Affirmed and Opinion filed October 28, 1999.

In The

Fourteenth Court of Appeals

NO. 14-97-01283-CR
NO. 14-97-01284-CR

TERRY BRADLEY DICKSON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Criminal Court at Law No. 4
Harris County, Texas
Trial Court Cause Nos. 97-22693 and 97-22694

O P I N I O N

Terry Dickson, appellant, was charged in two separate informations with the misdemeanor offenses of criminal trespass and assault. *See* TEX. PEN. CODE ANN. § § 30.05, 22.01 (Vernon Supp. 1999). Appellant entered a plea of "not guilty" to both offenses. After considering the evidence, a jury found appellant guilty as charged. The trial court assessed appellant's punishment at confinement for 180 days in the Harris County Jail for the criminal trespass and 270 days in the Harris County Jail for the assault. In three points of error, appellant claims: (1) the evidence at trial was legally insufficient to support the assault conviction; (2) the evidence at trial was factually insufficient to support the assault conviction; and

(3) appellant was denied the right to confront and cross-examine witnesses against him in violation of the Sixth and Fourteenth Amendments to the U.S. Constitution when the trial court prevented him from impeaching State's witness, Anthel Bolyn. We affirm.

On May 28, 1997, Anthel Bolyn, the complainant, and Jesse Garza were working as security guards at an apartment complex where they lived. The two men noticed appellant walking through a section of the complex where no one lived. Only residents and guests were allowed on the grounds and "no trespassing" signs were posted around the complex. Bolyn did not recognize appellant as a resident or frequent guest. Appellant was carrying a pillow case over his shoulder and his shirt had tape across the front.

Bolyn and Garza watched appellant as he walked across the complex. A few moments later, the two men found appellant peeking around the corner by a basketball court watching children play. As the security officers approached, they informed appellant they wanted to speak with him. Bolyn then recognized appellant as the man he had chased away from the apartments a few months earlier after picking up a little girl in a common area.

Upon recognizing appellant, Bolyn quickened his pace. Appellant ran, and Bolyn gave chase. Bolyn summoned help from the night manager of the complex, and continued the pursuit. Bolyn closed in after appellant unsuccessfully attempted to climb a fence. Appellant then pulled something from his pocket and lunged at Bolyn's stomach with the object. The object cut Bolyn's stomach and blood was visible from outside his shirt.

Bolyn tried unsuccessfully to grab appellant. Appellant encountered another fence and Bolyn caught up. Bolyn informed appellant the police were on their way and to stop resisting. The apartment's night manager arrived and confirmed that police had been summoned. Appellant then jumped the fence and ran to a nearby service station. Appellant attempted to steal a car from a woman pumping gas, but the keys were not in the ignition. As the pursuing security guards approached, they saw a woman beating on a car's driver side window, screaming, "That's my car! That's my car!"

The men pulled appellant out of the vehicle and wrestled him to the ground. Bolyn, concerned appellant was reaching for his pocket again, head-butted appellant. Bolyn continued to restrain appellant's

arms, fearing he would again reach for his pocket. When Officer D. J. King of the Pasadena Police Department arrived on the scene, he observed appellant struggling with Bolyn and Garza. King handcuffed appellant. A subsequent search revealed appellant was in possession of a set of keys and KY jelly.[1]

In his first point of error, appellant claims the evidence is "legally insufficient" to support his conviction for assault because the State did not show appellant cut Bolyn with a key as alleged in the information. When reviewing the legal sufficiency of the evidence, we look at the evidence in the light most favorable to the verdict and determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Mason v. State*, 905 S.W.2d 570, 574 (Tex. Crim. App. 1995). The jury is the exclusive judge of the credibility of witnesses and of the weight to be given their testimony. *See Jones v. State*, 944 S.W.2d 642, 647 (Tex. Crim. App. 1996). Likewise, reconciliation of conflicts in the evidence is solely within the exclusive province of the jury. *See id.* This standard of review applies to both direct and circumstantial evidence cases. *See Chambers v. State*, 711 S.W.2d 240, 245 (Tex. Crim. App. 1986).

Appellant contends the State did not prove appellant assaulted Bolyn by cutting his stomach with a key. The information alleged appellant injured Bolyn by "CUTTING THE COMPLAINANT'S STOMACH WITH A KEY." Though cutting with a key is not a required element of the offense, appellant claims the allegation is descriptive of an essential element of the offense and had to be proved up by the State.

