**Affirmed and Majority and Concurring Opinions filed March 7, 2002.**

**In The**

# Fourteenth Court of Appeals

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**NO. 14-00-01444-CR**

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**TROY LESTER BARNES, Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

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**On Appeal from the 268th District Court**
**Fort Bend County, Texas**
**Trial Court Cause No. 33,244**

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## M A J O R I T Y   O P I N I O N

Appellant, Troy Lester Barnes ("Barnes"), was charged by indictment with the felony offense of assault on a public servant. A jury convicted appellant of the charged offense and assessed punishment at four years' confinement in the Institutional Division of Texas Department of Criminal Justice. On appeal, appellant asserts five points of error. We affirm.

## I. FACTUAL AND PROCEDURAL BACKGROUND

On April 25, 2000, at approximately 11:00 p.m., while on duty, Deputy Reggie Powell observed appellant's vehicle make a turn without using a turn signal. Deputy Powell made

a U-turn in order to initiate a traffic stop. While turning around, Deputy Powell saw appellant abruptly turn into a driveway, again without using a turn signal. Deputy Powell followed appellant into the driveway and turned on the patrol car's overhead lights. Appellant had already gotten out of the vehicle and raised the hood of his car. The passenger had also gotten out and was walking towards the front of the car. Because the neighborhood they were in was known for narcotics and appellant and his passenger exited the vehicle so quickly, Deputy Powell suspected that there might be some narcotic activity going on.

Deputy Powell recognized the passenger and told him to get back into the vehicle while he took appellant to the rear of the vehicle. Appellant denied having identification on him, but gave Deputy Powell a name and date of birth which was later discovered to be false. Deputy Powell was getting suspicious and asked appellant to sit down in the back of his patrol car while he talked to the passenger. The passenger told Deputy Powell that they had just come from a known narcotic house.

At that point, Deputy Flint Turner arrived on the scene. He talked to Deputy Powell and decided to talk to appellant in order to obtain appellant's real name. He walked to Deputy Powell's patrol car and opened the rear driver's side door. After appellant gave Deputy Turner the same false name he had given Deputy Powell, he kicked the door open and jumped out. Deputy Powell witnessed appellant jumping out of the patrol car and Deputy Turner trying to push appellant back into the car. Appellant, however, was able to get out of the patrol car and run past Deputy Turner. Deputy Turner was able to get a hold of appellant's left arm when Deputy Powell caught up and grabbed appellant.

A struggle ensued between appellant, Deputy Turner, and Deputy Powell. Deputy Powell had both of his arms around appellant attempting to prevent his escape. Appellant tried to release himself from Deputy Powell's grip by pulling Deputy Powell's fingers up. Deputy Turner and Deputy Powell managed to get appellant to the ground, but appellant got up just as fast. At that point, appellant was standing, Deputy Powell was on the ground holding appellant's legs, and Deputy Tuner was standing. During the struggle, appellant

tried to take Deputy Turner's firearm from him. Both Deputies used their pepper spray on appellant in an effort to gain control of him, but appellant did not react. Appellant twice reached down and shoved his thumb into Deputy Powell's eye and pulled up.

Feeling as though the situation was getting out of control, Deputy Powell yelled to Deputy Turner to "take [appellant] out." Deputy Turner put his hand on his gun and began to unholster it when appellant's behavior de-escalated. He put his gun back in the holster and appellant began swinging again. Deputy Turner grabbed his flashlight and hit appellant several times in the thigh and clavicle. Appellant finally fell to the ground and was cuffed.

## II. POINTS OF ERROR ON APPEAL

In five points of error, appellant argues his conviction should be reversed because: (1) the proof presented at trial varied from the indictment; (2) appellant was indicted with assault on one public servant, but was factually tried on two separate counts of assault on a public servant; (3) the evidence is factually and legally insufficient to support a conviction for assault on a public servant; (4) an improper definition of beyond a reasonable doubt was given; and (5) the prosecutor made improper comments during closing argument.

## III. ALLEGED VARIANCE

Appellant argues that he was surprised and prejudiced by the variance between the indictment and the proof presented at trial. In his brief, appellant asserts that the indictment alleges an assault on Deputy Powell, but the State "proved an assault to Deputy Flint Turner in addition to Deputy Powell."

