In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-16-00212-CR

BLAKE WELCH, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

On Appeal from the 47th District Court
Potter County, Texas
Trial Court No. 69,554-A, Honorable Dan L. Schaap, Presiding

June 12, 2017

MEMORANDUM OPINION

Before QUINN, C.J., and CAMPBELL and PIRTLE, JJ.

A jury convicted appellant Blake Welch of aggravated assault with a deadly weapon[1] and sentenced him to twenty years' confinement in prison. Through one issue, he argues on appeal that because of a material variance between the indictment and the State's proof at trial the evidence of causation was insufficient to support his conviction. Disagreeing, we will overrule appellant's issue and affirm the judgment of the trial court.

[1] TEX. PENAL CODE ANN. § 22.02(a)(2) (West 2011).

Background

By indictment, the State alleged appellant "intentionally, knowingly or recklessly cause[d] bodily injury to Clinton Norton Jr. by striking him with his foot, and did use or exhibit a deadly weapon, namely, his foot, during the commission of the assault."

Karen Willis testified at trial she and her husband had a party at their home. Guests included appellant, Norton, and Darius Nelson. There was repeated testimony that Willis, appellant, Norton, and Nelson were intoxicated.

Willis and Nelson testified to the fight between appellant and Norton. Willis saw Norton lying face down in the street in front of her house. He did not move or speak. She also said appellant applied three or four "hard" kicks to Norton's head. Willis also testified appellant later kicked Norton three or four more times.

Nelson said he and Willis attempted to break up the fight. He also said he saw appellant kicking Norton and then, minutes later, saw appellant twice kick Norton in the head. By that point, Norton appeared unconscious.

Emergency medical assistance was summoned. At the hospital, Norton remained comatose for some eighteen days before he died. According to the trial testimony of a forensic pathologist, Norton died of complications of blunt force injuries to the head. Concerning Norton's autopsy, the pathologist testified to subdural hemorrhaging and a contusion of the frontal lobe. The pathologist agreed Norton's injuries were consistent with repeated strikes to the head by someone's foot.

The officer who arrested appellant on a warrant testified that appellant asked why he was under arrest. The officer responded that the warrant was for aggravated assault with a deadly weapon. To this appellant replied, "'[M]an, a deadly weapon? I just used my hands and feet.'" In a written statement to police, appellant acknowledged Norton fell to the ground after they exchanged punches. Appellant then began kicking Norton as he lay on the ground. Appellant added that no one else punched or kicked Norton. Appellant also gave police a recorded statement which was played for the jury at trial. In his recorded statement, when asked if he kicked Norton in the head, appellant responded, "I might have."

Appellant also testified in his own defense. He blamed Norton for instigating their fight. He also testified Nelson kicked Norton in the head. Appellant further testified he saw Willis hit Norton with what he believed was a pool cue "or something." On cross-examination, appellant acknowledged he kicked Norton in the abdomen but denied kicking him in the head.

Analysis

Appellant raises a single issue on appeal, contending the evidence was insufficient to support his conviction for aggravated assault with a deadly weapon. The crux of the argument is narrow: appellant argues the evidence showed Norton was injured by hand-punches or by falling to the ground but the indictment alleged appellant caused Norton bodily injury by striking him with his foot. He contends, "Since the State did not allege any other means of causing the bodily injury, they are bound to prove that appellant's foot caused bodily injury to Mr. Norton." This asserted variance between the

indictment and the State's proof, appellant concludes, was material, leaving the State's proof of guilt insufficient.

We review the sufficiency of the evidence under the familiar standard of *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, 902 (Tex. Crim. App. 2010). Doing so, we determine "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements for the crime beyond a reasonable doubt." *Jackson,* 443 U.S. at 319. The essential elements of the crime are "the elements of the offense as defined by the hypothetically correct jury charge for the case." *Johnson v. State,* 364 S.W.3d 292, 294 (Tex. Crim. App. 2012) (citing *Malik v. State,* 953 S.W.2d 234, 240 (Tex. Crim. App. 1997)). The hypothetically correct jury charge "accurately sets out the law, is authorized by the indictment, does not unnecessarily increase the State's burden of proof or unnecessarily restrict the State's theories of liability, and adequately describes the particular offense for which the defendant was tried." *Johnson,* 364 S.W.3d at 294 (quoting *Malik,* 953 S.W.2d at 240). The law authorized by the indictment is "the statutory elements of the offense . . . as modified by the charging instrument." *Johnson,* 364 S.W.3d at 294 (quoting *Curry v. State,* 30 S.W.3d 394, 404 (Tex. Crim. App. 2000)).

