In The
Court of Appeals
Sixth Appellate District of Texas at Texarkana

No. 06-17-00112-CR

CHRISTOPHER STEVEN JONES, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 402nd District Court
Wood County, Texas
Trial Court No. 22,286-2014

Before Morriss, C.J., Moseley and Burgess, JJ.
Memorandum Opinion by Justice Moseley

MEMORANDUM OPINION

After a jury found Christopher Steven Jones guilty of witness tampering, Jones was sentenced to two years' imprisonment. However, the trial court suspended Jones' sentence in favor of placing him on community supervision for a period of ten years and ordered him to pay court costs.

On appeal, Jones argues (1) that the evidence is legally insufficient to establish his guilt, (2) that the trial court abused its discretion by refusing Jones' Article 36.02 request to reopen the evidence to allow further cross-examination of the State's main witness, and (3) that the bill of costs contains an unconstitutional charge. We conclude that legally sufficient evidence established Jones' guilt, that the trial court did not abuse its discretion in overruling Jones' request to re-open the evidence, and that we may not modify the amount of court costs assessed. Accordingly, we affirm the trial court's judgment.

I. Legally Sufficient Evidence Supports the Jury's Verdict

A. Factual Background

Jones lived in a recreational vehicle (RV) parked in a lot space at Jim Hogg RV Park, which he rented from the City of Quitman, Texas. On March 5, 2014, Jones arrived home after a day of work to discover that the door of the RV had been "jimmied open" and that he had been burglarized. Jones called 9-1-1 to report the theft of guns, valuable electronics, and $600.00 in cash. He also called his boss, Steven Kinel, to inform him of his misfortune.

Kinel testified that he met Jones at his home and overheard a conversation between Jones and Robert Shannon Clanton, a park ranger employed by the City of Quitman to manage and

oversee Jim Hogg RV Park. According to Kinel, Clanton said that he "may have seen something." Jones testified that Clanton approached him to discuss the burglary and that he reported what Clanton had told him to police.

Don Fortner, formerly a police officer with the Quitman Police Department, testified that he was dispatched to Jones' home to investigate. According to Fortner, Jones reported that a black Chevrolet was parked across the street during the burglary. Jones' written statement to police said, "Alex Pringle was seen leaving the scene in an old camo jacket by the park ranger." After taking Jones' written statement, Fortner referred the case to John Farmer, an investigator with the Quitman Police Department.

Farmer testified that he had received reports that others nearby had also been burglarized. According to Farmer, Jones' tip regarding Pringle came from Clanton. However, Farmer also testified that after Jones spoke with Clanton, Jones directed Farmer's attention to a new suspect named Christopher Sims, instead of Pringle. Farmer informed the jury that although no one spoke to Sims, he excluded Sims as the perpetrator after Fortner interviewed Sims' girlfriend.

At trial, Clanton testified that he approached Farmer during the investigation "because Mr. Jones had said that he had a conversation with [him (Clanton)], which he did not." Clanton testified that he did not know Pringle and that Jones' assertion that he had seen Pringle leaving the scene was a lie.

After a few weeks passed without the apprehension of a suspect, Jones engaged in the encounter which led to the charge against him in this case. Carey Fry testified that as part of her job with the Quitman Chamber of Commerce, she collected rent payments for Jim Hogg RV Park.

According to Fry, Jones approached her while paying rent, said that someone had stolen guns from his RV, and asked Fry if she "would just say that [she] saw somebody in a black Camaro . . . by his RV." Fry understood, by Jones' comments, that Jones was seeking her help to provide false information to law enforcement officers to implicate the driver of the black Camaro in the burglary. Fry testified that Jones offered her "money to lie for him," that she refused the money, and that he then offered to buy her dinner instead. Fry said that she agreed to assist Jones because she was scared of what would happen if she refused to cooperate with him.

