In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-16-00068-CR

BOBBY CHAD BARRINGER, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

On Appeal from the 316th District Court
Hutchinson County, Texas
Trial Court No. 11,034; Honorable James M. Mosley, Presiding

October 3, 2017

MEMORANDUM OPINION

Before CAMPBELL, PIRTLE and PARKER, JJ.

Appellant, Bobby Chad Barringer, was convicted by a jury of theft of a radiator with a value of $1,500 or more but less than $20,000, a state jail felony, alleged to have been committed on November 28, 2012. *See* TEX. PENAL CODE ANN. § 31.03(e)(4)(A)

(West Supp. 2016).[1] During the punishment phase, Appellant plead true to two prior state jail felonies enhancing his offense to a third degree felony.[2] Finding the enhancement allegations to be true, the jury sentenced him to three years confinement. On appeal, Appellant asserts (1) the State's comments during *voir dire* and trial violated his constitutional right not to testify, (2) the State's evidence of the value of the radiator was insufficient to convict, (3) the trial court's reference to an uncharged crime during its oral rendition of the jury charge and subsequent change to the charge denied Appellant a fair trial, and (4) the admission of hearsay evidence denied Appellant a fair trial. The trial court's judgment is affirmed.

BACKGROUND

In May 2013, an indictment issued alleging that on or about November 28, 2012, Appellant unlawfully appropriated property, to-wit: two radiators of the value of $1,500 or more but less than $20,000, with the intent to deprive the owner, Donnie Piland, of the property. In October 2015, the State filed an *Announcement to Abandon Language in Indictment* and deleted the word "two" and the "s" on radiators. The trial court subsequently issued an order approving the State's *Announcement.* On October 28 and 29, a jury trial was held.

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[1] Section 31.03(e)(4)(A) was amended in 2015; Act of June 20, 2015, 84th Leg., R.S., ch. 1251 (H.B. 1396), § 2, 2015 Tex. Gen. Laws 4209, 4213, eff. Sept. 1, 2015, to make theft a state jail felony if "the value of the property stolen is $2,500 or more but less than $30,000 . . . ." The enabling language of the 2015 amendment states that "[t]he changes in law made by this Act to the Penal Code apply only to an offense committed on or after the effective date of this Act [September 1, 2015]." *Id.* at § 30(a), 2015 Tex. Gen. Laws 4209, 4221. Because the theft, here, occurred on November 28, 2012, we apply the statute in effect at the time, i.e., making theft a state jail felony if the value of the stolen property is more than $1,500 but less than $20,000, and citations to § 31.03(e)(4)(A) are references to the prior statute.

[2] *See* TEX. PENAL CODE ANN. § 12.425(a) (West Supp. 2016).

The State's evidence established that Donnie Piland, owner of Alvin's Radiator Shop, discovered two C15 CAT radiators missing when he opened his shop. He had intended to refurbish and sell the radiators. He testified that to buy the radiator that had been sitting in his shop before it went missing would cost more than $1,500 but less than $20,000. He further estimated that, if a radiator could be found in the condition that the radiators were in, the price could run between $2,500 and $5,000 apiece depending on how bad an oil rig operator needed the radiator. At the time of the theft, the radiators were in high demand and a new C15 CAT radiator cost approximately $9,000.

Shortly after Piland discovered the radiators were missing, Jennifer Felker, an office manager for Texas Pipe and Metal, spotted Appellant's maroon Toyota Tundra pickup, license number CAO5987, towing a trailer containing an industrial radiator covered by a tarpaulin. Although she did not personally speak to Appellant that day, she recognized the pickup as belonging to him because he had previously sold scrap there a number of times. After an employee of Texas Pipe and Metal was unable to negotiate a mutually satisfactory price for the radiator, the pickup pulled away. At almost the same moment, Felker received a call from Piland about the missing radiators and shortly thereafter she spoke to Corporal Aaron McWilliams of the Borger Police Department.

Corporal McWilliams located a maroon pickup matching Felker's description outside a residence on West Grand Street in Borger, Texas. Appellant lived at the residence and was getting out of his pickup as Corporal McWilliams arrived. When he

approached Appellant, he observed a large black radiator that matched the description of one of Piland's stolen radiators in Appellant's trailer covered by a tarpaulin. Piland next arrived and made a positive identification of the radiator as one missing from his shop. Although the preliminary value of the radiator was estimated at between $500 and $1,500, Piland subsequently provided Corporal McWilliams with a receipt from the place he purchased the radiator for $9,053.86.

