Affirmed and Opinion filed May 17, 2001.

In The

Fourteenth Court of Appeals

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NO. 14-99-00936-CR

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JAMES KANU OKOLO, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 337th District Court
Harris County, Texas
Trial Court Cause No. 806,458

O P I N I O N

Appellant was convicted of bribery of a public servant. He paid an employee in the Houston Fire Department to provide him with names and addresses ambulance patrons who were treated by the department for injuries. The court assessed punishment of four years' confinement. On this appeal, we determine whether (1) the indictment was defective for failing to put appellant on notice of which legal duty he bribed the fire department employee to violate; (2) the evidence was legally sufficient to support appellant's conviction; and (3) the court erred by excluding various published laws and legal opinions that appellant used in forming his belief that his conduct was not criminal. We affirm.

Background

Appellant is an unlicensed law school graduate. He worked at the Houston law office of Jacqueline Medlock doing legal support. One activity he engaged in was to procure information about persons who were recently injured so the firm could contact them regarding legal services. Appellant met Nicol Dames, who worked for the Houston Fire Department (HFD) as a data entry operator. Appellant paid Dames $50 per day for identity and contact information of accident victims who had been transported by HFD ambulances. On a daily basis, using a fax machine provided by appellant, Dames transmitted the information to appellant at Medlock's office. Appellant and Dames never had meetings at Medlock's office or at HFD offices; they always met in public places, such as a service station or copy center. HFD suspected data operators of transferring information about accident victims to members of the public. After investigating Dames and confirming she was doing so, the investigators confronted her. She agreed to cooperate in their investigation and implicated appellant as paying her for the data. Dames was fitted with a concealed device which recorded her conversations with appellant. Appellant met with Dames twice, each time giving her a $500 money order. Officers obtained a warrant and arrested appellant for bribery of a public servant. At the time of his arrest, appellant had in his possession another $500 money order payable to Dames.

The indictment charging appellant with bribery alleged several factual particulars about the offense. It read, in relevant part, that appellant:

> did . . . intentionally and knowingly offer to confer upon, and agree to confer a benefit, namely money, to Nicol Dames, a public servant employed by the City of Houston Fire Department, as consideration for Nicol Dames to release patient identity records created by emergency services personnel, in violation of a duty imposed by law on Nicol Dames, namely Section 773.091 of the Texas Health and Safety Code.[1]

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[1] Section 773.091(a), the relevant portion of the statute, provides:

> Records of the identity, evaluation, or treatment of a patient by emergency medical services

In a pretrial motion, appellant moved the court to quash the indictment because section 773.091 violated the free speech clause of the First Amendment. The court denied the motion, but the state later obtained a new indictment, removing the factual particulars, just leaving the bare statutory elements. This indictment read, in relevant part, that appellant:

> did . . . intentionally and knowingly offer to confer upon, and agree to confer upon Nicol Dames a benefit as consideration for a violation of a duty imposed by law upon a public servant. . . .

Appellant filed another motion to quash, claiming that the second indictment deprived him of his due process right to adequate notice of the charge against him because it failed to state what was the duty imposed by law on Dames. At the hearing, the state informed the trial court it "anticipated" the evidence would show that the duty imposed by law was section 773.091. The court denied the motion. At trial, in addition to 773.091, the state offered evidence and testimony that the duty imposed by law was an internal fire department policy. Appellant was convicted under the second indictment.

Notice Under the Indictment

Both the United States and Texas Constitutions require the State to give a defendant notice before trial of the nature and cause of the accusation against him. U.S. Const. AMEND. VI; TEX. Const. art. I, § 10. They further require that notice be given with sufficient clarity and detail to enable the defendant to anticipate the state's evidence and prepare a proper defense to it. *Garcia v. State*, 981 S.W.2d 683, 685 (Tex. Crim. App. 1998). Article 21.03 provides that "[e]verything should be stated in an indictment which is necessary to be proved." TEX. CODE CRIM. PROC. ANN. art. 21.03. Article 21.04 provides "[t]hat the certainty required in an indictment is such as will enable the accused to plead the judgment that may be given upon it

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> personnel or by a physician providing medical supervision that are created by the emergency medical services personnel or physician or maintained by an emergency medical services provider are confidential and privileged and may not be disclosed except as provided by this chapter.