A variance occurs when there is a discrepancy between the allegations in the indictment and the proof offered at trial. *Gollihar v. State,* 46 S.W.3d 243, 246 (Tex. Crim. App. 2001)). The hypothetically correct charge "need not incorporate allegations that give rise to immaterial variances." *Johnson,* 364 S.W.3d at 294 (quoting *Gollihar,* 46 S.W.3d at 256).

As the indictment alleged here, a person commits aggravated assault if he commits assault causing bodily injury under section 22.01(a)(1)[2] and "uses or exhibits a deadly weapon during the commission of the assault." TEX. PENAL CODE ANN. § 22.02(a)(2). The variance appellant sees between the indictment and proof in this case occurs in the manner and means by which the State alleged he caused Norton bodily injury.[3] "Bodily injury" assault is a result-oriented assaultive offense. *Landrian v. State*, 268 S.W.3d 532, 536, 540 (Tex. Crim. App. 2008); *see Garfias v. State,* 424 S.W.3d 54, 60 (Tex. Crim. App. 2014) (assaultive offense causing bodily injury is a result-oriented offense, citing *Landrian,* 268 S.W.3d at 540). The Court of Criminal Appeals made clear in *Johnson*, 364 S.W.3d at 298-99, that a variance of the type appellant perceives to be present in this case is not material, and would not be reflected in the hypothetically correct jury charge. There, the indictment alleged the defendant caused serious bodily injury to the victim by hitting her with his hand or twisting her arm with his hand. The evidence showed the victim's arm was broken when the defendant threw her against the wall. 364 S.W.3d at 293. Pointing out the focus or gravamen of such an offense is the victim and the bodily injury that was inflicted, the court held, "The precise act or nature of conduct in this result-oriented offense is inconsequential." *Id*. at

[2] A person commits assault if he "intentionally, knowingly, or recklessly causes bodily injury to another." TEX. PENAL CODE ANN. § 22.01(a)(1) (West Supp. 2016).

[3] Appellant asserts no insufficiency in the evidence his foot, in the manner of its use or intended use, was capable of causing death or serious bodily injury and was thus a deadly weapon. *See* TEX. PENAL CODE ANN. § 1.07(a)(17) (West Supp. 2016) (defining a deadly weapon as "a firearm or anything manifestly designed, made, or adapted for the purpose of inflicting death or serious bodily injury" or "anything that in the manner of its use or intended use is capable of causing death or serious bodily injury").

298 (quoting *Landrian*, 268 S.W.3d at 537). Likewise, it is inconsequential here whether appellant caused Norton bodily injury by means of blows from his fist, by means of causing him to fall to the ground or by means of striking him with his foot. For the bodily-injury element of the aggravated assault for which he was convicted, the evidentiary sufficiency analysis focuses on the victim and the bodily injury appellant inflicted, not the manner or means of its infliction. *See Karl v. State,* No. 02-16-00001-CR, 2016 Tex. App. LEXIS 10672, at *5-6 (Tex. App.—Fort Worth Sept. 29, 2016, no pet.) (mem. op., not designated for publication) (rejecting material variance contention in prosecution under section 22.02(a)(2), stating "in an assaultive offense, the manner and means of causing a victim's injury are not essential elements of an offense that are required to be included in a hypothetically correct jury charge"); *see also Thomas v. State,* 303 S.W.3d 331, 333 (Tex. App.—El Paso 2009, no pet.); *Matthews v. State*, No. 07-07-0482-CR, 2008 Tex. App. LEXIS 8544, at *7-10 (Tex. App.—Amarillo November 13, 2008, no pet.) (mem. op., not designated for publication) (both rejecting similar material variance contentions in prosecutions for assault under section 22.01).

In this straight-forward prosecution for aggravated assault alleging appellant caused Norton bodily injury by use of a deadly weapon, a variance in the indictment and proof of the manner of conduct appellant employed to cause the injury, a variance involving neither statutory language nor the allowable unit of prosecution, is not material and could not bring about an insufficiency in the evidence appellant caused bodily injury to Norton.[4] *See Johnson*, 364 S.W.3d at 298-99. When the elements of aggravated

[4] Even were the variance material, the jury had before it ample evidence that appellant, not Nelson or Willis, caused the bodily injury Norton suffered, and that he did so by means of kicking him with his foot.

assault defined by the hypothetically correct jury charge are compared with the evidence adduced at trial, we find a rational jury could have found those elements beyond a reasonable doubt. *See Jackson,* 443 U.S. at 319, *Karl,* 2016 Tex. App. LEXIS 10672, at *8. Appellant's issue is overruled.

Conclusion

We affirm the judgment of the trial court.

James T. Campbell
Justice

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