As a general rule, a variance between the indictment and the evidence presented at trial is fatal to a conviction. *Stevens v. State*, 891 S.W.2d 649, 650 (Tex. Crim. App. 1995) (citations omitted). The reasoning behind the doctrine of variance is that a defendant should "learn in advance of trial and with reasonable certainty with what he is being charged so that he can properly prepare his defense." *Ward v. State*, 829 S.W.2d 787, 788–89 (Tex. Crim. App. 1992). Moreover, due process guarantees the defendant notice of the charges against

him. *Stevens*, 891 S.W.2d at 650. If there is a real tangible difference between the allegations in the indictment and the proof offered in support thereof, due process is violated. *Id*.

Appellant's first point of error is without merit. Several times in his brief, appellant argues the State proved an assault on Deputy Turner *in addition to* an assault on Deputy Powell. In other words, appellant concedes that the State presented evidence proving the offense charged in the indictment. A variance only exists when there is a difference between the evidence offered at trial and the offense presented in the charging instrument. *Id*. According to appellant's own statements, the evidence offered at trial did not vary from the indictment. Therefore, no variance existed and appellant's first point of error is overruled.

## IV. EVIDENCE OF ASSAULT ON OFFICER NOT NAMED IN INDICTMENT

Appellant asserts the trial court erred in admitting evidence of Officer Turner's injuries because Officer Turner was not the public servant named in the indictment, and this evidence was more prejudicial than probative. Specifically, appellant complains of the admission of Officer Turner's testimony regarding appellant's assault on him, and the exhibits related to, and photographs of the injuries sustained by Officer Turner. Furthermore, appellant argues that this evidence constituted evidence of an extraneous offense that had no relevance other than to show conformity with character.

### A. Standard of Review

We review the trial court's decision to admit evidence pursuant to Texas Rule of Evidence 403 under an abuse of discretion standard. *Montgomery v. State*, 810 S.W.2d 372, 391 (Tex. Crim. App. 1990). Rule 403 provides that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." TEX. R. EVID. 403. Evidence of other "crimes, wrongs or acts" are not admissible to prove character of a person and action in

conformity therewith. TEX. R. EVID. 404(b). However, it may be admissible for other purposes. *Id*. Furthermore, evidence of an extraneous offense is admissible when it is so interwoven with the offense at trial that it shows the context in which the offense occurred. *Wyatt v. State*, 23 S.W.3d 18, 25 (Tex. Crim. App. 2000) (citations omitted). Evidence admissible under Rule 404(b) is still subject to exclusion under Rule 403, if it is more prejudicial than probative. *Alba v. State*, 905 S.W.2d 581, 585 (Tex. Crim. App. 1995) (citations omitted). However, the trial court need not engage in the Rule 403 balancing test unless the defendant objects on that basis. *Id*. at 585–86. The decision to admit or exclude evidence is within the sound discretion of the trial court. *Id*. at 586.

**B. Testimony and Medical Records**

Appellant did not object to Deputy Turner's testimony or to the admission of his medical records. Generally, in order to complain on appeal, an appellant must show that the complaint was made to the trial court by a timely request, objection, or motion. TEX. R. APP. PROC. ANN. 33.1. Therefore, appellant did not preserve his complaint regarding the admission of Deputy Turner's testimony or his medical records.

Even if appellant had not waived this complaint, we would still overrule this point of error. Evidence of other crimes, wrongs, or acts are admissible if they are intermixed with the offense at trial or they rebut a defensive theory. *Wyatt*, 23 S.W.3d at 25 (citations omitted). The assaults on Deputy Powell and Deputy Turner occurred simultaneously. Based on Deputy Powell's position during the struggle, he could not provide the jury with a complete picture of what ensued. By his own admission, Deputy Powell did not know what occurred between appellant and Deputy Turner during the struggle. Deputy Turner's testimony and medical records were necessary to rebut the defensive theory that the assaults were not intentional. Therefore, this evidence was admissible and we overrule appellant's second point of error regarding Deputy Turner's testimony and medical records.