TEX. HEALTH & SAFETY CODE ANN. § 773.091(a).

in bar of any prosecution for the same offense." *Id.* at art. 21.04. The general rule is that a motion to quash will be sustained if the facts sought are essential to giving notice. *Thomas v. State*, 621 S.W.2d 158, 161 (Tex. Crim. App. 1980). However, unless a fact is essential, the indictment need not plead evidence relied on by the state. *Id.* Subject to rare exceptions, an indictment tracking the language of the statute will satisfy constitutional and statutory requirements. *State v. Mays,* 967 S.W.2d 404, 406 (Tex. Crim. App. 1998). However, a statute which uses an undefined term of indeterminate or variable meaning requires more specific pleading in order to notify the defendant of the nature of the charges against him. *Id.* at 407.

In our case, the indictment tracked the language of the bribery statute. Appellant was charged under section 36.02 of the penal code, which states: "A person commits an offense if he intentionally or knowingly offers, confers, or agrees to confer on another, or solicits, accepts, or agrees to accept from another . . . any benefit as consideration for a violation of a duty imposed by law on a public servant. . . ." TEX. PEN. CODE ANN. § 36.02(a)(3). Appellant argues the second indictment was defective for failing to specify what "duty imposed by law" he was alleged to have bribed Dames to violate.

Appellant contends that his case falls within *Mays* because the bribery statute uses an "undefined term of indeterminate or variable meaning" which requires more specific allegations to adequately notify the defendant of the charges against him. *Mays,* 967 S.W.2d at 407. He recognizes that the term "law" is defined under penal code 1.07(a)(30). But he points out that the bribery statute specifies more — that one commits an offense if he confers a benefit for a violation of a "duty imposed by law" upon a public servant. He contends that this clause has such a variable meaning, he was left to guess or assume which of any legally imposed duties the state would seek to prove in order to convict him. That defect, he says, requires more specific pleading to satisfy constitutional notice requirements. In support, he cites a number of cases in which the indictment was held insufficient to provide notice of the offense. *See, e.g., Haecker v. State,* 571 S.W.2d 920 (Tex. Crim. App. 1978) (failure to allege

more specifically the manner and means of "torture" in cruelty to animals allegation); *Mustard v. State*, 711 S.W.2d 71, 75-6 (Tex. App.—Dallas 1986, pet. ref'd) (holding indictment insufficient because it did not specify how defendant "conferred" a benefit).

Appellant's cases are not in point. In each holding he relies upon, the indictment was held to have provided insufficient notice because it failed to allege an act or omission *by the defendant*. Here, the challenged portion of the indictment, the duty imposed by law on Dames is, of course, not descriptive of appellant's conduct. Our research indicates the court of criminal appeals has uniformly rejected claims where the defendant alleges he was not provided adequate notice where the indictment alleged an element other than his or her own conduct. *See, e.g., Moreno v. State*, 721 S.W.2d 295, 300 (Tex. Crim. App. 1986) (indictment charging defendant with murder of officer engaged in the lawful discharge of official duties was not required to include alleged acts of officer that constituted his action in discharge of those duties); *Nethery v. State*, 692 S.W.2d 686, 695 (Tex. Crim. App. 1985) (indictment charging defendant with the murder of a peace officer was not required to include the statutory definition of "peace officer" because the allegation did not pertain to an act or omission of the defendant); *Thomas v. State*, 621 S.W.2d 158, 161, 163 (Tex. Crim. App. 1980) (indictment charging theft not required to plead statutory definitions of "owner" and "effective consent" because the allegations did not pertain to the defendant's conduct). None of appellant's authorities hold an indictment insufficient when the challenged provision addressed a matter *other than* a defendant's conduct.