When questioned by Corporal McWilliams, Appellant denied that he stole the radiator. Instead, he asserted that he found it the night before on the side of the highway near the Turkey Creek Plant. Jeremy Rody testified for the defense that in November 2012, he was driving south on Highway 136 when he saw Appellant's truck by the side of the road with its flashers blinking. He slowed down and observed Appellant attempting to place a "big, black box like a radiator" on his trailer. Rody described their location as "close to the Turkey Creek Plant." He testified he told no one of the incident until he met Appellant by chance the day before trial commenced.

Thereafter, the jury convicted Appellant of theft of a radiator valued at $1,500 or more but less than $20,000. During the punishment phase, he plead true to the commission of two prior state jail felonies and was sentenced to three years confinement. This appeal followed.

ISSUE ONE

Appellant asserts that the State's comments during *voir dire* and at trial violated his constitutional right to not be compelled to give evidence against himself. We disagree.

It is well settled that the State may not comment on the accused's failure to testify. *Randolph v. State,* 353 S.W.3d 887, 891 (Tex. Crim. App. 2011). Such a comment offends both state and federal constitutions as well as Texas statutory law. *See* U.S. CONST. amend V; TEX. CONST. art. I, § 10; TEX. CODE CRIM. PROC. ANN. art. 38.08 (West 2005). *See also Griffin v. California*, 380 U.S. 609, 615, 85 S. Ct. 1229, 141 L. Ed. 2d 106 (1965) ("the Fifth Amendment . . . forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt").

In assessing whether the defendant's rights have been violated, the test is whether the language used was manifestly intended or was of such character that the jury would necessarily and naturally take it as a comment on the defendant's failure to testify. *Randolph*, 353 S.W.3d at 891. We must view the State's argument or statement from the jury's standpoint and resolve any ambiguities in favor of it being permissible. *Id.*

To violate a defendant's right, the State's reference to the defendant's failure to testify must be a clear and inevitable interpretation and not one that reasonably might be construed as merely an implied or indirect allusion. *Randolph,* 353 S.W.3d at 891. *See Patrick v. State,* 906 S.W.2d 481, 490-91 (Tex. Crim. App. 1995) ("A mere indirect or implied allusion to the accused's failure to testify does not violate appellant's rights" and "if the language can reasonably be construed to refer to appellant's failure to produce evidence other than his own testimony, the comment is not improper."). Courts may not find that the State manifestly intended to comment on the defendant's failure to

testify if some other explanation for the remark is equally plausible. *Randolph*, 353 S.W.3d at 891. However, a statement is a direct comment on the defendant's failure to testify if it references evidence that only the defendant can supply. *See Hogan v. State*, 943 S.W.2d 80, 82 (Tex. App.—San Antonio 1997, no pet.).

If a prosecutorial remark impinges on an appellant's right against self-incrimination, the remark is an error of constitutional magnitude; *Snowden v. State*, 353 S.W.3d 815, 818 (Tex. Crim. App. 2011), and a reviewing court must reverse the judgment unless it can conclude beyond a reasonable doubt that the error did not contribute to the defendant's conviction or punishment. *Id.* at 818, 822 (citing TEX. R. APP. P. 44.2(a)). Our primary inquiry is what effect the error had, or reasonably may have had, on the jury's decision. *Cantu v. State*, 395 S.W.3d 202, 211 (Tex. App.—Houston [1st Dist.] 2012, pet. ref'd). "This requires us to evaluate the entire record in a neutral, impartial, and even-handed manner, not in the light most favorable to the prosecution." *Id.* at 211 (quoting *Wimbrey v. State*, 106 S.W.3d 190, 192 (Tex. App.—Fort Worth 2003, pet. ref'd)).

The first such purported instance of inappropriate comment occurred during *voir dire.* At the time, Appellant's counsel did not object to the prosecutor's statements. In *Sanders v. State*, 963 S.W.2d 184, 190 (Tex. App.—Corpus Christi 1998, pet. ref'd), the prosecutor, during *voir dire*, presented the panel with hypothetical reasons why a defendant might not want to testify (such as family loyalty, fear of drug dealers, or his guilt). Despite the fact that the appellant did not object, the court held that because the statements were made during *voir dire*, there was no error as the defendant had not yet

invoked his right. *Id.* *See also Campos v. State*, 589 S.W.2d 424, 426 (Tex. Crim. App. 1979) (holding that because the State had no way of knowing whether the defendant would in fact testify, no error was committed by the prosecution for commenting on the defendant's failure to testify during *voir dire*); *Reynolds v. State*, 744 S.W.2d 156, 159-60 (Tex. App.—Amarillo 1987, pet. ref'd) (a comment "which occurs prior to the time testimony in the case had closed cannot be held to refer to a failure to testify which has not yet occurred"). Similarly, the State, here, had no way of knowing at the time the comments were made whether Appellant would testify. Accordingly, the prosecutor's comments during *voir dire* were not a violation of Appellant's right not to testify.

