ACCEPTED
14-24-00246-CR
FOURTEENTH COURT OF APPEALS
HOUSTON, TEXAS
7/1/2024 8:22 AM
DEBORAH M. YOUNG
CLERK OF THE COURT

NO. 14-24-00246-CR

IN THE COURT OF APPEALS

FOR THE

FOURTEENTH DISTRICT OF TEXAS

HOUSTON, TEXAS

FILED IN
14th COURT OF APPEALS
HOUSTON, TEXAS
7/1/2024 8:22:17 AM
DEBORAH M. YOUNG
Clerk of The Court

ELIAS CHARALAMBOUS, APPELLANT

VS.

THE STATE OF TEXAS, APPELLEE

BRIEF FOR THE APPELLANT

TRIAL COURT CAUSE NUMBER 23CR2049
IN THE 56TH DISTRICT COURT OF
GALVESTON COUNTY, TEXAS

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Attorneys for Elias Charalambous

ORAL ARGUMENT WAIVED

LIST OF PARTIES

Presiding Judge	Honorable O.A. "Lonnie" Cox
Appellant	Elias Charalambous
Appellee	The State of Texas
Attorney for Appellant (Trial only)	Mr. John Reed 2951 Marina Bay Dr., # 130-81 League City, Texas 77573-2735
Attorney for Appellant (Appeal only)	Mr. Joel H. Bennett 17045 El Camino Real, Ste. 214 Houston, Texas 77058
Attorney for Appellee (Trial only)	Mr. Tyler Alley Ms. Nasharria Serinash Galveston County Criminal District Attorney's Office 600 59TH Street, Suite 1001 Galveston, Texas 77551
Attorney for Appellee (Appeal only)	Galveston County Criminal District Attorney's Office 600 59TH Street, Suite 1001 Galveston, Texas 77551

CITATION TO THE RECORD

Clerk's Record ..... CR (volume and page)

Reporter's Record ..... RR (volume and page)

TABLE OF CONTENTS

LIST OF AUTHORITIES

CASES

STATUTES

RULES

NO. 14-24-00246-CR

IN THE

COURT OF APPEALS

FOR THE

FOURTEENTH DISTRICT OF TEXAS

HOUSTON, TEXAS

ELIAS CHARALAMBOUS, Appellant

v.

THE STATE OF TEXAS, Appellee

Appealed from the 56TH District Court
of Galveston County, Texas
Cause No. 23CR2049

BRIEF FOR APPELLANT

TO THE HONORABLE COURT OF APPEALS:

Now comes Elias Charalambous, by and through his attorney of record Joel H. Bennett, of Sears, Bennett, & Gerdes, LLP, and files this brief.

STATEMENT OF THE CASE

Appellant was charged by indictment with Arson. CR—

6. Appellant pled not guilty to the charge and a trial by jury began on March 4, 2024. CR-48; RR2-6. The State gave notice of two enhancement paragraphs prior to trial. CR-26. After hearing the evidence and argument of counsel, the jury found Appellant "guilty" as alleged in this indictment. RR3-120, CR-79. Prior to trial, Appellant elected to have the Jury assess punishment, and after hearing evidence and argument of counsel on the issue of punishment, the Jury found both enhancement paragraphs "True" and sentenced Appellant to seventy-five (75) years in the Texas Department of Criminal Justice—Institutional Division. RR4-22; CR-24, 84. Judgment and Sentence was entered and signed on March 6, 2024, as well as the trial court's certification of Defendant's right to appeal. CR—87-91, 92. Notice of Appeal was timely filed on the same day. CR—95.

APPELLANT'S SOLE ISSUE

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR A DIRECTED VERDICT. THE STATE'S PLEADING FAILED TO ALLEGE THE CORRECT DATE OF OFFENSE. UNDER THE UNIQUE FACTS OF THIS CASE, THE STATE'S RELIANCE UPON THE "ON OR ABOUT" LANGUAGE FAILS TO ENSURE APPELLANT IS NOT SUBJECTED TO SUBSEQUENT PROSECUTION.