### C. Photographs

Appellant asserts that the probative value of the photographs of Deputy Turner's injuries did not outweigh the danger of unfair prejudice they presented. Appellant's objection at trial was: "Allowing these into evidence do not go to the facts of the case and also it will just confuse the jury." His complaint on appeal is that this evidence was more prejudicial than probative. A complaint on appeal must comport with the objection presented to the trial court. TEX. R. APP. PROC. ANN. 33.1; *see also Davis v. State*, 22 S.W.3d 8, 11 (Tex. App.—Houston [14th Dist.] 2000, no pet.) (citations omitted). Appellant's complaint on appeal does not comport with the objection made at trial. Therefore, appellant did not preserve this complaint for appellate review.

Even if appellant had not waived this complaint, we would still overrule this point of error. Photographs are generally admissible where oral testimony about the same matters would be admissible. *Emery v. State*, 881 S.W.2d 702, 710 (Tex. Crim. App. 1994). As stated above, Deputy Turner's testimony regarding his injuries was admissible. Thus, photographs of Officer Turner's injuries were also admissible. We overrule the remainder of appellant's second point of error.

## V. FACTUAL AND LEGAL SUFFICIENCY

Appellant argues that the evidence is legally and factually insufficient to support the jury's verdict.

### A. Legal Sufficiency

Appellant asserts the evidence is legally insufficient because the jury charge did not precisely track the allegations in the indictment. However, appellant fails to point out how he believes the jury charge did not track the indictment. Appellant's argument is unclear and does not contain appropriate citations to the record. For example, after appellant's statement that the indictment does not track the jury charge, he cites to the portion of the record where the trial court is charging the jury on punishment issues. Therefore, appellant's brief is

inadequate regarding this issue and appellant waives this point of error. *See* TEX. R. APP. PROC. ANN. 38.1(h).

Furthermore, we find that the jury charge did track the language in the indictment. The indictment reads in pertinent part:

> "[Appellant] . . . did then and there intentionally, knowingly, and recklessly cause bodily injury to Reggie Powell, a person the defendant knew was a public servant, . . . by placing the thumb of [appellant] in the eye of Deputy Reggie Powell, . . . while the said Reggie Powell was lawfully discharging an official duty, to wit: the investigation of a traffic violation."

The jury charge reads in pertinent part as follows:

> "[Appellant] did then and there intentionally and knowingly or recklessly cause bodily injury to Reggie Powell, a public servant, by then and there placing the thumb of [appellant] in the eye of Deputy Reggie Powell, while Reggie Powell was lawfully discharging an official duty, namely, investigating a traffic violation . . . ."

Moreover, we find the evidence was legally sufficient. When reviewing the legal sufficiency of the evidence, this court must view the evidence in the light most favorable to the prosecution and determine whether 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 (1979); *Garrett v. State*, 851 S.W.2d 853, 857 (Tex. Crim. App. 1993). This standard of review applies to cases involving both direct and circumstantial evidence. *King v. State*, 895 S.W.2d 701, 703 (Tex. Crim. App. 1995). On appeal, this court does not reevaluate the weight and credibility of the evidence, but we consider only whether the jury reached a rational decision. *Muniz v. State*, 851 S.W.2d 238, 246 (Tex. Crim. App. 1993).

Unquestionably, the State must prove beyond a reasonable doubt that the accused is the person who committed the crime charged. *Johnson v. State,* 673 S.W.2d 190, 196 (Tex. Crim. App. 1984); *Rice v. State,* 801 S.W.2d 16, 17 (Tex. App.—Fort Worth 1990, pet. ref'd). It is important to note that reconciliation of conflicts and contradictions in the evidence is within the province of the jury. *Losada v. State*, 721 S.W.2d 305, 309 (Tex.

Crim. App. 1986); *Butler v. State,* 981 S.W.2d 849, 853 (Tex. App.—Houston [1st Dist.] 1998, pet. ref'd). Furthermore, the sufficiency of the evidence is not destroyed by contradictions or conflicts between witnesses' testimony. *Weisinger v. State,* 775 S.W.2d 424, 429 (Tex. App.—Houston [14th Dist.] 1989, pet. ref'd). When confronted with evidence raising conflicting inferences, a reviewing court must presume that the trier of fact resolved any such conflict in favor of the prosecution, and must defer to that resolution. *Matson v. State,* 819 S.W.2d 839, 846 (Tex. Crim. App. 1991).

