YEAR 2005 CASE SUMMARIES

By
The Honorable Pat Garza
Associate Judge
386th District Court
San Antonio, Texas

Evidence was sufficient to support jury's finding that respondent engaged in delinquent conduct by committing the offense of fraudulent use of identifying information.[In the Matter of D.J.](05-4-13)

On September 30, 2005, the Tyler Court of Appeals held that evidence was legally sufficient to support jury's finding that respondent engaged in delinquent conduct by committing the offense of fraudulent use of identifying information resulting in subsequent commitment to TYC.

¶ 05-4-13. **In the Matter of D.J.**, MEMORANDUM, No. 12-04-00131-CV, 2005 Tex.App.Lexis 8151 (Tex.App.— Tyler, 9/30/05).

Facts: In its second amended petition, the State alleged, among other matters, that D.J. engaged in delinquent conduct in that she violated penal law. Specifically, the State alleged that on December 10, 2003, D.J. committed the offense of fraudulent use of identifying information in that she, with intent to harm or defraud another, and without the consent of Evelyn Pinkard, used identifying information of Pinkard's driver's license number, social security number, Medicare card, and credit cards, by presenting said identifying information to unlawfully open a checking account in Pinkard's name for her own access and use. D.J. pleaded "not true," and the matter proceeded to jury trial.

At trial, Edgar Chavez, a sales associate for Community Credit Union in Dallas County, Texas, testified on the State's behalf. Chavez testified that D.J. entered the credit union on December 10, 2003. Chavez identified D.J. as the person who presented herself as Evelyn Pinkard that day and further testified that D.J. signed Pinkard's name on the sign-in sheet and told Chavez she wanted to open a checking account and order a box of checks. According to Chavez, D.J. provided him with a social security card and what resembled a Texas identification card. Chavez verified that the driver's license number on the card matched with the name Evelyn Pinkard. Chavez also checked the social security card and discovered that it was issued prior to the date of birth listed on the card. Chavez contacted the credit union's fraud department and was instructed to contact the police department. Meanwhile, Chavez continued to visit with D.J. about banking with the credit union until the police arrived. Chavez could not recall whether D.J. had signed a signature card, but stated that she had "completed all that paperwork" that one would ordinarily complete. Chavez testified that D.J. did not ultimately open a checking account at the credit union although she attempted to do so.

Grand Prairie Police Department Officer Brian Bossheart also testified for the State. Bossheart testified that on the date in question, he and Officer Jason Gray responded to a call at the credit union. When they arrived, they spoke with the representative of the credit union who advised them that someone was there trying to open an account and the identification documents did not appear to be true and correct.

Bossheart testified that D.J. showed him and Gray some credit cards and a Medicare card that had the name Evelyn Pinkard on them.

Evelyn Pinkard testified that she was the victim of a robbery at a restaurant in Lancaster, Texas in November 2003, during which her wallet, containing her identification, social security card, Medicare card, and some credit cards, was stolen. Pinkard testified that she did not know D.J. and did not give D.J. her consent to use her social security card or any other identification cards to open a checking account.

After the State rested its case, D.J. moved for a directed verdict. The trial court denied D.J.'s motion. Following the close of evidence, the trial court conducted a charge conference. D.J. requested that the lesser included offense of attempted fraudulent use of identifying information be included in the charge. The trial court denied D.J.'s request. Ultimately, the jury found D.J. engaged in delinquent conduct by committing the offense of fraudulent use of identifying information. The trial court sentenced D.J. to commitment to the Texas Youth Commission for an indeterminate period. This appeal followed.

Held: Affirmed

Opinion: In her first issue, D.J. argues that the trial court erroneously denied her motion for directed verdict because the evidence was legally insufficient to support the jury's finding. n1 Legal sufficiency is the constitutional minimum required by the *Due Process Clause of the Fourteenth Amendment* to sustain a criminal conviction. *See* ***Jackson v. Virginia****, 443 U.S. 307, 315-16, 99 S. Ct. 2781, 2786-787, 61 L. Ed. 2d 560 (1979)*; *see also* ***Escobedo v. State****, 6 S.W.3d 1, 6 (Tex. App.-San Antonio 1999, pet. ref'd)*. The standard for reviewing a legal sufficiency challenge is whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *See* ***Jackson****, 443 U.S. at 320, 99 S. Ct. at 2789*; *see also* ***Johnson v. State****, 871 S.W.2d 183, 186 (Tex. Crim. App. 1993)*. The evidence is examined in the light most favorable to the jury's verdict. *See* ***Jackson****, 443 U.S. at 320, 99 S. Ct. at 2789*; ***Johnson****, 871 S.W.2d at 186*. A successful legal sufficiency challenge will result in rendition of an acquittal by the reviewing court. *See* ***Tibbs v. Florida****, 457 U.S. 31, 41-42, 102 S. Ct. 2211, 2217-218, 72 L. Ed. 2d 652 (1982)*.

> n1 In juvenile cases, when considering issues of evidentiary sufficiency, we apply the standard of review applicable to criminal cases. *See, e.g.,* ***In re G.A.T.,*** *16 S.W.3d 818, 828 (Tex. App.-Houston [14th Dist.] 2000, pet. denied)*.

To support the jury's finding that D.J. engaged in delinquent activity by committing the offense of fraudulent use of identifying information, the State was required to prove that D.J. (1) with intent to harm or defraud another, and (2) without the consent of Evelyn Pinkard, (3) used Pinkard's identifying information. *See TEX. PEN. CODE ANN. § 32.51(b)* (Vernon Supp. 2004-05). "Identifying information" means information that alone or in conjunction with other information identifies an individual including an individual's name, social security number, date of birth, and government-issued identification number. *See TEX. PEN. CODE ANN. 32.51(a)(1)(A)* (Vernon Supp. 2004-05).