According to Farmer, Jones then listed Josh Harvey, an "ex-friend," as another possible suspect who was allegedly driving a black Camaro. Farmer testified that Jones referred him to Fry and claimed that she had seen Harvey's vehicle at his trailer. Yet, when Farmer interviewed Fry, she denied seeing the Camaro, and further said that Jones had offered her money to lie by claiming that she had seen it. In the end, Farmer testified that his investigation failed to point to the perpetrator of the burglary.

Jones testified in his defense at trial by denying that he had asked Fry to lie and by characterizing Fry's version of their conversation as a misunderstanding. Jones said he had simply asked Fry if she had seen the Camaro, which he described to her. According to Jones, Fry said she had seen a vehicle matching the description Jones had provided near the time of the burglary. Jones testified that he then asked Fry if she would relay that information to the police and that Fry

agreed. Jones denied offering Fry any money. Instead, Jones testified that because he was single and seeking a date, he asked Fry out to dinner and that Fry responded, "We'll see."[1]

After the jury heard the conflicting testimony, it concluded that Jones was guilty of witness tampering. Jones contends that this evidence is legally insufficient to support the jury's verdict.

B. Standard of Review

In evaluating legal sufficiency, we review all the evidence in the light most favorable to the trial court's judgment to determine whether any rational jury could have found the essential elements of the offense beyond a reasonable doubt. *Brooks v. State*, 323 S.W.3d 893, 912 (Tex. Crim. App. 2010) (plurality op.) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)); *Hartsfield v. State*, 305 S.W.3d 859, 863 (Tex. App.—Texarkana 2010, pet. ref'd). Our rigorous legal sufficiency review focuses on the quality of the evidence presented. *Brooks*, 323 S.W.3d at 917–18 (Cochran, J., concurring). We examine legal sufficiency under the direction of the *Brooks* opinion, while giving deference to the responsibility of the jury "to fairly resolve conflicts in testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007) (citing *Jackson*, 443 U.S. at 318–19); *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007).

Legal sufficiency of the evidence is measured by the elements of the offense as defined by a hypothetically correct jury charge. *Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997). The hypothetically correct jury charge is "one that accurately sets out the law, is authorized by the

[1]During cross-examination, Jones said that Clanton and Fry lied about their conversations with him and opined that these City of Quitman employees, along with Farmer, might be "out to get [him]."

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." *Id*.

Section 36.05, titled "Tampering with a Witness," provides that "[a] person commits an offense if, with intent to influence the witness, he offers, confers, or agrees to confer any benefit on a witness or prospective witness in an official proceeding, or he coerces a witness or a prospective witness in an official proceeding . . . to testify falsely."[2] TEX. PENAL CODE ANN. § 36.05(a)(1) (West 2016). Tracking the language of this statute, the State's indictment alleged that Jones, "intentionally or knowingly offer[ed] or agree[d] to confer a benefit, to wit: United States Currency, to CAREY FRY, who was then and there a prospective witness in an official proceeding, to-wit: a criminal investigation, with intent to influence the said CAREY FRY to testify falsely in said official proceeding."

Jones argues that the evidence is legally insufficient to demonstrate that he tampered with a witness because (1) Fry was not a prospective witness in the burglary investigation and (2) he had no intent to influence her.

C. Analysis

Jones acknowledges that "[w]itnesses may include persons reporting criminal activities" and that a witness does not have to be called to testify at a trial. *See Nzewi v. State*, 359 S.W.3d 829, 833–34 (Tex. App.—Houston [14th Dist.] 2012, pet. denied). His argument that Fry was not

[2]"'Official proceeding' means any type of administrative, executive, legislative, or judicial proceeding that may be conducted before a public servant." TEX. PENAL CODE ANN. § 1.07(a)(33) (West Supp. 2016).

a prospective witness is based solely on the fact that "[s]he had no idea as to whom burglarized Mr. Jones[']s house." Thus, Jones concludes that Fry was not a prospective witness in the criminal investigation.[3] The State argues that by his actions, Jones made Fry a witness in the investigation. We agree with the State, since nothing in Section 36.05 requires a witness or prospective witness to have actually seen a crime committed or have knowledge of the perpetrator of the crime.