The rule requiring specificity beyond the statutory language generally applies only when the statutory term describes an act or omission of the defendant. *See Lewis v. State*, 659 S.W.2d 429, 431 (Tex. Crim. App. 1983) (addressing notice issues where a statute defines the manner or means of the commission of the offense in several alternative ways). This is because a defendant is constitutionally entitled to know what conduct he allegedly engaged in so he can properly prepare a defense to that allegation. *State v. Carter*, 810 S.W.2d 197, 199 (Tex. Crim. App. 1991). Appellant had no difficulty defending some of his payments. At trial,

appellant testified that some of the money he paid Dames was legitimate compensation for an airline ticket he purchased from her and for some auto repairs. Clearly, appellant was notified that intentionally offering or paying Nicol Dames money for violating her lawful duty was his crime. Appellant also proffered legal defenses discussed below to the section 773.091 duties of Dames. The indictment demonstrably provided appellant sufficient notice of the charge against him. We therefore hold the failure to allege each duty[2] Dames may have violated did not abridge appellant's right to notice. Appellant's first issue is overruled.

Legal Sufficiency

Appellant next contends the evidence was insufficient to prove he intentionally or knowingly gave Dames consideration for violation of a duty imposed by law upon her.[3] More specifically, he argues that his actions were as consistent with innocent intent as guilty intent.

In determining whether the evidence is legally sufficient to support the verdict, we view the evidence "in the light most favorable to the verdict" and ask whether "any rational finder of fact could have found the essential elements of the crime beyond a reasonable doubt."

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[2] We recognize that there may be a rare scenario in which an indictment would not provide adequate notice of a matter not implicating a defendant's conduct. *See Mays*, 967 S.W.2d at 409 (Baird, J., concurring) ("if the statutory language is not completely descriptive, merely tracking the language of the statute is insufficient to provide the constitutionally required notice to the defendant"). However, such is not the case here.

[3] The penal code defines "intentionally" and "knowingly" as follows:

> A person acts intentionally, or with intent, with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result.
>
> A person acts knowingly, or with knowledge, with respect to the nature of his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or that the circumstances exist. A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result.

TEX. PEN. CODE ANN. § 6.03.

Weightman v. State, 975 S.W.2d621, 624 (Tex. Crim. App. 1998); *Lane v. State*, 933 S.W.2d 504, 507 (Tex. Crim. App. 1996) (citing *Jackson v. Virginia*, 443 U.S. 307, 318-319 (1979)).

Appellant claims that after he engaged in significant research, he determined that his conduct would not cause Dames to violate a duty imposed by law under section 773.091. As such, as a matter of law, he did not have the requisite intent to commit the offense of bribery.

The state responds that appellant admitted he was specifically aware of the statute and that the reason he conducted his research in the first place is that he was concerned that his venture might very well be illegal. Indeed, since appellant admitted he was aware his activities might constitute an offense and that his behavior would be questionable enough to warrant such extensive research, it was well within the province of the jury to determine appellant was not truthful about his conclusion of the supposed legality of his acts. *Jones v. State*, 984 S.W.2d 254, 258 (Tex. Crim. App. 1998) (holding that the jury is permitted to believe or disbelieve any part of a defendant's testimony). Further, appellant's other acts were probative of an awareness of wrongdoing. He paid Dames $50 a day for the information – a significant amount more than one would normally expect to pay for information available in the same manner to the general public. Also, he paid by money order rather than law firm check and the two met in places where legitimate business involving exchange of money for information is not normally conducted. In reaching its verdict, the jurors were free to use their common sense and apply common knowledge, observation, and experience gained in the ordinary affairs of life when giving effect to the inferences that may reasonably be drawn from the evidence. *See Jones v. State*, 900 S.W.2d 392, 399 (Tex. App.—San Antonio 1995, pet. ref'd).

We hold the evidence adduced at trial, together with rational inferences therefrom, were sufficient to enable a rational jury to find beyond a reasonable doubt that appellant intentionally or knowingly gave Dames consideration for violation of a duty imposed by law imposed upon her. We overrule appellant's legal sufficiency issue.

Exclusion of Evidence

Finally, appellant claims the trial court erred in refusing admission into evidence copies of several authorities (1) that he relied on in forming the belief that his conduct was legal (negating a culpable *mens rea*), and (2) which supported his mistake of law defense.

We review the trial court's decision to exclude evidence under an abuse of discretion standard. *Green v. State*, 934 S.W.2d 92, 101-02 (Tex. Crim. App. 1996). We will not reverse a ruling that is within the "zone of reasonable disagreement."[4] *Id.* at 102.

