IN THE
TENTH COURT OF APPEALS

No. 10-19-00312-CR

MICHALL LEE LUNA,

Appellant

v.

THE STATE OF TEXAS,

Appellee

From the 440th District Court
Coryell County, Texas
Trial Court No. 18-25042

MEMORANDUM OPINION

The jury convicted Michall Luna of the offense of tampering with or fabricating physical evidence. The jury found the enhancement paragraphs to be true and assessed punishment at 40 years confinement. We affirm.

AMENDED INDICTMENT

In order to address the issues Luna raises on appeal, we must first determine whether the indictment was properly amended. The original indictment filed on September 27, 2018, alleged that on or about July 15, 2018, Luna:

> did then and there, knowing that an investigation was in progress, to-wit: a traffic stop, intentionally or knowingly concealed drug paraphernalia to-wit: a pipe, with intent to impair its availability as evidence in the investigation.

On April 23, 2019, the State filed a motion to amend the indictment to include the language "knowing that an investigation was pending and/or in progress." The trial court granted the motion on April 29, 2019 and ordered that the indictment be amended as stated in the State's motion. The indictment was not amended on its face at that time. On August 9, 2019, the trial court again took up the motion to amend the indictment at the docket call. Luna's attorney stated that he was aware of the requested amendment and had no objection to the amendment. The trial court again granted the motion to amend the indictment and stated on the record that the face of the indictment was amended. A photocopy of the indictment as amended to contain the phrase "pending and/or in progress" was filed on August 27, 2019, the second day of trial. It was filed after jury selection, but prior to presentment of the indictment to the jury. The trial court read the amended indictment to Luna before the jury, and Luna entered a plea of not guilty.

Luna contends that the amended indictment was not timely filed and is not the controlling indictment in his case. In *Riney v. State*, the Court of Criminal Appeals

instructed that if the trial court approves the State's amended version of the indictment, the amended photocopy of the original indictment need only be incorporated into the record under the direction of the court, pursuant to Article 28.11 of the Code of Criminal Procedure, with the knowledge and affirmative assent of the defense. *Riney v. State*, 28 S.W.3d 561, 566 (Tex. Crim. App. 2000). At the docket call, Luna stated that he had no objection to amending the indictment. The trial court stated that the face of the indictment was amended, and the amended indictment was made part of the record. The amended indictment was read before the jury, and Luna entered a plea of not guilty. As evidenced by Luna stating he had no objection to the amendments, on two separate occasions, there is no question Luna had notice of the indictment as amended. We find that the indictment was properly amended.

SUFFICIENCY OF THE EVIDENCE

In the first issue, Luna contends that the evidence is insufficient to support his conviction. The Court of Criminal Appeals has expressed our standard of review of a sufficiency issue as follows:

> When addressing a challenge to the sufficiency of the evidence, we consider whether, after viewing all of the evidence in the light most favorable to the verdict, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); *Villa v. State*, 514 S.W.3d 227, 232 (Tex. Crim. App. 2017). This standard requires the appellate court to defer "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. We may not re-weigh the evidence or substitute our judgment for that of the factfinder. *Williams*

> *v. State*, 235 S.W.3d 742, 750 (Tex. Crim. App. 2007). The court conducting a sufficiency review must not engage in a "divide and conquer" strategy but must consider the cumulative force of all the evidence. *Villa*, 514 S.W.3d at 232. Although juries may not speculate about the meaning of facts or evidence, juries are permitted to draw any reasonable inferences from the facts so long as each inference is supported by the evidence presented at trial. *Cary v. State*, 507 S.W.3d 750, 757 (Tex. Crim. App. 2016) (citing *Jackson*, 443 U.S. at 319); *see also Hooper v. State*, 214 S.W.3d 9, 16-17 (Tex. Crim. App. 2007). We presume that the factfinder resolved any conflicting inferences from the evidence in favor of the verdict, and we defer to that resolution. *Merritt v. State*, 368 S.W.3d 516, 525 (Tex. Crim. App. 2012). This is because the jurors are the exclusive judges of the facts, the credibility of the witnesses, and the weight to be given to the testimony. *Brooks v. State*, 323 S.W.3d 893, 899 (Tex. Crim. App. 2010). Direct evidence and circumstantial evidence are equally probative, and circumstantial evidence alone may be sufficient to uphold a conviction so long as the cumulative force of all the incriminating circumstances is sufficient to support the conviction. *Ramsey v. State*, 473 S.W.3d 805, 809 (Tex. Crim. App. 2015); *Hooper*, 214 S.W.3d at 13.
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> We measure whether the evidence presented at trial was sufficient to support a conviction by comparing it to "the elements of the offense as defined by the hypothetically correct jury charge for the case." *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 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.*; *see also Daugherty v. State*, 387 S.W.3d 654, 665 (Tex. Crim. App. 2013). The "law as authorized by the indictment" includes the statutory elements of the offense and those elements as modified by the indictment. *Daugherty*, 387 S.W.3d at 665.