STATEMENT OF FACTS

Appellant was charged in this case, trial court cause number 23CR2049, with Arson, alleged to have been committed on or about May 27, 2023. RR2-4-6. The State also charged Appellant with Arson in a separate case, trial cause number 23CR2093. RR2-4. During the pretrial proceedings, the State told the trial court that they filed a motion to amend the indictment in cause 23CR2093, changing the manner and means from "start a fire by igniting gasoline with a flame" to "start a fire by igniting an ignitable substance". RR2-4. Appellant objected to proceed with the second case without the proper ten-day notice; the trial court sustained that objection. RR2-4. The case proceeded to trial in trial court cause number 23CR2049.

During the case in chief, the State approached the trial court and requested to introduce evidence of extraneous offenses; Appellant objected and hearing was held outside the presence of the jury. RR3-29. The proposed extraneous offenses included "the other case under indictment". RR3-30. The other indictment (23CR2093) is against the same victim and same building.

RR3-30. The jury was excused and the trial court heard evidence about several extraneous offenses. RR3-30-52.

Daniel Martinez is an assistant fire marshal with the Galveston Fire Department. RR3-30-31. He conducted an investigation on May 27, 2023. RR-31. He testified that the May 27th incident was the first fire in the chain of events. RR3-32. The address of that first was also 5205 Avenue U. RR3-32. Upon his arrival, there was a small fire that was contained to the front door area. RR3-32. During the investigation, he recovered a portion of a burned newspaper with the date of May 26, 2023, the day before the fire. RR3-33-34. After discovering the date of the newspaper, he went around to several convenience stores looking for anyone that purchased lighter fluid and a newspaper. RR3-24 He located security footage from a store at 45th and Seawall from the evening before showing a white male wearing a white t-shirt and gray sweat pants purchasing two cans of lighter fluid and a newspaper. RR3-34. He was able to identify the person in the video as Appellant. RR3-34. Mr. Martinez also recovered surveillance video from the hair salon (5205 Avenue U) which showed a white male

with a white t-shirt and gray sweat pants pouring an ignitable liquid on the front door and lighting it. RR3-34-35.

Mr. Martinez also investigated the fire from June 3, 2023. RR3-35. The second fire took place at the same location as the first fire. RR3-35. The second fire was also determined to be arson from the irregular burn pattern on the southwest corner and the presence of a gas can and lighter at the scene. RR3-36.

The State argued to the trial court that the witness could testify to the investigation that took place a week prior, which is charged in case number 23CR2093, the case that was continued due to the notice issue. RR3-36. The State alleged the extraneous offense occurred on May 27 and the case under trial occurred a week later. RR3-36-37.

Appellant objected to the introduction of any evidence from the May 27th prior fire. RR3-38. The trial court excluded the evidence of the fire from May 27th. RR3-42.

Angela Daniel works at her family business, Lulu's Salon located at 5205 Avenue U. RR3-44. The building

was burned on June 3rd and May 27th. RR3-46. This concluded the relevant evidence to this issue outside the presence of the jury.

In front of the jury, Daniel Martinez testified that he went to the scene of fire on June 3, 2023 at 5205 Avenue U. RR3-56. During cross-examination, he confirmed that his investigation of this event occurred on June 3, 2023. RR3-70.

The State rested and Appellant made a motion for a directed verdict. RR3-88. The substance of the motion included the fact that the State pled May 27, 2023 but the proof was that the incident occurred on June 3, 2023. RR3-88. The State responded that the alleged date of May 27, 2023 is an on or about date and prior and anterior to the presentment of the indictment. The State continued is argument, staging that May 27 is close to June 3 and was prior to the offense being indicted. RR3-89. The trial court denied the motion. RR3-90-91.

During the conference regarding the jury charge, Appellant objected the language, "In this case, the indictment was filed September 12, 2023". Appellant

pointed out that this information was outside the record from the testimony. Appellant continued his objection stating that the instruction bordered on commenting on the evidence. RR3-93. The State responded, arguing "the legal instructions can include when the indictment was filed strictly for the purpose of clarifying on or about language that the Defense has brought into question…". RR-94. The State continued, "There is no legal reason to keep that information out. It's strictly there to instruct the Jury as to the on or about language…". RR3-94.

The trial court left in the information regarding the date of the filing of the indictment and further overruled Appellant's objection. RR3-95.

During final arguments, the State argued that the on or about language means that the date in the indictment does not have to be the exact date of the offense. RR3-106. The State further argued that in some cases they do not have the exact date. RR3-106. The argument continued that June 3rd is roughly one week after May 27th and the alleged date is prior to the filing of the indictment which was September 12, 2023. RR3-106.

