IN THE
TENTH COURT OF APPEALS

No. 10-16-00447-CR

SHACKLES DUANE CLARK,

Appellant

v.

THE STATE OF TEXAS,

Appellee

From the 249th District Court
Johnson County, Texas
Trial Court No. F50465

MEMORANDUM OPINION

Shackles Duane Clark was convicted of unauthorized use of a motor vehicle, enhanced, and sentenced to 10 years in prison. *See* TEX. PENAL CODE ANN. § 31.07 (West 2016). Because there was no material variance between the indictment and the proof and thus, the evidence was sufficient to support the conviction, and because the trial court did not err in issuing a supplemental instruction, the trial court's judgment is affirmed.

BACKGROUND

Manuel Castillo Contreras started his pickup to go to work one morning when he

realized he left his lunch in his house. Leaving the pickup running, he went back in the house to get his lunch. Five minutes later, when Contreras returned, his pickup was gone. Later that morning, Mary Bustillo received a call from her aunt about a pickup parked on a lane by Mary's home. When Mary went to investigate, she saw the pickup parked on the side of a state highway. After speaking to the person with the pickup, Mary called 911. While en route to talk to Mary, Deputy Richards of the Johnson County Sherriff's Office saw the pickup at a gas station. Richards ran a check on the license plate and discovered the pickup was stolen. Richards stopped, and after talking with Clark who had the keys to the pickup, arrested Clark for unauthorized use of a motor vehicle. Contreras was called to the scene and identified the pickup as the one taken from his house earlier in the day.

SUFFICIENCY OF THE EVIDENCE

In his first two issues, Clark asserts the evidence is insufficient to support his conviction and the trial court erred in overruling Clark's motion for a directed verdict because there was a fatal variance between the allegations in the indictment and the proof at trial. The indictment alleged that the vehicle Clark was accused of operating was a "2004 White Chevy 3500 Pickup Truck." The testimony at trial revealed that the pickup was a white 2005 GMC. Because a challenge to the trial court's ruling on a motion for directed verdict is in actuality a challenge to the sufficiency of the evidence to support the conviction, we address these issues together. *See Madden v. State*, 799 S.W.2d 683, 686 (Tex. Crim. App. 1991).

Standard of Review

The Court of Criminal Appeals has expressed our standard of review of a sufficiency issue as follows:

> In determining whether the evidence is legally sufficient to support a conviction, a reviewing court must consider all of the evidence in the light most favorable to the verdict and determine whether, based on that evidence and reasonable inferences therefrom, a rational fact finder could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007). This "familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Jackson*, 443 U.S. at 319. "Each fact need not point directly and independently to the guilt of the appellant, as long as the cumulative force of all the incriminating circumstances is sufficient to support the conviction." *Hooper*, 214 S.W.3d at 13.

Lucio v. State, 351 S.W.3d 878, 894 (Tex. Crim. App. 2011).

The Court of Criminal Appeals has also explained that our review of "all of the evidence" includes evidence that was properly and improperly admitted. *Conner v. State*, 67 S.W.3d 192, 197 (Tex. Crim. App. 2001). And if the record supports conflicting inferences, we must presume that the factfinder resolved the conflicts in favor of the prosecution and therefore defer to that determination. *Jackson v. Virginia*, 443 U.S. 307, 326, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). Further, direct and circumstantial evidence are treated equally: "Circumstantial evidence is as probative as direct evidence in establishing the guilt of an actor, and circumstantial evidence alone can be sufficient to establish guilt." *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007). Finally, it is well established that the factfinder is entitled to judge the credibility of witnesses and can

choose to believe all, some, or none of the testimony presented by the parties. *Chambers v. State*, 805 S.W.2d 459, 461 (Tex. Crim. App. 1991).