Appellant was charged with the offense of assault on a public servant, Deputy Powell. A person commits this offense if the person: (1) intentionally, knowingly, or recklessly causes bodily injury to another; and (2) the offense is committed against a person the actor knows is a public servant while the public servant is lawfully discharging an official duty. TEX. PEN. CODE ANN. § 22.01. Deputy Powell testified that, in his belief, appellant intentionally put his thumb in Deputy Powell's eye. Deputy Powell testified that although he suffered no bruising or swelling, that appellant hurt him and he was caused bodily injury and pain. Deputy Powell further testified that he was driving a marked patrol car, and was in his uniform. Finally, Deputy Powell testified that he was lawfully discharging his official duties when the incident occurred. Viewing this evidence in a light most favorable to the prosecution, we find a rational jury could have found the essential elements of the crime beyond a reasonable doubt. Accordingly, we overrule appellant's third point of error challenging the legal sufficiency of the evidence.

**B. Factual Sufficiency**

Appellant asserts that the officers' testimony was "too contradictory on numerous occasions with regard to important fact detail" for the jury to have found the necessary elements of the offense beyond a reasonable doubt. Appellant cites to numerous pages in the record. However, appellant does not identify any specific testimony or explain any specific contradictions. Furthermore, appellant provides no argument supporting his contention the alleged contradictions render the evidence insufficient. Under Texas Rule of Appellate

Procedure 38.1(h), appellant must, through his brief, provide "a clear and concise argument for the contentions made, with appropriate citations to the record." TEX. R. APP. PROC. ANN. 38.1(h). We do not have, nor would we employ, the judicial resources necessary to manufacture arguments for appellant and scour the record in their support. *See Garcia v. State*, 887 S.W.2d 862, 871 (Tex. Crim. App. 1994). We find appellant has waived his complaint. Accordingly, appellant's third point of error challenging factual insufficiency is overruled.

## VI. DEFINITION OF REASONABLE DOUBT

Appellant asserts that the definition of reasonable doubt given by the prosecutor during closing argument confused the jury and undermined the burden of proof. During the State's closing, the prosecutor stated: "If you have a reasonable doubt, then you find him not guilty. Of course, what is a reasonable doubt. A doubt - - it's a doubt based on reason and common sense. You are all reasonable people. You apply your common sense to this, okay. There is not reason to doubt the report of the officers."

Generally, in order to preserve the issue of improper jury argument for appellate review, counsel must make an objection, request an instruction to disregard, and move for a mistrial. *Cook v. State*, 858 S.W.2d 467, 473 (Tex. Crim. App. 1993) (citations omitted). Appellant did not object at trial and raises this complaint for the first time on appeal. Therefore, he did not preserve this complaint for appellate review. TEX. R. APP. P. 33.1.

Moreover, the State's definition is the same definition the Court of Criminal Appeals said has no real meaning. *Paulson v. State*, 28 S.W.3d 570, 572 (Tex. Crim. App. 2000). A definition that uses the very words of the phrase being defined, such as the one given by the State here, is of no practical assistance. In other words, it is of no consequence and could not have possibly influenced the jury. Therefore, even if it was improper under *Paulson* for

the State to give this definition, it was harmless.[1] Appellant's fourth point of error is overruled.

## VII. CLOSING ARGUMENT

In his final point of error, appellant asserts the State's comment in closing argument regarding defense counsel constitutes misconduct. Specifically, appellant contends that the statement made was manifestly improper because it attacked defense counsel and, therefore, reversible error exists.

The statement appellant complains of is the following:

> "You have got officers putting their lives on the line for the citizens of Fort Bend County, veteran officers doing what they have been trained to do. And you have got defense attorneys in this trial that come up here and suggest to you and say, Why did they stop him, and they even go so far as to suggest to you that they are just picking on this man, to suggest to you, Well, maybe his blinker– maybe he turned the blinker on and you didn't see it. Remember the questions? You have to look no further, Ladies and Gentlemen, than the Defendant's own statement. Right off the bat, I stopped at the stop sign and was fixing to make a right turn and I didn't use my turn signal."

The State asserts that this statement was made in response to the following defense argument:

> "Why did they stop him? I don't know. The cops tried to say that, Well, it's a turn signal. We submit, Ladies and Gentlemen of the Jury, that there was a hunch that he was coming from some drug area. There is even some question as to where that drug area is."