"[A]llegations which are not essential to constitute the offense, and which might be entirely omitted without affecting the charge against the defendant, and without detriment to the indictment, are treated as surplusage." *Eastep v. State*, 941 S.W.2d 130, 134 (Tex. Crim. App. 1997) (quoting *Whetstone v. State*, 786 S.W.2d 361, 364 (Tex. Crim. App. 1990)). Language in the indictment which is surplusage can ordinarily be disregarded and does not affect the State's burden of proof. *See Burrell v. State*, 526 S.W.2d 799, 802 (Tex. Crim. App.1975). A well-recognized exception to the general surplusage rule, however, requires that if any unnecessary language included in an indictment describes an essential element

[1] Officer King testified, "I think I also removed a pocket knife." The apartment night manager and another officer on the scene, however, both testified they were aware of only the keys and KY jelly.

of the crime charged, the State must prove the allegation, though needlessly included, even if the allegation would otherwise be surplusage. *See id.*; *Whetstone*, 786 S.W.2d at 364.

Therefore, the State is bound by the allegations as set out in the charging instrument, and must prove those allegations beyond a reasonable doubt. *See Weaver v. State*, 551 S.W.2d 419, 420-21 (Tex. Crim. App. 1977). If a variance exists between the allegations contained in an indictment and the proof offered by the State, the evidence is insufficient to sustain a conviction. *See Franklin v. State*, 659 S.W.2d 831, 833 (Tex. Crim. App. 1983). However, here the State offered circumstantial evidence that the weapon used by appellant was a key. Because the State alleged keys were used in the attack and put on evidence that keys were used, we find no "fatal variance" between the information and the evidence presented. The State presented sufficient evidence for the jury to find the object appellant took from his pocket to cut Bolyn was the same object later removed by police. *See Dewberry v. State*, 743 S.W.2d 260, 264-65 (Tex. App.–Dallas 1987), *rev'd on other grounds*, 776 S.W.2d 589 (Tex. Crim. App. 1989). We overrule point of error one.

In his second point of error, appellant alleges the evidence is factually insufficient to support a conviction for assault. Appellant claims the fatal variance between the allegation in the indictment and the proof at trial requires reversal. When reviewing the factual sufficiency of the evidence, we view all the evidence without the prism of "in the light most favorable to the prosecution" and set aside the verdict only if it is "so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust." *Clewis v. State*, 922 S.W.2d 126, 129 (Tex. Crim. App. 1996). Although an appellate court is authorized to disagree with the verdict, a factual sufficiency review must be appropriately deferential so as to avoid an appellate court's substituting its judgment for that of the jury. *See id.* at 130.

Appellant did not offer any evidence that the keys removed from his pocket were not the same object used to cut Bolyn. Appellant argues that because Officer King's testimony that keys were used to cut Bolyn is contradicted by Bolyn himself, a factual sufficiency review must find the assault conviction manifestly unjust. We disagree. Bolyn testified he was cut by an object held by appellant. Bolyn did not testify that he was *not* cut by a key. Testimony from the night manager and the officers at the scene, confirmed keys were removed from appellant's pocket. The jury had the right to believe, based on the

State's evidence, that keys were used in the attack. We do not find the jury's verdict so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Accordingly, appellant's second point of error is overruled.

In point of error three, appellant contends the trial court erred in disallowing his attempt to impeach the credibility of Bolyn with proof that Bolyn was on deferred adjudication, thus violating the Sixth and Fourteenth amendments to the U.S. Constitution. Appellant made a bill of exception, during which Bolyn testified he was on deferred adjudication for another two months for a felony committed in 1992. Appellant argues he should have been able to cross examine Bolyn on his deferred adjudication to expose a possible bias, motive, or ill will.

In order to invoke his right to question a witness about the witness's deferred adjudication status, the defendant must show the witness testified against the defendant as a result of bias, motive, or ill will emanating from the witness's deferred adjudication status. *See Duncan v. State*, 899 S.W.2d 279, 281 (Tex. App.–Houston [14th Dist.] 1995, pet ref'd) (*citing Callins v. State*, 780 S.W.2d 176, 196 (Tex. Crim. App. 1989). Appellant does not contend, nor has he presented any evidence to show, that Bolyn's deferred adjudication status created some sort of bias, motive, or ill will. Under the facts presented here, we find nothing to rationally suggest Bolyn's deferred adjudication affected or even had the potential to affect the credibility of his testimony. Accordingly, appellant's third point of error is overruled.

/s/ J. Harvey Hudson
Justice

Judgment rendered and Opinion filed October 28, 1999.
Panel consists of Chief Justice Murphy and Justices Hudson and Frost.
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