Affirmed and Opinion filed June 1, 2000.

In The

Fourteenth Court of Appeals

NO. 14-99-00472-CR

WESLEY DEWAYNE GEORGE, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 212th District Court
Galveston County, Texas
Trial Court Cause No. 97CR1389

O P I N I O N

Appellant was charged by indictment with the offense of murder. Two prior felony convictions were alleged for the purpose of enhancing the range of punishment. A jury convicted appellant of the charged offense. The jury found the enhancement allegations true and assessed punishment at confinement for life in the Texas Department of Criminal Justice--Institutional Division. Appellant raises five points of error. We affirm.

I. Voir Dire

The first point of error contends the trial court erred in denying appellant's requested mistrial

following improper remarks by the State during voir dire.

A. Factual Summary

During its voir dire examination, the State broached, in general terms, the subject of punishment enhancement resulting from prior felony convictions. Toward the end of these remarks, the prosecutor stated enhancements would be included in the court's charge.[1] Immediately following that statement, the following exchange occurred:

> DEFENSE COUNSEL: Your Honor, may we approach?
>
> THE COURT: Yes.
>
> (At the Bench, on the record)
>
> DEFENSE COUNSEL: I am going to object to the Prosecutor saying the definitions of enhancements will be included in the charge at the conclusion of trial, implying that the Defendant has enhancements alleged at the present time and ask the Jury to disregard – first, I object to that statement that was made.
>
> THE COURT: How did you phrase that last statement? You are (inaudible).
>
> THE STATE: We are going to give a charge on enhancements at punishment phase. I can qualify it. There's no problem, Your Honor.
>
> THE COURT: Just rephrase it. You have got to speak in a hypothetical.
>
> THE STATE: Right. I was going to do it in a hypothetical.
>
> THE COURT: Do you want me to instruct?
>
> DEFENSE COUNSEL: I would ask for a mistrial.

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[1] Specifically the prosecutor stated: "[The jury charge is] the law for the Jury to follow, and it will include everything that I just went over about the enhancements."

THE COURT: I deny that. Do you want an instruction?

DEFENSE COUNSEL: No.

The prosecutor continued his voir dire stating he was speaking in "general terms of any criminal case" and not necessarily about the facts of the instant prosecution.[2]

B. Analysis

Our law provides that non-jurisdictional enhancement allegations shall not be read until the hearing on punishment. *See* TEX. CODE CRIM. PROC. ANN. art. 36.01(a)(1). This provision was enacted to prevent the prejudice which results from an announcement at the outset of the proceedings that the State believes that the defendant was previously convicted of one or more felony offenses. *See Frausto v. State*, 642 S.W.2d 506, 509 (Tex. Crim. App. 1982). However, a prosecutor may inform the venire of the range of punishment applicable if the State were to prove a prior conviction for enhancement purposes, but it may not inform the jury of any of the specific allegations contained in the enhancement paragraph of a particular defendant's indictment. *See id.* at 509.

Appellant relies on *Frausto* in support of this argument. In *Frausto*, the prosecutor specifically informed the venire that the indictment alleged a prior burglary conviction and stated the name of the complainant, the year of conviction, and the court and cause number related to that conviction.

Our research reveals another case on this subject. In *Phea v. State*, 767 S.W.2d 263, 269 (Tex. App.—Amarillo 1989, pet. ref'd), the State made a comment similar to the one complained of here. After

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[2] Specifically, the prosecutor stated:

> Let me clear up one thing before we move on, ladies and gentlemen. At this point in the trial we don't know what the evidence is going to show in the trial, and I am speaking in general terms of any criminal case. In any criminal case these issues may arise, and that's why I am going over them just because they do arise. And that doesn't necessarily mean they will come up in this case. Are there any questions about that? What I am going to do during this whole voir dire process is cover things that generally come up in criminal trials and try to introduce you to law on those things.

giving a hypothetical example of the use of prior convictions for enhancement purposes, the prosecutor said: "Now, we anticipate that after all the evidence is presented--well, let me back up." The prosecutor ceased his statement and the defendant approached the bench and made his objection. The Amarillo Court of Appeals found no error in the prosecutor's comment because "[t]he remarks did not inform the venire of appellant's prior conviction for burglary, nor did they mention any of the specific allegations in the enhancement paragraph of the indictment." *Id*. at 270.