Generally, in order to preserve an error regarding improper jury argument for appellate review, counsel must make an objection, request an instruction to disregard, and

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[1] *Paulson* overruled the portion of *Geesa v. State*, 820 S.W.2d 154 (Tex. Crim. App. 1991), that required trial courts to instruct juries on the definition of reasonable doubt in the jury charge. 28 S.W.3d at 573. The Court of Criminal Appeal thought the better practice was to give no definition at all. *Id.* However, it did not mandate that no definition should be given. *Id.* Rather, the *Paulson* court held it would not constitute reversible error for the parties to agree to a definition and have the jury be so instructed. *Id.*

move for a mistrial. *Cook v. State*, 858 S.W.2d at 473. Again, appellant did not object at the trial court, but raises this complaint for the first time on appeal. Therefore, he did not preserve this complaint for appellate review. TEX. R. APP. P. 33.1.

Even if appellant had preserved this complaint for appellate review, we would still overrule this point of error. Under the Texas Rules of Appellate Procedure, improper prosecutorial argument is non-constitutional error in criminal cases, and we disregard it unless it "affects substantial rights." TEX. R. APP. P. 44.2(b); *see also Martinez v. State*, 17 S.W.3d 677, 692 (Tex. Crim. App. 1998) (acknowledging that improper jury argument is generally treated as non-constitutional error). A substantial right is thus affected when error had a "substantial and injurious effect or influence in determining the jury's verdict." *King v. State*, 953 S.W.2d 266, 267 (Tex. Crim. App. 1997) (citing *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)).

There are four permissible areas of jury argument: (1) summation of evidence; (2) reasonable deductions from the evidence; (3) answers to arguments of opposing counsel; and (4) a plea for law enforcement. *Wilson v. State*, 938 S.W.2d 57, 59 (Tex. Crim. App. 1996). Improper argument constitutes reversible error if: (1) the argument is violative of a statute; (2) it injects a new and harmful fact into the case; or (3) it is manifestly improper, harmful and prejudicial to the rights of the accused. *Id.*

We find that the State's argument was a response to defense counsel's theory that Deputy Powell lied about his reason for stopping appellant. The state is entitled to rebut appellant's argument. The statement appellant complains of was within the permissible bounds of jury argument. Accordingly, we overrule appellant's fifth point of error.

## VIII. CONCLUSION

We overrule all of appellant's points of errors and affirm the judgment of the trial court.

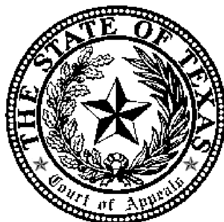
/s/ John S. Anderson
Justice

Judgment rendered and Opinion filed March 7, 2002.

Panel consists of Justices Brister, Anderson, and Frost. (Anderson, J. Majority.)

Do Not Publish — TEX. R. APP. P. 47.3(b).

**Affirmed and Majority and Concurring Opinions filed March 7, 2002.**

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## CONCURRING OPINION

A party must state specifically the basis for the objection unless the particular ground is apparent from the context. *Ethington v. State*, 819 S.W.2d 854, 858 (Tex. Crim. App. 1991). Because appellant did not object to Deputy Turner's testimony or medical records, he did not preserve his complaint for appellate review. *See* TEX. R. APP. P. 33.1(a).

When asserting error in the admission of evidence, the error claimed on appeal must correspond to the objection raised at trial. *Martinez v. State*, 867 S.W.2d 30, 35 (Tex. Crim. App. 1993). Although appellant objected at trial to the admission of the photographs of Deputy Turner's injuries, appellant did not assert the grounds for exclusion he now urges

on appeal. Thus, because appellant's complaint on appeal does not comport with the objection he voiced at trial, appellant did not preserve error as to his complaint on the admission of these photographs. *See id.*

Although the majority opinion finds that appellant waived error regarding these matters, it nevertheless addresses the merits of appellant's arguments on these issues. Because this discussion is not necessary to the resolution of appellant's points of error, I respectfully decline to join that portion of the opinion.

/s/ Kem Thompson Frost
Justice

Judgment rendered and Opinion filed March 7, 2002.

Panel consists of Justices Brister, Anderson, and Frost.

Do Not Publish — TEX. R. APP. P. 47.3(b).