To determine whether the State has met its burden under *Jackson*, we compare the elements of the crime as defined by the hypothetically correct jury charge to the evidence admitted on the record at trial before the factfinder. *Thomas v. State*, 444 S.W.3d 4, 8 (Tex. Crim. App. 2014); *see Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997). A hypothetically correct jury charge need not, however, incorporate allegations that would give rise to only immaterial variances. *See Geick v. State*, 349 S.W.3d 542, 545 (Tex. Crim. App. 2011). Immaterial variances do not affect the validity of a criminal conviction. *Thomas*, 444 S.W.3d at 9.

Variance

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). Variances can be classified into three categories, depending upon the type of allegation that the State has pled in its charging instrument but failed to prove at trial. *Johnson v. State*, 364 S.W.3d 292, 298 (Tex. Crim. App. 2012). First, a variance involving statutory language that defines the offense always renders the evidence legally insufficient to support the conviction. *Id*. Second, a variance involving a non-statutory allegation that describes an "allowable unit of prosecution" element of the offense may or may not render the evidence legally insufficient, depending upon whether the variance is material. *Id*. at 298-299. Finally, other types of variances involving immaterial non-statutory allegations do not render the evidence legally insufficient. *Id*. at 299.

Neither Clark nor the State contend the vehicle description variance falls within the first category. Rather, Clark contends the variance falls within the second category; whereas, the State contends it falls within the third category. We need not determine which category the variance falls within because the variance is immaterial.

Only a "material" variance will render the evidence insufficient. *Gollihar v. State*, 46 S.W.3d 243, 257 (Tex. Crim. App. 2001). A variance that is not prejudicial to a defendant's substantial rights is immaterial. *Id*. at 248. In determining whether a defendant's substantial rights have been prejudiced we consider whether (1) the indictment, as written, informed the defendant of the charge against him sufficiently to allow him to prepare an adequate defense at trial, and (2) prosecution under the indictment as drafted would subject the defendant to the risk of being prosecuted later for the same crime. *Id*.

Application

There is no indication in the record that Clark did not know what vehicle the State was claiming he operated without Castillo's effective consent or that Clark was misled by the allegation or surprised by the proof at trial. The allegation of the wrong year and make of the pickup did not impair his ability to prepare his defense. Clark did not attempt to raise a defense that he did not operate the vehicle alleged. Rather, Clark's defense was that he was in possession of the vehicle because a friend had asked Clark to drive the vehicle for him. Clark's defense did not depend upon the vehicle year and make alleged.

Neither does the allegation of the year and make subject Clark to the risk of being prosecuted later for the same crime. Clark is in no danger of being prosecuted again for theft of the same vehicle proved at trial because the whole record may be reviewed in order to protect against a subsequent prosecution. *See Gollihar v. State*, 46 S.W.3d 243, 258 (Tex. Crim. App. 2001) (citing *United States v. Apodaca*, 843 F.2d 421, 430 n.3 (10th Cir.) (entire record, not just indictment, may be referred to in protecting against double jeopardy in event of subsequent prosecution), *cert. denied*, 488 U.S. 932, 102 L. Ed. 2d 342, 109 S. Ct. 325 (1988)).

Accordingly, we hold the variance was immaterial, and therefore should be disregarded in a sufficiency of the evidence review under a hypothetically correct jury charge. Because Clark's sufficiency issue is based solely on the variance, our inquiry is ended. *See Gollihar*, 46 S.W.3d at 258. Clark's first and second issues are overruled.

CHARGE ERROR

In his third issue, Clark complains that the trial court commented on the evidence to the jury when the court issued a supplemental instruction during deliberations which, Clark contends, effectively told the jury to disregard any variance between the indictment and the proof presented at trial.

During its deliberations, the jury sent the following note to the trial court:

> Can the ~~indictment~~ charges as written as a 2004 White Chevy 3500 pickup truck not matching the facts of the vehicle being a 2005 GMC White pickup truck negates the charge?[1]

[1] In closing argument, as one reason to find Clark not-guilty, Clark pointed out the discrepancy between the pleading and the proof to the jury. It its closing argument, the State informed the jury that the discrepancy did not matter.