Appellant argued that the State has the burden to prove each and every element of the offense beyond a reasonable doubt. RR3-109. Appellant then argued that the very first element is that the offense was alleged to be committed on May 27, 2023 but this offense was proven to have occurred on June 3, 2023. RR3-110-111. In its final summation, the State told the jury, "All I have to prove is that it was done—the crime occurred before the indictment." RR3-117.

During the punishment phase of the trial, the State presented evidence regarding the other arson case (cause number 23CR2093). RR3-184. Daniel Martinez testified that he investigated another fire at the same 5205 Avenue U location on May 27, 2023. RR3-184. His investigation showed that the fire from May 27, 2023 was started by Appellant with lighter fluid and a newspaper. RR3-184-191.

Appellant requests this Court take judicial notice of the indictment in cause number 23CR2093, 56TH District Court, Galveston County, Texas. Attached as Exhibit "A" to this brief.

SUMMARY OF ARGUMENT

The trial court erred in denying Appellant's motion for a directed verdict. A directed verdict is a challenge to the sufficiency of the evidence. The evidence is this case absolutely proves that the State failed to prove all of the elements alleged in the indictment. Unlike most cases, the "on or about" language fails to satisfy notice requirement of an indictment. The State's reliance on the jury instruction is insufficient to rectify the error and prove sufficient notice of the allegation on which Appellant was put to trial. Such notice is required to prevent the possibility of subsequent prosecution.

ARGUMENT AND AUTHORITIES

An indictment is more than simply general notice to a defendant. An indictment must be sufficiently specific to give a defendant adequate notice of the specific allegation against him. Absent holding the State to the burden of proving all of the allegations of this indictment, Appellant would be denied such notice to prevent Appellant from being subjected to successive prosecutions.

Appellant was charged in two separate indictments with two separate charges of arson, committed on two separate dates. As demonstrated by the indictments in both cases, the language of the two indictments is completely identical—absent the cause number and offense report number. The indictment in this case is on page 2 of the Clerk's Record. Appellant requests this Court to take judicial notice of the indictment in case number 23CR2093, the companion case that did not go to trial, as discussed in the pretrial proceedings found in the beginning of volume 2 of the Reporter's Record. Judicial Notice may be taken at any point of a proceeding. *Tex. R. Evid. 201(c)(2) and (d)*. The indictment in 23CR2093, the companion case, is attached as Exhibit "A" to this brief.

At the close of the evidence at the guilt-innocence stage of the trial, Appellant moved for a directed verdict. Part of Appellant's argument was the failure of the State to prove the date alleged in the indictment. The State responded that the "on or about" language allowed the State to prove any date within the statute of limitations. The trial court overruled

Appellant's request for an instructed verdict. A request for an instructed verdict is a challenge to the sufficiency of the evidence to support a conviction.

"A challenge to the trial court's ruling on amotion for an instructed verdict is in actuality a challenge to the sufficiency of the evidence to support a conviction. *Madden v. State, 799 S.W.2d 683, 686 (Tex. Crim. App. 1990), cert. denied, 499 U.S. 954, 111 S.Ct. 1432, 113 L.Ed.2d 483 (1991).* In reviewing the legal sufficiency of the evidence to support a conviction, we view all the evidence in the light most favorable to the verdict. *Cardenas v. State, 30 S.W.3d 384, 389-90 (Tex. Crim. App. 2000); Narvaiz v. State, 840 S.W.2d 415, 423 (Tex. Crim. App. 1992), cert. denied, 507 U.S. 975, 113 S.Ct. 1422, 122 L.Ed.2d 791 (1993).* The critical inquiry is whether, after so viewing the evidence, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *McDuff v. State, 939 S.W.2d 607, 614 (Tex. Crim. App.), cert. denied, 522 U.S. 844, 118 S.Ct. 125, 139 L.Ed.2d 75 (1997)." Horne v. State, 46 S.W.3d 391, 393 (Tex. App.-Fort Worth 2001, pet. ref'd).*

In this case, Appellant's request for an instructed verdict should have been sustained and granted. The State's argument that they can prove any date during the statute of limitations in any case without any protection to a defendant runs afoul of the required notice provisions of an indictment. The State argued to the jury, "All I have to prove is that it was done—the crime occurred before the indictment." Due Process requires more.