The second purported instance occurred during Appellant's case-in-chief after Corporal McWilliams was called as a witness to rebut Rody's account that he observed Appellant loading what appeared to be a radiator into his trailer the night before the theft was discovered. The State asked Corporal McWilliams whether Appellant mentioned that Rody had seen him loading the radiator when he confronted Appellant the day the radiators went missing. The exchange between Corporal McWilliams and the State was, in pertinent part, as follows:

STATE: Did he mention anybody was with him when he loaded that radiator into the trailer?

MCWILLIAMS: No.

STATE: So even—you know, when you're accusing him of stealing this thing—I

MCWILLIAMS: Uh-huh.

STATE: —he never said, wait, wait, wait, I've got somebody who can—

DEFENSE:	Objection. That's leading, Your Honor.
COURT:	Sustained.
STATE:	Again, he made no mention of anybody?
MCWILLIAMS:	No, he did not.
STATE:	I pass the witness, Your Honor.
DEFENSE:	No questions.

Appellant asserts that the State improperly commented on his right not to testify by stating "[s]o even—you know, when you're accusing him of stealing this thing . . . he never said, wait, wait, wait, I've got somebody who can . . . ." Appellant's counsel did not object to the statement because it was an improper comment on Appellant's right not to testify but objected that the statement was leading. This objection was sustained. Neither did Appellant's counsel request an instruction that the jury disregard the statement or move for a mistrial.

Because Appellant did not object to the statement based upon his Fifth Amendment right not to testify at trial, he did not preserve error on his constitutional claims. *Heidelberg v. State*, 144 S.W.3d 535, 537-38 (Tex. Crim. App. 2004). It is well-settled that the legal basis of a complaint raised on appeal cannot vary from the legal basis asserted at trial. *Id.* at 537. Accordingly, Appellant did not preserve this issue on appeal. *Cleveland v. State*, 177 S.W.3d 374, 384 (Tex. App.—Houston [1st Dist.] 2005, pet. ref'd), *cert. denied*, 547 U.S. 1073, 126 S. Ct. 1774, 164 L. Ed. 2d 523 (2006).

That said, even if a proper objection had been made, there would be no harm because the statement cannot be interpreted as a direct reference to Appellant's failure to testify at trial. The State made no reference to Appellant's failure to testify and the comment could reasonably be considered only as a reference to what Appellant did not or would not say during his interview with Corporal McWilliams. As such, it was a reference to what was said or not said during the interview, not to what Appellant said—or did not say—at trial.

Furthermore, at closing, the prosecutor's reference to McWilliams's interview was very brief (with no objection) making probable the implication that the jury placed little, if any, weight upon the statement. This is particularly so when the trial court admonished the jury during *voir dire,* before closing arguments, and in the charge of Appellant's right not to testify. *See Cantu*, 395 S.W.3d at 211-213 (harm, if any, was slight where statement related to what defendant did not or would not say during a 911 call because the prosecutor did not overly emphasize any error and the trial court's instructions throughout the trial admonished the jury of defendant's right not to testify). Appellant's first issue is overruled.

SECOND ISSUE

Appellant next asserts the trial court erred by denying his motion for a directed verdict at the close of the State's case-in-chief because the State's evidence of the value of the radiator was confusing and contradictory. As such, we treat Appellant's issue as a challenge to the sufficiency of the State's evidence; *Williams v. State,* 937

S.W.2d 479, 482 (Tex. Crim. App. 1996), and we find that the State's evidence was sufficient.

The only standard that a reviewing court should apply in determining whether the evidence is sufficient to support each element of a criminal offense the State is required to prove beyond a reasonable doubt is the standard set forth in *Jackson v. Virginia*, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). *Brooks v. State*, 323 S.W.3d 893, 912 (Tex. Crim. App. 2010). In determining whether the evidence is legally sufficient to support a conviction, this court considers all the evidence in the light most favorable to the verdict and determines whether, based on that evidence and reasonable inferences to be drawn therefrom, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Winfrey v. State*, 393 S.W.3d 763, 768 (Tex. Crim. App. 2013); *Lucio v. State*, 351 S.W.3d 878, 894 (Tex. Crim. App. 2011). As a reviewing court, we must defer to the jury's credibility and weight determinations because the jury is the sole judge of the witnesses' credibility and the weight to be given their testimony. *Brooks*, 323 S.W.3d at 899. Therefore, in order to reverse, we would have to determine that, when viewed in the requisite light, no rational trier of fact could have found the necessary elements of the offense beyond a reasonable doubt.