Jones told Farmer that he saw a black Chevrolet Camaro on the day of the burglary. This fact was one of consequence in the burglary investigation, given Jones' attempt to lead officers to the driver of the vehicle (possibly Harvey) as a suspect. Fry testified that she specifically informed Jones that she was working on the day of the burglary and did not see the vehicle. By requesting that Fry falsely report that she had seen the vehicle, and by specifically requesting that Farmer question Fry, Jones made Fry a potential witness in the case on a fact of consequence to the investigation. The fact that she ultimately truthfully reported that she had not seen the vehicle did not remove her from being a potential witness, as the absence of the Camaro could have also been a fact of consequence in the investigation.

Jones also argues that the State failed to prove that he intended to influence her to provide false testimony because he was simply intending to help the Quitman Police Department resolve the burglary. These intents, however, are not mutually exclusive. Fry testified that Jones offered her money to lie to the police after she had informed him that she did not see the Camaro. Although Jones attempted to characterize his conversation with Fry as a misunderstanding, the jury was free

[3]In other words, Jones contends that Fry would have been a witness only if she had lied for him.

to determine that Fry's version of events was correct and that Jones' actions demonstrated that he intended to influence Fry to testify falsely.

We find the evidence legally sufficient to support Jones' conviction. Accordingly, we overrule his first point of error.

II. The Trial Court Did Not Abuse Its Discretion in Denying Jones' Request to Reopen the Evidence

The following discussion transpired after the State and the defense both rested, but before closing arguments:

> [BY THE DEFENSE] . . . Your Honor, I -- I'm going to present a request to the Court for permission to re-open so that I can explore a point of impeachment evidence as to Carey Fry's testimony.
>
> I present that because I think that's material to our defense, and I would ask permission to re-open to explore that with that witness.
>
> . . . .
>
> [BY THE STATE]: State's opposed. Defense closed yesterday, had ample opportunity to cross-examine Ms. Fry at that time. We're ready to proceed with closing argument.
>
> THE COURT: . . . I agree with the State. There was ample opportunity yesterday to explore all the possible avenues of impeachment. Your request is noted and overruled.

In his second point of error, Jones argues that the trial court abused its discretion in denying his request to reopen the evidence.[4]

[4]Jones also fleetingly asserts, without adequate discussion in his brief, that the trial court's actions violated his right to due process and due course of law. These issues were not raised below and are not preserved for our review. *See* TEX. R. APP. P. 33.1.

"Article 36.02 governs a party's right to reopen a case. It provides that the trial court 'shall allow testimony to be introduced at any time before the argument of a cause is concluded, if it appears that it is necessary to a due administration of justice.'" *Peek v. State*, 106 S.W.3d 72, 75 (Tex. Crim. App. 2003) (quoting TEX. CODE CRIM. PROC. ANN. art. 36.02). The phrase "'due administration of justice' means a judge should reopen the case if the evidence would materially change the case in the proponent's favor." *Id.* at 79. We review a trial court's refusal to allow a party to reopen its case-in-chief for abuse of discretion. *See generally id.* at 72, 75.

A trial court abuses its discretion when declining to reopen the evidence if the following conditions are met:

> (1) the witness was present and ready to testify;
> (2) the request to reopen was made before the charge was read to the jury and final arguments were made;
> (3) the court had some indication of what the testimony would have been, and was satisfied that the testimony was material and bore directly on the main issues in the case; and,
> (4) there was no showing that introduction of the testimony would have impeded the trial or interfered with the orderly administration of justice.