D.J. argues that the proof at trial varied from the court's charge and the allegations in the State's petition. The sufficiency of the evidence is measured against the offense as defined by a hypothetically correct jury charge. *See* ***Malik v. State****, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997)*. Such a charge would include one that "accurately sets out the law, is authorized by the indictment, does not unnecessarily increase the State's burden of proof or unnecessarily restrict the State's theories of liability, and adequately describes the particular offense for which the defendant is tried." ***Id.*** The hypothetically correct jury charge need not incorporate allegations that give rise to immaterial variances. *See* ***Gollihar v. State,*** *46 S.W.3d 243, 255-56 (Tex. Crim. App. 2001)*. Thus, we must determine whether there exists a variance in the allegation in the charging instrument and the proof at trial. If we determine that such a

variance exists, then we must determine if such a variance is material and prejudices the defendant's substantial rights. ***Id.*** *at 256-57*. That is, we must determine whether the charging instrument, as written, informed the defendant of the charge against him sufficiently to allow him to prepare an adequate defense at trial and whether prosecution under the deficiently drafted indictment would subject the defendant to the risk of being prosecuted later for the same crime. ***Id.*** *at 257*.

Variance

In the case at hand, the jury was asked to find whether D.J., with intent to harm or defraud another, and without the consent of Evelyn Pinkard, used identifying information of Evelyn Pinkard's driver's license number or social security number, by presenting said identifying information to unlawfully open a checking account in the name of Evelyn Pinkard. Therefore, D.J. argues, the State was required to prove that D.J. did, in fact, open a checking account in the name of Evelyn Pinkard.

Section 32.51(a)(1)(A) requires only that the actor use the information with intent to harm or defraud another. Here, Chavez testified that since credit unions are nonprofit organizations, if the credit union has any profits, it has to send the profits back to its members with a higher interest paid on deposits or a lower interest rate on loans. Thus, Chavez explained, when someone defrauds the credit union, the credit union takes a loss, which in turn, effects all of its members. Chavez further testified that the use of someone else's name can harm the person whose name is used.

We disagree that the language "by presenting said identifying information to unlawfully open a checking account" required the State to prove that D.J. accomplished what the record reflects she set out to do. Our reading of the court's charge does not indicate that the charge varied from the elements of the statute. Rather, we read the court's charge as asking whether D.J. used Pinkard's identifying information by presenting said identifying information for the purpose of unlawfully opening a checking account in the name of Evelyn Pinkard. In light of Chavez's testimony, a finding that D.J. acted with such a purpose satisfies the element that D.J. acted with intent to harm or defraud another. n2

> n2 The word "purpose" is synonymous with an intention. *See* BLACK'S LAW DICTIONARY 1236 (6th ed. 1990).

Moreover, our reading of the charge conforms with the notion of a hypothetically correct charge, which, to iterate, is one that accurately sets out the law and does not unnecessarily increase the State's burden of proof. Requiring that the State prove that D.J. caused harm where the statute only requires that the State prove that the appellant intended to harm or defraud another would run afoul of the standard set forth by the court in ***Malik***. Therefore, we conclude that no variance existed. n3

> n3 Since we do not conclude that a variance existed in the instant case, we need not determine the issue of materiality.

The record reflects that D.J., without Pinkard's consent, intentionally used Pinkard's driver's license and social security card for the purposes of opening a checking account at a credit union for D.J.'s own use. The record further reflects that such activity harms credit union members as well as the person whose identifying information is used. Thus, we hold that the evidence was legally sufficient to support the jury's finding that D.J. engaged in delinquent conduct by committing the offense of fraudulent use of identifying information. D.J.'s first issue is overruled.

LESSER INCLUDED OFFENSE

In her second issue, D.J. argues that the trial court erred in not including attempted fraudulent use of identifying information in its charge as a lesser included offense. An offense is a lesser included offense if (1) it is established by proof of the same or less than all the facts required to establish the commission of the offense charged; (2) it differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property, or public interest suffices to establish its commission; (3) it differs from the offense charged only in the respect that a less culpable mental state suffices to establish its commission; or (4) it consists of an attempt to commit the offense charged or an otherwise included offense. *TEX. CODE CRIM. PROC. ANN. art. 37.09* (Vernon 1981).

Whether a charge on a lesser included offense is required is determined by a two-pronged test. *See* ***Schweinle v. State,*** *915 S.W.2d 17, 18 (Tex. Crim. App. 1996)*. First, we must determine whether the offense constitutes a lesser included offense. Second, the lesser included offense must be raised by the evidence at trial. ***Id.*** In other words, there must be some evidence which would permit a rational jury to find that if guilty, the defendant is guilty only of the lesser offense. *Id.*

In the case at hand, D.J. argues that there is some evidence for the jury to find that D.J. only attempted to use the identifying information to unlawfully open a checking account. However, D.J.'s argument on her second issue is related to her argument concerning her first issue. In other words, D.J. argues that the record supports that she attempted, but did not succeed in opening a checking account. However, the crime of attempted fraudulent use of identifying information would require evidence supporting that D.J. only attempted to use the identifying information. The record in the instant case supports only that D.J. did, in fact, use Pinkard's identifying information with the intent to defraud or harm another. Thus, the evidence would not permit the jury to find that if guilty, D.J. was only guilty of attempted fraudulent use of identifying information. Therefore, we hold that the trial court did not err in refusing D.J.'s request that it submit such a lesser included offense. D.J.'s second issue is overruled.

Conclusion: Having overruled D.J.'s first and second issues, we ***affirm*** the trial court's judgment.