Zuniga v. State, 551 S.W.3d 729, 732-33 (Tex. Crim. App. 2018).

On July 15, 2018 at approximately 1:00 a.m., Trooper Christopher McNeel initiated a traffic stop after observing Luna speeding on a motorcycle. Trooper McNeel stated that after he activated his lights, Luna's driving became erratic. Trooper McNeel saw objects

coming away from the motorcycle and bouncing off of the highway. McNeel testified that he did not arrest Luna at the time of the traffic stop because he was not sure exactly what the objects coming from the motorcycle were.

Immediately after the traffic stop, Trooper McNeel went back to the area where he observed the objects being thrown from the motorcycle. He found a glass pipe used to smoke methamphetamine that contained methamphetamine residue. Appellant was later charged with possession of methamphetamine and tampering with physical evidence.[1]

Section 37.09 of the Texas Penal Code provides that a person commits the offense of tampering with or fabricating physical evidence:

> if, knowing that an investigation or official proceeding is pending or in progress, he:
> (1) alters, destroys, or conceals any record, document, or thing with intent to impair its verity, legibility, or availability as evidence in the investigation or official proceeding; …

TEX. PENAL CODE ANN. § 37.09 § (a) (West 2016). Because we found that the indictment was properly amended, we must determine if the evidence is legally sufficient to show that Luna intentionally concealed the drug paraphernalia knowing that an investigation was pending and/or in progress.

[1] Luna appeals from his conviction for possession of methamphetamine in Cause No. 10-19-00313-CR.

Luna first argues that the evidence is insufficient to show that he concealed the drug paraphernalia. To determine whether Appellant's conduct fit the statutory term "conceal," we interpret the statute based on its plain meaning. *Williams v. State*, 270 S.W.3d 140, 146 (Tex. Crim. App. 2008); *Hines v. State*, 535 S.W. 102, 110 (Tex. App. — Eastland 2017, pet. ref'd). In the absence of statutory definitions, we turn to the common, ordinary meaning of that word. *Hines v. State*, 535 S.W. at 110. Merriam-Webster's Collegiate Dictionary provides two definitions for "conceal": (1) "to prevent disclosure or recognition of" and (2) "to place out of sight." *Conceal*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2004).

Luna contends that abandonment of the pipe is not sufficient evidence of concealment. In cases of tampering with evidence, not every act of discarding an object evinces an intent to impair the availability of that object as evidence in a later investigation or proceeding. *Thornton v. State*, 425 S.W.3d 289, 304 (Tex. Crim. App. 2014). In *Thornton*, the Court noted that it is in the province of the factfinder to draw reasonable inferences from the evidence surrounding the discarding of the object. *See Id*.

Trooper McNeel testified that when he reviewed video from his in-car camera, he was able to see Luna discarding and placing items on the ground. That video was played before the jury. The jury heard evidence from which they could reasonably infer that Luna prevented the disclosure of evidence. A reasonable jury could have inferred that

Luna intended to impair the pipe's availability as evidence. *See Thornton v. State*, 425 S.W.3d at 304.

Luna next argues that the evidence is insufficient to show that an investigation was in progress at the time of the concealment. As previously stated, the indictment was amended so that the State was required to show that an investigation was pending and/or in progress at the time of the concealment. Trooper McNeel testified that his investigation began when he activated his lights. Immediately after Trooper McNeel activated his lights, Luna began driving erratically and throwing objects from his motorcycle. The jury could have reasonably found that Luna knew an investigation was pending and/or in progress at the time he concealed the pipe. We find that the evidence is sufficient to support the conviction for tampering with or fabricating the physical evidence. We overrule the first issue.

JURY CHARGE

In the second issue, Luna argues that the trial court improperly charged the jury. Luna's issue on appeal is based upon his argument that the indictment was not properly amended. He contends that the trial court broadened the theory of conviction by including the theory of liability that he knew an investigation was pending and/or in progress in the jury instructions. The jury charge tracked the properly amended indictment and the applicable statute. *See Duffy v. State*, 567 S.W.2d 197, 204(Tex. Crim. App. 1978). The trial court did not err in charging the jury. We overrule the second issue.

CONCLUSION

We affirm the trial court's judgment.

JOHN E. NEILL
Justice

Before Chief Justice Gray,
Justice Davis, and
Justice Neill
Affirmed
Opinion delivered and filed August 5, 2020
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