Specifically for Appellant, the State returned two identical indictments against Appellant for the same date and using the same manner and means. Neither of these indictments were actually correct. To allow the State to rely on general pleading principals defeats the requirement of actual notice to Appellant, under the specific facts of this case. This lackadaisical attitude regarding actual notice of the allegation should not be permitted or tolerated.

The First Court of Appeals addressed the sufficiency of an indictment in *State v. Peterson, 612 S.W.3d 508, 512 (Tex. App. 2020, pet. ref'd)*:

"A person accused of a crime is

constitutionally entitled to notice of the charge against her as a matter of due process. *State v. Ross, 573 S.W.3d 817, 820 (Tex. Crim. App. 2019)*. The indictment must be specific enough to inform the defendant of the nature of the accusations against her so she may prepare a defense. *State v. Moff, 154 S.W.3d 599, 601 (Tex. Crim. App. 2004); see also Tex. Code Crim. Proc. Ann. art. 21.03* ("Everything should be stated in an indictment which is necessary to be proved."); *id.* [*Tex. Code Crim Proc.] art. 21.11* ("An indictment shall be deemed sufficient which charges the commission of the offense in ordinary and concise language in such a manner as to enable a person of common understanding to know what is meant, and ***with that degree of certainty that will give the defendant notice of the particular offense with which he is charged***, and enable the court, on conviction, to pronounce the proper judgment...."). " (Emphasis added).

An indictment pleading an "on or about date" is generally sufficient to allow the prosecution to prove

the offense happened at any time within the statute of limitations and prior to the return of the indictment. *Tex. Code Crim. Proc. § 21.02(6)*. But in this case, the application of the general provision prevents the requirement of actual notice of the allegation against Appellant and to "…and with that degree of certainty that will give the defendant notice of the particular offense with which he is charged."

The State made two identical allegations in two separate indictments. The evidence produced at trial prove that two separate arsons were committed, one on May 27, 2023 and one on June 3, 2023. The indictment in this case alleged that the offense occurred on May 27, 2023. The proof at trial was that the offense actually occurred on June 3, 2023.

It is axiomatic that any defendant is entitled to sufficient notice of the allegation made against him and which would allow for him to prepare a defense. The Court of Criminal Appeals held that a motion to quash would be proper if the indictment failed to provide such notice to a defendant. "We hold that appellant's motion to quash in the instant case ***entitled him to the***

allegation of facts sufficient to bar a subsequent prosecution for the same offense and sufficient to give him precise notice of the offense with which he was charged. *American Plant Food Corp. v. State, 508 S.W.2d 598 (Tex. Crim. App. 1974)." King v. State, 594 S.W.2d 425, 427 (Tex. Crim. App. 1980)(Emphasis added).*

The problem with allowing the sloppy pleadings of the State to prevail in this situation is there can be no fair assurance of what case actually went to trial. Was it the case from May 27 or the case from June 3? Appellant had the right to know the answer to this question prior to the beginning of trial, not after the evidence had been presented.

The prosecutor—intentionally or not—failed to mention in his opening statement the date of the offense that was on trial. Why? After the conclusion of the evidence from the guilt-innocence portion and the punishment phase of the trial, it is apparent that there should have been an arson case from May 27, 2023 in which lighter fluid was the ignitable substance. There should have been a separate case from June 3, 2023 in which gasoline was the ignitable substance.

The State just smashed the facts of the two cases together and spit out two identical indictments—neither of which were accurate. Appellant correctly pointed out to the trial court in his motion for a directed verdict that the State failed to carry its burden of proof. To permit the State after the close of the evidence to rely on 'any date within the statute of limitations' defies the notice provisions required by the Texas Court of Criminal Appeals as explained in the *King* case.

The Court of Criminal Appeals has been consistent in holding that the indictment must convey adequate notice to a defendant. "Thus, the issue becomes whether the indictment ***on its face*** fails to convey some requisite item of notice. The notice provided by the indictment in question must be examined from the perspective of the accused in light of his constitutional presumption of innocence." *DeVaughn v. State, 749 S.W.2d 62, 68 (Tex. Crim. App. 1988)(citations omitted)(Emphasis added).*

Appellant's motion for directed verdict should not have been denied by the trial court relying upon the

general "on or about" language. To do so, defeats any semblance of notice to this Appellant in this case. Compare the two indictments-they are identical. Equally as important, neither is accurate as to the facts shown at trial. To allow the State to rely upon any date within the statute of limitations prevents Appellant from being protected from subsequent prosecutions for the same alleged conduct.

