the pleading, it does not show that the State proved "an entirely different offense" than the offense it alleged against Jonathan. *See id.* at 298 (noting that a variance between two different methods of committing a single murder "can never be material because such a variance can never show an 'entirely different offense' than what was alleged").

Based on the foregoing reasons, we overrule Jonathan's sole issue on appeal and affirm the trial court's judgment.

Rebeca C. Martinez, Justice

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