When the record is viewed in context, taking into consideration the remarks made before and after appellant's objection, we are persuaded that the instant case is not of the extreme nature as *Frausto*; the prosecutor did not provide any specific information related to either enhancement allegation. Instead, the instant case more closely resembles *Phea*. Accordingly, we hold the remarks by the prosecutor were not improper. Therefore, the trial court did not err in overruling appellant's requested mistrial.

The first point of error is overruled.

II. Enhancements

The second and third points of error contend the trial court erred in submitting jury instructions on the enhancement allegations because there was a fatal variance between the date alleged and the date proved, and because of that variance the evidence is insufficient to support the jury's findings of true to each enhancement allegation. We will address these points jointly.

The indictment's first enhancement paragraph alleged the following:

> And the Grand jurors aforesaid do further present that prior to the commission of the primary offense on December 7, 1989 in cause No. 89CR0992, in the 122nd Judicial District Court of Galveston County, Texas, the said WESLEY DEWAYNE GEORGE was convicted of the felony of Delivery of a Controlled Substance, to-wit: Cocaine.

However, the evidence adduced at the punishment phase of trial, specifically State's exhibit 96, a pen packet, proved the conviction occurred on December 4, 1989.

Prior to the trial court's reading of the punishment charge to the jury, appellant objected to the inclusion of any reference to the enhancement allegations because there was a fatal variance between the

date alleged and the date of the conviction. In response, the State conceded there was a variance but argued the variance was not fatal because the other information in the enhancement allegation was correct and, therefore, appellant had sufficient notice. The trial court overruled the objection, finding the enhancement allegation did not have to be pled with the same particularity as the indictment. The jury subsequently found both enhancement allegations true.

Initially we note the trial court was correct; the State need not allege a prior conviction to the same degree of detail as required for charging an original offense. *See Selvage v. State*, 737 S.W.2d 128, 129 (Tex. App.—San Antonio 1987, pet. ref'd). Additionally, the policy basis for the fatal variance doctrine is to avoid surprising the defendant at trial with different information. *See Plessinger v. State*, 536 S.W.2d 380, 381 (Tex. Crim. App. 1976). To show the variance was fatal, the defendant must prove that it misled him to his prejudice. *See Stevens v. State*, 891 S.W.2d 649, 650 (Tex. Crim. App. 1995). In the instant case, appellant offered no proof or argument that he was prejudiced, surprised or misled by the wrong date of the prior offense. *See Human v. State*, 749 S.W.2d 832, 836 (Tex. Crim. App. 1988). Consequently, we hold the trial court did not err in instructing the jury on the enhancement allegations. The second point of error is overruled.

We now turn to the sufficiency challenge. State's exhibit 96, a pen packet recording the prior conviction alleged in the first enhancement paragraph was admitted into evidence without objection. This form of proof constitutes sufficient evidence to support the jury's affirmative finding that appellant had been previously convicted of the offense alleged in the first enhancement paragraph. *See Beck v. State*, 719 S.W.2d 205, 209 (Tex. Crim. App. 1986); *Wilson v. State*, 671 S.W.2d 524, 525 (Tex. Crim. App. 1984). The third point of error is overruled.

III. Sufficiency Challenges

The fourth and fifth points of error contend the trial court erred in denying appellant's motion for instructed verdict and that the evidence is insufficient to support the jury's verdict. The specific complaint raised in each of these points is that the evidence is insufficient to establish the element of intent. We will address these points jointly.

A. Standard of Review

We begin by determining the appropriate standard of appellate review for resolving these points of error. When we are asked to determine whether the evidence is legally sufficient to sustain a conviction we employ the standard of *Jackson v. Virginia* and ask "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979).

In *Cook v. State*, 858 S.W.2d 467, 470 (Tex. Crim. App. 1993), the Court of Criminal Appeals stated: "A challenge to the trial judge's ruling on a motion for an instructed verdict is in actuality a challenge to the sufficiency of the evidence to support the conviction." Therefore, when considering a point of error contending the trial court erred in overruling a motion for instructed verdict, the reviewing court "will consider the evidence presented at trial by both the State and appellant in determining whether there was sufficient evidence." *Id*. In other words, the standard of appellate review of a ruling on a motion for instructed verdict is the same standard in reviewing legal sufficiency of the evidence. *See Margraves v. State*, 996 S.W.2d 290, 302 (Tex. App.—Houston [14th Dist.] 1999, pet. ref'd)(*citing Roper v. State*, 917 S.W.2d 128, 130 (Tex. App.—Fort Worth 1996, pet. ref'd); *Griffin v. State*, 936 S.W.2d 353, 356 (Tex. App.—Houston [14th Dist.] 1996, pet. ref'd)).