After discussion and research by the parties, the trial court responded to the jury as follows:

> Ladies and Gentleman of the Jury:
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> The Court acknowledges your last "Note from Jury."
>
> You are advised that our law provides that variance between facts established at trial and the charging instrument, i.e., an indictment, regardless of whether viewing the variance as a sufficiency of the evidence problem or as a notice-related problem, is that a variance that is not prejudicial to a defendant's "substantial rights" is immaterial."
>
> "Substantial rights include an indictment sufficient to allow a defendant to prepare an adequate defense at trial, and whether prosecution under a deficiently drafted indictment would subject the defendant to the risk of being prosecuted later for the same crime."
>
> The Court directs you to continue your deliberations.
>
> Signed this the 14th day of December, 2016.

Clark objected to the issuance of the instruction, asserting its timing was improper because the instruction should have been included in the original charge and the instruction was a comment on the evidence.

The purpose of a jury charge is to instruct the jury on the applicable law, and a charge must include an accurate statement of the law. *See* TEX. CODE CRIM. PROC. ANN. art. 36.14 (West 2007). Moreover, the trial court must apply the law to the facts adduced at trial. *Gray v. State*, 152 S.W.3d 125, 127 (Tex. Crim. App. 2004). Supplemental instructions such as the one given in this case are governed by article 36.16 of the Texas Code of Criminal Procedure which provides, in part:

> …After the argument begins no further charge shall be given to the jury unless required by … the request of the jury, … and in the event of such

> further charge, the defendant or his counsel shall have the right to present objections in the same manner as is prescribed in Article 36.15.

TEX. CODE CRIM. PROC. ANN. art. 36.16 (West 2006).

It was apparent from the note that the jury did not know what to do when the evidence did not match a descriptive fact in the indictment. It was also apparent that the trial court, by submitting a supplemental instruction, felt the need to supplement the charge so that it correctly stated the law. The statute and case-law permit the supplementation of the charge in these instances. *See Smith v. State*, 898 S.W.2d 838, 854-855 (Tex. Crim. App. 1995). Thus, the timing of the supplemental instruction was not improper.

A trial court may not, however, submit a charge that comments on the weight of the evidence. *See* TEX. CODE CRIM. PROC. ANN. art. 36.14 (West 2007). A charge comments on the weight of the evidence if it assumes the truth of a controverted issue or directs undue attention to particular evidence. *See Whaley v. State*, 717 S.W.2d 26, 32 (Tex. Crim. App. 1986); *Hawkins v. State*, 656 S.W.2d 70, 73 (Tex. Crim. App. 1983); *Lacaze v. State*, 346 S.W.3d 113, 118 (Tex. App—Houston [14th Dist.] 2011, pet. ref'd). In determining whether the charge improperly comments on the weight of the evidence, we consider the court's charge as a whole and the evidence presented at trial. *See Russell v. State*, 749 S.W.2d 77, 79 (Tex. Crim. App. 1988).

The trial court's supplemental instruction, although inartfully worded, contained accurate statements of the law on variance. The majority of the instruction was taken from the "widely-accepted rule" on variance as opined by Court of Criminal Appeals in

Gollihar. *See Gollihar v. State*, 46 S.W.3d 243, 248 (Tex. Crim. App. 2001). In addition, the supplemental instruction was necessary to educate the jury on the law applicable to the law of variance, which only became an issue at the end of the State's case. It did not assume that the variance was immaterial or that Clark's substantial rights were not prejudiced. Further, although the supplemental instruction was in response to the jury's question regarding the specific year and make of the pickup Clark was accused of operating, it did not reference the evidence at all.

Considering the supplemental instruction along with the trial court's jury charge as a whole, the supplemental instruction did not assume the truth of a controverted issue or direct undue attention to particular evidence. Consequently, the trial court's jury charge did not improperly comment on the weight of the evidence, and Clark's third issue is overruled.

CONCLUSION

Having overruled each issue, we affirm the trial court's judgment.

TOM GRAY
Chief Justice

Before Chief Justice Gray,
Justice Davis, and
Justice Scoggins
Affirmed
Opinion delivered and filed May 23, 2018
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