> "Another important requirement is that the indictment be worded with sufficient certainty to prevent subsequent prosecution for the same offense. *TEX. CODE CRIM. PROC. ANN. art. 21.04 (Vernon 1989)*. Does this rule mean that once a defendant is prosecuted for an offense alleged as generally as the law now permits, that defendant may never again be prosecuted for the same offense (not transaction) against that victim if that offense occurred within the same ten-year period? This is the logical conclusion, but it is not the law.
>
> "…
>
> "Article 21.04 of the Code of Criminal

> Procedure requires that an indictment be sufficiently certain to enable 'the accused to plead the judgment that may be given upon it in bar of any prosecution for the same offense.' *Tex. Code Crim. Proc. Ann. art. 21.04 (Vernon 1989)*. It is difficult to see how the indictment in the case *sub judice* would protect Appellant from again being tried for the same transactions without a reading of the entire record of the trial now before this court."

Sledge v. State, 903 S.W.2d 105, 109 (Tex. App. 1995), aff'd, 953 S.W.2d 253 (Tex. Crim. App. 1997).

Under the facts of this case and based upon two identical indictments, and the multiple identical, allegations the State brought against Appellant, the State failed to prove the allegations brought in this trial. As described in *Sledge*, by allowing the State to default to "all we have to prove is that it happened" the required notice provisions and requirements are completely gutted. It is undisputed by the State and the Defense that the date alleged in the indictment is wrong. Both indictments allege the same offense, at

the same location, and with the same complainant. To permit the State to rely on "any date" defeats the right to notice and due process. The trial court erred in denying Appellant's motion for a directed verdict under the specific facts of this case because the State failed to prove the allegations of its indictment and any other holding fails to hold the State to the proper notice requirements of an indictment.

For all the foregoing reasons, Appellant's Sole Issue should be sustained, the conviction in this case be reversed, and the case rendered.

CONCLUSION AND PRAYER

WHEREFORE, PREMISES CONSIDERED, the Appellant, Elias Charalambous, prays that the Judgment of the Trial Court be reversed and remanded for further proceedings consistent with this Court's opinion.

Respectfully submitted,

SEARS, BENNETT, & GERDES, LLP

/s/ Joel H. Bennett

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ATTORNEY FOR E. CHARALAMBOUS

CERTIFICATE OF SERVICE

I hereby certify that Appellant's Brief has been served upon the Galveston County Criminal District Attorney's Office on this the 1st day of July, 2024 by email to heather.gruben@co.galveston.tx.us.

/s/ Joel H. Bennett
Joel H. Bennett

Certificate of Compliance

In compliance with TRAP 9.4(i), I certify that the word count in this reply brief is approximately 3726 words.

/s/ Joel H. Bennett
Joel H. Bennett

EXHIBIT "A"

THE STATE OF TEXAS
VS
ELIAS CHARALAMBOUS

DA Control Number:	2023-DA-002019	SO Number:	232111
Cause No:	23-CR-2093	Court:	56th District Court
Offense Code:	20990010 - ARSON		
CJIS TRN #:	9217744468 A001	Offense Report No:	23-03169
Agency:	Galveston Fire Marshal	Status:	JAIL
Co-Defendant:		Co-Defendant Control Number:	
Staff Initials: TML		Bond Amount:	$200,000
		Grand Jury	July Term, 2023 122ND District Court
Witness Name:			

JUDGE

IN THE NAME AND BY AUTHORITY OF THE STATE OF TEXAS

THE GRAND JURORS for the County of Galveston, State aforesaid, duly organized as such at the July Term, A.D., 2023 upon their oaths in said Court present that ELIAS CHARALAMBOUS, on or about the 27th day of May, 2023 and anterior to the presentment of this indictment in the County of Galveston and State of Texas, did then and there, with intent to damage or destroy a building located at 5205 Avenue U, Galveston, Texas, start a fire by igniting gasoline with a flame, knowing that the building was within the limits of an incorporated city or town, namely Galveston.

AGAINST THE PEACE AND DIGNITY OF THE STATE.

Foreperson of the Grand Jury

DISTRICT CLERK
GALVESTON COUNTY, TEXAS

2023 SEP 12 AM 10: 52

FILED

23-CR-2093
DCINDICT
Indictment - OCA
2642549