B. Factual Summary

Following his arrest, appellant gave a voluntary statement to peace officers. In the statement, appellant admitted to assaulting the deceased, binding his feet and hands, placing a gag in his mouth, and covering his body with a blanket. At the conclusion of the statement, appellant stated: "I never intended to kill anyone, nor plan to."

Dr. William E. Korndorffer, the Chief Medical Examiner for Galveston County, performed an autopsy on the deceased. The deceased's hands were bound behind his back, his feet were bound together, and he had a gag across his mouth, which was cutting into the edges of his lips on both sides. The deceased had bruises with blood and swelling over the left side, right side, back and top of his head and face, and he had 10 to 20 whiplash injuries, described as big, long linear cuts to the outer layer of the skin,

to his back. These injuries could have been caused by an instrument such as a whip or a stick, coat hanger, or electrical wire. The deceased had no significant injuries to his hands, which Korndoffer interpreted as no offensive or defensive injuries. Korndoffer concluded the cause of death was the result of blunt trauma to the head, which led to bleeding into the brain. This blunt trauma was consistent with being caused by hands, feet and a television remote control.

C. Analysis

As noted above, appellant contends the evidence is insufficient as to the element of intent. The indictment alleged the offense of murder under Texas Penal Code sections 19.02(b)(1) and (2). Therefore, we must decide whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found appellant had the intent to cause the death of the deceased and/or had the intent to cause serious bodily injury. In making this determination, we are mindful that intent may be inferred from the actions or conduct of the defendant. *See McGee v. State*, 774 S.W.2d 229, 234 (Tex. Crim. App.1989), *cert. denied*, 494 U.S. 1060, 110 S.Ct. 1535, 108 L.Ed.2d 774 (1990).

In these points of error, appellant relies exclusively on *Foster v. State*, 639 S.W.2d 691 (Tex. Crim. App. 1982), where the defendant shot, at close range, and killed the deceased and denied having the intent to kill. The Court of Criminal Appeals found the evidence insufficient because other evidence established that:

(1) the defendant and the deceased had a loving relationship on the evening of the shooting;
(2) the weapon involved was defective and fired easily, even with its safety on;
(3) after the shooting, the defendant promptly sought medical assistance for the deceased and then notified the police;
(4) the defendant admitted handling the weapon when it discharged; and,
(5) the defendant was extremely distraught after the shooting.

The instant case stands in stark contrast to *Foster*. Here the deceased was not shot a single time but rather was severely beaten about the head, whipped on the back with some instrument, bound and gagged. Following the assault, appellant neither sought medical attention, nor called the police. Finally,

rather than being distraught, appellant began a two day binge of consuming narcotics that were financed by selling the deceased's property. For these reasons, we find *Foster* is not controlling.

The undisputed evidence established appellant beat, bound and gagged the deceased. The wounds resulting from the blunt trauma were so severe as to cause bleeding into the tissue of the brain, which resulted in the death of the deceased. The only evidence from which one could conclude these wounds were not inflicted with the intent to cause death or serious bodily injury is found in the statement of appellant where he stated: "I never intended to kill anyone, nor plan to."

When resolving a challenge to the sufficiency of the evidence, we must remember the jury is the sole judge of the credibility of the witnesses and the weight to be given their testimony. *See Vanderbilt v. State*, 629 S.W.2d 709, 716 (Tex. Crim. App. 1981), *cert. denied*, 465 U.S. 910, 102 .Ct. 1760, 72 L.Ed.2d 169 (1982). The jury is free to believe all, part, or none of a witness's testimony. *See Sharp v. State*, 707 S.W.2d 611, 614 (Tex. Crim. App. 1986), *cert. denied*, 488 U.S. 872, 109 S.Ct. 190, 102 L.Ed.2d 159 (1988). Clearly the jury chose not to believe appellant's statements regarding his lack of intent.

After viewing the evidence in the light most favorable to the prosecution, we find a trier of fact could rationally infer from the nature, type and degree of injuries inflicted upon the deceased by appellant that those injuries were inflicted with the intent to cause the death of the deceased and/or the intent to cause serious bodily injury to the deceased. Accordingly, we hold the evidence is sufficient to support the jury's verdict. The fourth and fifth points of error are overruled.

The judgment of the trial court is affirmed.

/s/ Charles F. Baird
Justice

Judgment rendered and Opinion filed June 1, 2000.

Panel consists of Justices Hudson, Wittig and Baird.[3]
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[3] Former Judge Charles F. Baird sitting by assignment.