the Jasuta / Schulman report

Volume 32, Number 11 ~ Monday, March 25th, 2024 (Report No. 1,506)

TIBA's Case of the Week

Amarillo Court of Appeals

Case Name: ***Ashley Elaine Brewer v. The State of Texas***

- **OFFENSE**: Theft of Property <$2,500
- **COUNTY**: Potter
- **C/A CASE No**. 07-23-00191-CR
- **DATE OF OPINION**: March 19, 2024 **OPINION**: Justice Alex Yarbrough
- **DISPOSITION**: Conviction Affirmed
- **TRIAL COURT**: 251st D/C; Hon. Ava Estevez
- **LAWYERS**: John Bennett (Defense); Kerry Sullivan (State)

[§§ 530.03 **Sufficiency of the Evidence / Identification of Complainant**]: Appellant was charged with theft of a python from a pet store. The complainant, who managed the store, Javier Jimenez, was named "Jimenez Javier" in the indictment and jury charge. Throughout trial, however, he was referred to as Javier Jimenez. During cross-examination, he testified he has never used "Jimenez Javier" as an alias. After the State presented its case-in-chief, the defense moved for a directed verdict arguing the State had failed to prove the identity of the owner of the python due to the manager's first and last names being transposed in the indictment. The trial court denied the motion. Appellant was the only witness for the defense. The jury found her guilty as charged. This appeal followed in which she asserts the evidence is insufficient to sustain her conviction due to the incorrect name of the complainant in the indictment and jury charge.

Holding: Appellant contends the misidentification of the complainant in the indictment and jury charge are not idem sonans and could subject her to double jeopardy. We disagree. *** The doctrine of *idem sonans* permits the misspelling of a name in legal documents if the attentive listener would find difficulty distinguishing the misspelling from the proper spelling when pronounced. ***Martin v. State***, 541 S.W.2d 605 (Tex.Cr.App. 1976). Under the doctrine, absolute accuracy in the spelling of a name is not required. ***Dingler v. State***, 705 S.W.2d 144 (Tex.Cr.App. 1984). *** "A variance occurs when there is a discrepancy between the allegations in the indictment and the proof offered at trial." ***Byrd v. State***, 336 S.W.3d 242 (Tex.Cr.App. 2011)(see §§, Vol. 19, No. 13; 04/04/2011). It is fatal only if it is material and prejudices the defendant's substantial rights by either failing to give notice of the charges or by allowing a second prosecution for the same offense. ***Gollihar v. State***, 46 S.W.3d 243 (Tex.Cr.App. 2001)(see §§, Vol. 9, No. 20; 05/21/2001). *** In the underlying case, the complainant's name was not misspelled

but his first and last names were transposed. We concede the complainant's proper name and the name alleged in the indictment do not sound alike and agree with Appellant that the names are not *idem sonans*. *** Despite this Court's exhaustive search, no case involving transposed names was found. Nevertheless, the State's mistake did not result in prejudice to Appellant's substantial rights. Post Byrd, the Court of Criminal Appeals has noted the "bottom line" in a sufficiency review tolerates variances "as long as they are not so great that the proof at trial 'shows an entirely different offense' than what was alleged in the charging instrument." ***Ramjattansingh v. State***, 548 S.W.3d 540 (Tex.Cr.App. 2018)(see ☙, Vol. 26, No. 23; 06/11/2018). *** In the underlying case, although the complainant's first and last names in the indictment were transposed, the State established during the complainant's testimony that he was the manager of the entity from which Appellant stole the python. The State alleged Appellant committed theft and the evidence proved that theft. Measuring the evidence based on a hypothetically correct jury charge, the State proved beyond a reasonable doubt the person alleged in the indictment, i.e., "Jimenez Javier," was the "owner" for purposes of the theft statute. The variance was not so great as to show an entirely different theft was committed. Thus, we conclude the variance was not material. *** Appellant also argues the State failed to prove an element of theft -- the rightful owner of the stolen property. Although ***Byrd*** clarified that the name of the owner is not a "substantive element of theft," despite any discrepancies, the State must still prove beyond a reasonable doubt that the person alleged in the indictment is the same person shown by the evidence. In the underlying case, although the complainant testified he had never been known as "Jimenez Javier," the evidence established he was the "owner" of the pet store from which Appellant stole the python.

Sidebars

(**John G. Jasuta**) I disagree with Justice Yarbrough that a simple comma would have "obscured" the mistake. It would have remedied it in fact. Thanks Yarbrough, J., for supplying it.

(**David A. Schulman**) John and I have a fundamental disagreement over this case. He thinks it's about a failure of proof, I think it's about notice. I also think that if defense counsel had complained about a lack of notice when it came out at trial that the store manager, "Javier Jimenez," had never used "Jimenez Javier" as an alias, there might have been a stronger argument. That notwithstanding, the important thing here is the Court's determination that the variance wasn't material, and Appellant's substantial rights were not prejudiced.

Ed Note: Appellant included a double jeopardy argument in here claim. The Court rejected that claim, also, holding the "evidence established the owner of the python was the same person as alleged in the indictment, any attempt to reindict Appellant for a theft from "Javier Jimenez" would appear vindictive and be barred by double jeopardy."