According to the law applicable in this case, a person commits the offense of theft if he (1) unlawfully appropriates (2) property (3) with intent to deprive (4) the owner of the property, and (5) the value of the property stolen is $1,500 or more but less than $20,000. TEX. PENAL CODE ANN. § 31.03(a), (e)(4) (West 2011). Appellant disputes only that the evidence of the value of the radiator was insufficient to convict.

Here, Piland, the radiator's owner, testified that if he had to replace the stolen radiator, the cost would be more than $1,500 but less than $20,000. He testified that if he could have found a radiator at that time similar to the one that was stolen, its value would have been at least $2,500 and as much as $5,000 depending on how badly the purchaser needed the radiator to operate his oil rig. This evidence is sufficient to support the jury's finding that the stolen radiator was worth $1,500 or more but less than $20,000.[3]

Regardless of whether there was other record evidence that may be confusing or contradictory regarding the value of the radiator, it was the fact finders' task to resolve conflicting testimonial evidence, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. *See Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007) (citing *Jackson*, 443 U.S. at 318-19). Even if Piland's overall testimony could be considered inconsistent, we must resolve any inconsistencies in favor of the verdict. *Curry v. State*, 30 S.W.3d 394, 406 (Tex. Crim. App. 2000). Here, judging from the verdict, the jury apparently found Piland's testimony to be sufficiently credible to determine the value of the property stolen. We may not re-evaluate that finding. *Dewberry*, 4 S.W.3d 735, 740 (Tex. Crim. App. 1999). Appellant's second issue is overruled.

[3] Appellant did not object to Piland's testimony regarding the value of the radiator. Therefore, any objection related to hearsay and lay and expert opinions of value was waived. TEX. R. APP. P. 33.1(a); *Wilson v. State*, 71 S.W.3d 346, 349 (Tex. Crim. App. 2002). *See Holz v. State*, 320 S.W.3d 344, 351-52 (Tex. Crim. App. 2010).

ISSUE THREE

Appellant next asserts that the trial court's reading of a typographical error in the jury charge at the close of all the evidence but before closing arguments, and its subsequent correction in the final charge violated his right to a fair and impartial trial under the United States and Texas constitutions. We disagree.

In a felony case tried before a jury, the trial court is required to deliver a written charge "distinctly setting forth the law applicable to the case." *See* TEX. CODE CRIM. PROC. ANN. art. 36.14 (West 2007). Before that charge is read to the jury, the defendant or his counsel must be given a reasonable opportunity to examine the charge and make any objections thereto in writing. *Id.* After the opportunity to make objections, but still before the court reads the charge to the jury, counsel for both sides shall have a reasonable opportunity to present additional written instructions and ask that those instructions be given to the jury. *Id.* at art. 36.15 (West 2006). After the court has received any objections and requested instructions, and both sides have been given the opportunity to make any final objections, the judge shall then read the charge to the jury as finally written. *Id.* at art. 36.16 (West 2006).

Here, the State and Appellant's counsel had an opportunity to review the guilt/innocence charge prior to submission to the jury and both sides indicated they had no objection to the charge. While reading the charge aloud, the trial court noticed a typographical error identifying the offense alleged in the indictment as "evading arrest or detention." The remainder of the charge as well as the rendition of the jury's verdict named the correct offense as "theft." The trial court indicated to the jury that the word

"theft" would replace "evading arrest or detention," and in the final written charge submitted to the jury, the trial court marked through the words "evading arrest or detention" and the word "theft" was handwritten beneath the stricken language.[4] The trial court also dated and initialed the change. Neither the State nor the defense voiced any objection to this procedure. The jury then heard closing arguments. Appellant contends that the jury was tainted because, based on the erroneous instruction, the jury might assume during deliberations that other charges were pending against Appellant.[5]

Article 36.19 of the Code of Criminal Procedure dictates separate standards of review for preserved and unpreserved errors relating to the jury charge. *Id.* at art. 36.19 (West 2006); *Jimenez v. State*, 32 S.W.3d 233, 237 (Tex. Crim. App. 2000). If error was the subject of a timely objection in the trial court, reversal is required if the error "was calculated to injure the rights of the defendant"—that is, the defendant suffered "some harm." *Id.* If there was no objection, we will reverse only if it appears from the record that appellant was denied a "fair and impartial trial," and therefore suffered "egregious harm." *Taylor v. State*, 332 S.W.3d 483, 489 (Tex. Crim. App. 2011) (quoting *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985) (op. on reh'g)). Egregious harm occurs when the error "affects the very basis of the case, deprives the

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[4] The misidentification of the offense only occurred once and that was in the "negative" application portion of the charge wherein the jury was instructed: "Unless you so find beyond a reasonable doubt, or if you have a reasonable doubt thereof, you will find the defendant not guilty of the offense of ~~evading arrest or detention~~ *theft* and say by your verdict, "Not Guilty."

