

Affirmed and Opinion filed August 16, 2001.



In The

Fourteenth Court of Appeals

NO. 14-00-00533-CR

MICHAEL BUD SALLIE, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the 263rd District Court
Harris County, Texas
Trial Court Cause No. 836,720**

MEMORANDUM OPINION

The State charged appellant, Michael Bud Sallie, with felony possession of a firearm. Over his plea of not guilty, the jury found appellant guilty of the offense. Appellant then pled true to two enhancement paragraphs, after which the jury assessed appellant's punishment at thirty years' confinement in the Institutional Division of the Texas Department of Criminal Justice. Appellant appeals his conviction, and briefs this Court on two points of error: (1) the evidence was legally insufficient to prove the offense as alleged in the indictment; and (2) the trial court erred by lowering the State's burden of proof in its instructions to the jury. Both of these contentions are controlled by the Texas

Court of Criminal Appeals recent decision in *Gollihar v. State*, 46 S.W.3d 243 (Tex. Crim. App. 2001). For the reasons set forth below, we affirm the judgment of the trial court.

FACTUAL BACKGROUND

Appellant was charged with the felony of unlawful possession of a firearm by a felon, which is established if the State shows appellant (1) has been convicted of a felony offense; and (2) possesses a firearm “after conviction and before the fifth anniversary of the person’s release from confinement following conviction of the felony or the person’s release from supervision under community supervision, parole, or mandatory supervision, whichever date is later.” TEX. PEN. CODE ANN. § 46.04(a)(1) (Vernon 1994).

The indictment against appellant alleged that appellant had “been convicted of a felony, namely POSSESSION OF A CONTROLLED SUBSTANCE in the 178th District Court of Harris County, Texas, in Cause Number 724001 on January 23, 1997.” Appellant was previously convicted of this felony, but in the 230th District Court of Harris County, Texas, not in the 178th District Court. After the trial began, the State pointed out to the judge that the indictment contained this error. Over appellant’s objection, the State requested that the jury be charged that appellant had been convicted “in a district court of Harris County, Texas,” rather than in the 178th District Court.

At the conclusion of the State’s case-in-chief, State’s Exhibit Number 3 was published to the jury. This exhibit is the Judgment and Sentence of appellant under Cause Number 724001, conviction date of January 23, 1997, in the 230th District Court of Harris County, Texas for the offense of possession of a controlled substance. During trial, appellant acknowledged this conviction when he testified that he remembered committing the “offense of possession of a controlled substance in Cause No. 724,001 on January 23rd.” He did not state, and was not asked, about the year of this offense.

DISCUSSION AND HOLDINGS

Appellant contends that due to the variance between the indictment, the evidence,

and the jury charge, the evidence was legally insufficient to support his conviction, and the trial court erroneously lowered the State's burden of proof.

A variance between the wording of the indictment and the evidence presented at trial is fatal only when "it is material and prejudices [the defendant's] substantial rights." *Gollihar*, 46 S.W.3d at 257. When reviewing such a variance, we must analyze (1) whether the indictment, as written, sufficiently informed the defendant of the charge against him so as to allow him to prepare an adequate defense at trial, and (2) whether there is a danger that prosecution under the deficiently drafted indictment might subject the defendant to being prosecuted later for the same crime. *Id.*

Here, appellant admitted to his prior conviction, the State introduced evidence of the prior conviction, the jury was not misled, and appellant offered no proof that he was surprised or prejudiced by the error in the indictment. The State submitted proof to support all the allegations of the indictment, other than the name of the trial court: the cause number, the date, the county, and the offense recited in the Judgment and Sentence that the State offered into evidence all corresponded with the indictment. The record also reveals that appellant had "Open File" access to the State's files up to the week prior to trial.

Appellant did not attempt to raise as a defense that he was not convicted of a felony in the 178th District Court – his defense was that he was a felon, but was in an altered state of mind when the firearm somehow came into his possession. Appellant's defense of firearm possession in this trial had nothing to do with the name of the district court in which his previous conviction occurred.

The State was not required to plead the name of the court in order to give appellant adequate notice of the charge against him. *Id.* at 258; *see also Garner v. State*, 864 S.W.2d 92, 97 (Tex. App.—Houston [1st Dist.] 1993, pet. ref'd). Instead, it is sufficient for the State to plead and prove only appellant's possession of a firearm and conviction of the prior felony in question. TEX. PEN. CODE ANN. § 46.04(a)(1) (Vernon 1994); *see also*

Ware v. State, 749 S.W.2d 852, 855 (Tex. Crim. App. 1998). For that reason, the needless allegation of the trial court number also does not subject appellant to the risk of being prosecuted later for the same crime. *Id.*

In short, the variance was not material, and therefore should be disregarded in a legal sufficiency review under a hypothetically correct jury charge. *Id.*

Appellant's claim that omitting the words "178th" from the jury charge impermissibly lowered the State's burden of proof also is based solely on a variance. As a result, it is controlled by our decision that the variance was not material, and that the number of the district court in which his previous conviction occurred could be omitted from the jury charge without reducing the State's burden. The State's statutory burden for this offense as it relates to the prior felony is to prove beyond a reasonable doubt appellant was a felon at the time he possessed the firearm. That burden is required by the charge, even absent the name of the court. Appellant's points of error are overruled, and the judgment of the trial court affirmed.¹

/s/ Wanda McKee Fowler
Justice

Judgment rendered and Opinion filed August 16, 2001.

Panel consists of Justices Yates, Fowler, and Wittig.

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

¹ Citing to *Burrell v. State* and its progeny, appellant argues that because the State undertook to allege with unnecessary specificity an allegation that "is descriptive of that which is legally essential to charge a crime, the State must prove it as alleged though needlessly pleaded." This is known as the special exception to the general surplusage rule and was overruled by the Court of Criminal Appeals in *Gollihar*. 2001 WL 515254, at *8.