**Affirmed and Opinion filed April 27, 2000.**

**In The**

# Fourteenth Court of Appeals

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**NO. 14-99-00521-CR**

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**MARK WILLIAM BEESTON, Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

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**On Appeal from the 263rd District Court**
**Harris County, Texas**
**Trial Court Cause No. 763,998**

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## O P I N I O N

After appellant entered a plea of guilty without an agreed recommendation as to punishment, the trial court found appellant guilty of murder as charged in the indictment. Following the completion of a pre-sentence investigation, the court assessed punishment at confinement in the Institutional Division of the Texas Department of Criminal Justice for ten years.

The second paragraph of the indictment, to which appellant pled guilty, alleged that appellant intended to cause serious bodily injury to "SENECA SWEARINGER." Prior to appellant's plea, the State filed a motion to amend the indictment which requested permission of the trial court to alter the indictment

to reflect the true name of the victim, Seneca Swearingen. The State's motion was granted by the trial court. However, the State failed to effectuate the amendment of the indictment because the face of the indictment was never physically altered. *See Ward v. State,* 829 S.W.2d 787, 793 (Tex. Crim. App. 1992) (holding that neither the motion itself nor the trial judge's granting thereof is the amendment; rather, the amendment is the actual alteration of the face of the charging instrument).

The Waiver of Constitutional Rights, Agreement to Stipulate, and Judicial Confession executed by appellant as evidence of his guilt tracked the wording of the unamended indictment and contained the uncorrected name, Swearinger. In the stipulation, appellant stated that the factual allegations in the indictment were true.

In two points of error, appellant claims the evidence is legally and factually insufficient to support the conviction. Specifically, appellant complains that the evidence is insufficient because the allegation in the indictment and the proof presented at the plea hearing state that the victim's last name was "SWEARINGER," when in reality, the victim's surname was Swearingen. We find that appellant has waived error and affirm the conviction.

When an accused enters a plea and waives his right to trial by jury, the State must introduce evidence proving guilt to authorize a conviction. *See* TEX. CODE CRIM. PROC. ANN. art. 1.15 (Vernon Supp. 2000). In conducting a sufficiency review, an appellate court must review the entire record in a light most favorable to the prosecution to determine whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *See Jackson v. Virginia,* 443 U.S. 307, 318, 99 S.Ct. 2781, 2788, 61 L.Ed.2d 560 (1979). This constitutional mandate is predicated upon the ability of the reviewing court to consider all the relevant evidence in a given case. The presentation of only a partial record makes such a consideration impossible. *See Greenwood v. State,* 823 S.W.2d 660, 661 (Tex. Crim. App. 1992).

In the present case, appellant expressly waived his right to have a court reporter make a record of the plea proceedings. Consequently, there is no court reporter's record from the plea hearing. Rule 34.6(5) TEX. R. APP. P. states that in criminal cases, if an appellant complains that the evidence is

insufficient to support a finding of guilt, the record must include all the evidence admitted at the trial on the issue of guilt or innocence and punishment. In order to challenge the sufficiency of the evidence to support a judgment based on a plea of guilty, a defendant must bring forth a full statement of facts including a transcription of the plea proceedings. *See Williams v. State*, 950 S.W.2d 383, 385 (Tex. App.–Houston [1st Dist.] 1997, pet. ref'd). In the instant case, appellant's express waiver of the right to have a court reporter record his plea deprives this Court of a complete record from which to evaluate sufficiency of the evidence. In the absence of a complete record, we must presume there was sufficient evidence to sustain and support the judgment. *See id.* Without a statement of facts from the plea hearing, we cannot determine whether the evidence included in the transcript constitutes all of the evidence presented to the trial court. *See Allison v. State*, 618 S.W.2d 763, 765 (Tex. Crim. App. 1981). It is possible that at the plea hearing, the appellant admitted committing the offense of murder against Seneca Swearingen[1]. Without a complete statement of facts, an appellate court cannot consider the facts of the case to determine whether or not sufficient evidence exists to support the conviction. *See Greenwood v. State*, 823 S.W.2d at 661; *Richardson v. State*, 921 S.W.2d 359, 360-361 n. 3 (Tex. App.–Houston [1st Dist.] 1996, no. pet.). Due to his failure to provide a statement of facts from the plea hearing, appellant's challenge to the sufficiency of the evidence to support his guilty plea is overruled. *See Williams v. State*, 950 S.W.2d at 385.

In any event, we fail to see how appellant could have been harmed by the misspelling of the victim's name in the indictment and corresponding plea papers. The names Swearinger and Swearingen were used interchangeably during the hearing on the pre-sentence investigation report, the only proceeding which was recorded by a court reporter. Appellant testified that he had previously entered a plea of guilty to

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[1] Testimony by appellant admitting the correct name of the victim would have created a variance between the indictment and the proof. According to the doctrine of *idem sonans*, if the name alleged and the name proven can be sounded the same, a variance in spelling is immaterial. *See Martin v. State*, 541 S.W.2d 605, 608 (Tex. Crim. App. 1976); *Carr v.State*, 694 S.W.2d 123, 127 (Tex. App.-Houston [14th Dist.1985, pet. ref'd). A question involving the rule of *idem sonans* must be raised at trial or it is waived. *See id.*

intentionally and knowingly causing the death of Seneca Swearingen. The victim's mother answered in the affirmative when she was asked whether Seneca Swearinger was her son.

We find that the misspelling of the victim's name in the indictment and judicial confession did not prejudice appellant's defense.[2] Appellant cites no authority for the proposition that reversible error is shown when both the pleading and the proof contain a misspelled name. In fact, our review of relevant case law reveals *Lute v. State*, 166 Tex.Cr.R. 357, 314 S.W.2d 98 (1958), in which the Court of Criminal Appeals found no reversible error when the indictment alleged possession of "Herion"[sic] and the allegation was sustained by the proof.

The record shows unequivocally that appellant was not misled or confused about the true identity of the victim. Indeed, appellant has not claimed surprise, prejudice or mistaken meaning arising from the misspelled name. Because the record demonstrates that appellant was not surprised or prejudiced by the misspelled name in the indictment and the proof, no harm is shown. We overrule points of error one and two.

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[2] The doctrine of *idem sonans* provides analogous authority. *Cf Johnson v. Estelle*, 704 F.2d 232, 236 (5th Cir. 1983) (variance between indictment alleging murder of "Carol Ann Venters" and proof at trial that the victim was named "Carlyn Ann Venters" not fatal). Unless the misspelling prejudicially misleads a defendant in preparing a defense, the law does not consider as fatal a misspelling through the use of an incorrect letter. *See Lopez v. State*, 805 S.W.2d 882, 885 (Tex. App.–Corpus Christi 1991, no pet.). The object of the doctrine of variance between allegations of an indictment is to avoid surprise, and for such variance to be material it must be such as to mislead the party to his prejudice. *See Reyes v. State*, 3 S.W. 3d 623, 625 (Tex. App.–Houston [1st Dist.] 1999, no pet.).

The judgment of the trial court is affirmed.

PER CURIAM

Judgment rendered and Opinion filed April 27, 2000.
Panel consists of Justices Yates, Fowler, and Edelman.
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