[5] The record is devoid of any indication that the misnomer regarding the offense charged was anything other than a typographical error or a "cut-and-paste" error resulting from the failure to carefully proof-read the proposed draft of the charge as presented. Furthermore, the State did not argue in closing arguments that other offenses were pending against Appellant.

defendant of a valuable right, or vitally affects a defensive theory." *Allen v. State*, 253 S.W.3d 260, 264 (Tex. Crim. App. 2008).

Neither standard of harm applies, however, unless there is error in the jury charge. *Posey v. State*, 966 S.W.2d 57, 60 (Tex. Crim. App. 1998). Disregarding a requirement of article 36.16, regarding objections to the final charge, is an error to which these standards apply. *Id.* *See* TEX. CODE CRIM. PROC. ANN. art. 36.19 (West 2006). Accordingly, we begin by considering whether the trial court complied with article 36.16. *Id.*

Here, by resolving a typographical error in the jury charge during the trial court's oral rendition of the charge and by interlineating that correction in the final written charge given to the jury, the trial court was merely correcting an erroneous charge. *Teamer v. State*, 429 S.W.3d 164, 173 (Tex. App.—Houston [14th Dist.] 2014, no pet.) (citing *Vasquez v. State*, 389 S.W.3d 361, 366 (Tex. Crim. App. 2012)). The modification of the final charge did not deprive Appellant of a "fair and impartial" trial. As such, we hold that the trial court did not err by adopting the procedure used to make this correction before closing arguments and prior to the jury deliberating. *See Williams v. State,* 473 S.W.3d 319, 329 (Tex. App.—Houston [14th Dist.], pet. ref'd) (trial court did not err by correcting erroneous charge after deliberations had begun); *Gaines v. State*, 710 S.W.2d 630, 633 (Tex. App.—Dallas 1986, no pet.) (holding trial court did not err in correcting "a clerical error in the application paragraph in order to make that paragraph and the preceding definitions in the charge consistent" after closing arguments had commenced). Given the lack of any error, we need not examine

whether appellant suffered egregious harm as a result of the court's correction. *Williams*, 473 S.W.3d at 329.

However, even if the trial court had erred in reading or amending the charge, we find Appellant did not suffer egregious harm because his counsel had an opportunity to make additional closing arguments in light of the charge as corrected by the trial court. *See Teamer,* 429 S.W.3d at 173. *See also Barrett v. State,* No. 12-05-00224-CR, 2006 Tex. App. LEXIS 4936, at *3-5 (Tex. App.—Tyler June 7, 2006, no pet.) (mem. op., not designated for publication) (no injury to appellant where the correction of a typographical error in jury charge was made before closing arguments). Appellant's third issue is overruled.

FOURTH ISSUE

Finally, Appellant asserts that the trial court erred by admitting two hearsay statements: (1) a receipt printed from the Internet showing the value of a new C15 radiator near the time of the theft and (2) Felker's statements concerning the attempted sale of the radiator to Texas Pipe and Metal when she did not speak with either the driver (presumably Appellant) or passenger of the pickup transporting the radiator. Appellant contends the testimony amounted to "hearsay within hearsay" tending to put Appellant at the scrap yard and in the pickup identified by Felker. Appellant's counsel did not object to the admission of the complained-of statements.

Generally, for a complaining party to preserve error for appellate review, the record must reflect that the party raised the issue with the trial court in a timely and specific request, objection, or motion. TEX. R. APP. P. 33.1(a)(1). Assuming for the

sake of argument that the challenged evidence is, in fact, hearsay, admission of hearsay evidence is not fundamental error that can be raised for the first time on appeal. *See Moore v. State*, 935 S.W.2d 124, 130 (Tex. Crim. App. 1996) (error in admission of hearsay evidence constitutes unconstitutional error and "all existing authority holds the admission of hearsay must be preserved with a timely and specific objection to the evidence"); *Fernandez v. State*, 805 S.W.2d 451, 455-56 (Tex. Crim. App. 1991) (failure to timely object waives error, and hearsay admitted without objection is probative evidence).

Because Appellant failed to object to admission of the receipt and Felker's testimony at trial, he failed to preserve his issue for appeal. Accordingly, Appellant's fourth issue is overruled.

Conclusion

The trial court's judgment is affirmed.

Patrick A. Pirtle
Justice

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