Sims v. State, 833 S.W.2d 281, 285–86 (Tex. App.—Houston [14th Dist.] 1992, pet. ref'd) (quoting *Yee v. State*, 790 S.W.2d 361, 362 (Tex. App.—Houston [14th Dist.] 1990, pet. dism'd); *Gibson v. State*, 789 S.W.2d 421, 423 (Tex. App.—Fort Worth 1990, pet. ref'd)). "The burden is on the defendant to show that the proposed testimony would have materially changed the case in his favor." *Id.* at 286.

Here, the record demonstrated that Fry, who was subjected to extensive cross-examination, was released without objection on the day before Jones made his Article 36.02 motion. Aside from stating that he wanted to "explore a point of impeachment evidence," Jones failed to provide

the court with any indication of what he intended to ask Fry or what her testimony may have been. Without such clarification, the trial court was without adequate information required to assess whether the testimony was material or would "materially change the case in the proponent's favor."[5] *Peek*, 106 S.W.3d at 79. Accordingly, we cannot conclude that the trial court abused its discretion in overruling Jones' Article 36.02 request.

We overrule Jones' second point of error.

III. We May Not Modify the Assessment of Consolidated Court Costs

Last, Jones seeks to modify his consolidated court costs from $133.00 to $119.93 based on the Texas Court of Criminal Appeals' decision that portions of Section 133.102(e) of the Local Government Code, which allocated a percentage of funds obtained from assessments of court costs for abused children's counseling and comprehensive rehabilitation, were unconstitutional. *See Salinas v. State*, 523 S.W.3d 103, 112 (Tex. Crim. App. 2017).[6] However, the constitutional holding in *Salinas* does not apply retroactively in this case. The Texas Court of Criminal Appeals stated,

> [W]e will . . . apply our constitutional holding in this case to any defendant who has raised the appropriate claim in a petition for discretionary review before the date of this opinion, if that petition is still pending on the date of this opinion and if the claim would otherwise be properly before us on discretionary review. Otherwise, our holding will apply prospectively to trials that end after the date the mandate in the present case issues.

[5]The trial court was not required to presuppose that Fry would have been impeached by Jones' questioning in this circumstance.

[6]Section 133.102 was amended after the *Salinas* decision. *See* Act of May 18, 2017, 85th Leg., R.S., ch. 966, § 1, 2017 Tex. Sess. Law Serv. 3917, 3917–18 (West) (current version at TEX. LOC. GOV'T CODE § 133.102(e)). However, because Jones' case concluded well before the revised statute's effective date of June 15, 2017, we frame our analysis based on the prior version of Section 133.102. *See* Act of May 29, 2011, 82d Leg., R.S., ch. 1249, § 13(b), 2011 Tex. Gen. Laws 3349, 3353 (amended 2017).

Id. at 113. The court further stated, "If the Legislature redirects the funds to a legitimate criminal justice purpose, the entire consolidated court cost may be collected. If that occurs before mandate issues, the only cases that will be affected by this opinion will be the few that are now pending in this Court and are appropriate for relief." *Id.* at 113 n.54.

Jones' trial ended in April 2017. The mandate in *Salinas* did not issue until June 30, 2017. Before the mandate issued, the Legislature amended Section 133.102(e) to redirect funds previously allocated to abused children's counseling and comprehensive rehabilitation to the fair-defense account. *See* Act of May 18, 2017, 85th Leg., R.S., ch. 966, § 1, 2017 Tex. Sess. Law Serv. 3917, 3917–18 (West) (current version at TEX. LOC. GOV'T CODE § 133.102(e)). Thus, because Jones did not have a petition pending in front of the Texas Court of Criminal Appeals before the statute was amended, the court's holding in *Salinas* does not apply, and we may not modify the assessment of consolidated court costs. Accordingly, we overrule Jones' last point of error.

IV. Conclusion

We affirm the trial court's judgment.

Bailey C. Moseley
Justice

Date Submitted: November 2, 2017
Date Decided: November 10, 2017

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