The mistake of law statute provides:

> It is an affirmative defense to prosecution that the actor reasonably believed the conduct charged did not constitute a crime and that he acted in reasonable reliance upon:
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> > (1) an official statement of the law contained in a written order or grant of permission by an administrative agency charged by law with responsibility for interpreting the law in question; or
> >
> > (2) a written interpretation of the law contained in an opinion of a court of record or made by a public official charged by law with responsibility for interpreting the law in question.

TEX. PEN. CODE ANN. § 8.03(b) (Vernon 1994).

Appellant attempted to introduce the evidence after he testified about his interpretation of section 773.091(a) of the health and safety code. He stated that by reading these authorities, he concluded that the confidentiality requirement of 773.091(a), prohibiting disclosure of the "identity" of an accident victim, is either unconstitutional or is actually somehow permissible.

We will not needlessly engage in a detailed analysis of appellant's authorities because

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[4] We would note a violation of the rules of evidence is an abuse of discretion. The exclusion or inclusion of evidence should never be a movable, subjective "strike zone." Rather, some rules, like TEX. R. EVID. 403 are susceptible to having gradients. Other rules, like 901, should be clearly demarcated by the trained eye.

it is clear that none interpret 773.091(a), the specific law in question.[5] For that matter, nothing offered by appellant even indirectly addresses or implicates how he would have been entitled to legally obtain the information from Dames in the manner he did. Even were we to interpret the mistake of law defense most expansively, appellant's research simply does not "interpret the law in question." More accurately, appellant offered *his* interpretation of *other* laws. Thus, the court did not abuse its discretion in excluding appellant's evidence because it was inapplicable and irrelevant under the mistake of law defense. *See* TEX. PEN. CODE ANN. § 8.03(b); TEX. R. EVID. 401.[6]

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[5] Appellant's authorities are:

- *Reed v. State*, 888 S.W.2d 117, 122 (Tex. App.—San Antonio 1994, no pet.) (citing *Howard v. State*, 690 S.W.2d 252 (Tex. Crim. App. 1985) (holding the word "presence" should be given its ordinary, common-sense meaning).
- Op. Tex. Att'y Gen. No. 611 (first page of a Texas Attorney General's opinion interpreting the Open Records Act).
- *Moore v. Morales*, 843 F.Supp. 1124 (S.D.Tex. 1994), *rev'd in part*, 63 F.2d 358 (5th Cir. 1995) (holding statute that denied access to accident reports for 180 days was unconstitutional).
- *Edmond v. State*, 933 S.W.2d 121 (Tex. Crim. App. 1996) (involving official oppression by a police officer, holding that "where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, [the court's] duty is to adopt the latter").
- TEX. TRANS. CODE ANN. § 554.064 (stating what information is to be included in accident report form).
- TEX. GOV'T CODE ANN. § 552.021 (Open Government Records Act; stating a completed report of a government body is within the categories of public information).

[6] Appellant also argues the evidence was relevant to negate a culpable *mens rea*. Normally a court should admit relevant evidence going to a defendant's state of mind. *See* TEX. R. EVID. 402. But under rule 403, it is not required to admit wholesale anything a defendant merely contends went to his or her state of mind. As the rule states, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of . . . confusion of the issues or misleading the jury. . . ." TEX. R. EVID. 403. For example, what if appellant had offered complex U.S. Supreme Court cases interpreting the Commerce Clause, striking down state legislation, and he claimed that after he studied them he determined that 773.091(a) is invalid because it is an improper interference with interstate commerce in violation of the U.S. Constitution? Assuming appellant truly believed these cases would have absolved him of any criminal liability for his conduct, the court would clearly be acting within its discretion in excluding them. Any scintilla of probative value provided would be greatly outweighed by the potential for confusion and to mislead a jury. Though not quite as attenuated, appellant's proffer is nonetheless well off-the-mark. Therefore, the trial court did not abuse its discretion in excluding it under rule 403.

We overrule appellants issues and affirm the judgment of the trial court.

/s/ Don Wittig
Justice

Judgment rendered and Opinion filed May 17, 2001.

Panel consists of Justices Edelman, Wittig, and Frost (J.Edelman concurs in the result only).

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