Affirmed and Opinion filed January 20, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-98-00514-CR

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RODNEY EARL RANDOLPH, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 180th District Court
Harris County, Texas
Trial Court Cause No. 759,654

O P I N I O N

Rodney Earl Randolph appeals his conviction by a jury for possession of cocaine. The trial court assessed punishment at thirty years imprisonment, enhanced by two prior felony convictions. In five points of error, appellant contends: (1) and (2) the evidence is legally and factually insufficient to support his conviction; (3) the trial court erred in refusing to grant a mistrial after sustaining his objection to prosecutorial misconduct; (4) the trial court erred in refusing to admit testimony concerning a trespass affidavit; (5) he received ineffective assistance of trial counsel. We affirm.

I. FACTUAL BACKGROUND.

On April 14, 1997, Officer Travis Barker and other uniformed officers were investigating citizen complaints of trespassers and narcotics traffic in an apartment complex in Houston. The officers also had a "trespass affidavit" signed by the former owner of the complex, Eric Samet. This affidavit requested and authorized the Houston Police Department to enforce all trespass laws against uninvited persons found on the premises. There were several "No Trespassing" signs posted about the complex.

It was dark, and Officer Barker observed Officer Garza tapping on the window of appellant's truck that was parked in the well-lighted parking lot. Officer Barker stated that Officer Garza was trying to get appellant's identification to see if he lived in the complex, and make sure he wasn't trespassing. When Garza tapped on appellant's window, appellant immediately accelerated his truck in reverse. Barker was standing about fifteen feet behind appellant's truck, and shouted, "stop, police" at appellant, and drew his gun because he thought appellant would run over him. Barker stated that appellant was looking at him when he was backing the truck, and Barker identified appellant in court as the person driving the truck. Appellant kept coming toward Barker, and Barker then quickly sidestepped to avoid being hit. Appellant's truck brushed against Barker on the driver's side, then appellant accelerated and drove out of the parking lot onto the public street. Barker and Garza ran after appellant and shouted "stop, police" at appellant twice, but appellant kept going.

Officer Lance Johnson was driving his marked Houston police car, and was working in uniform with the other officers at the apartment complex. His partner, Officer Roger Collins, stated that the officers were checking on people to determine if they had a right to be there. When Johnson pulled up to the apartment complex, he observed appellant's truck pulling out of the northern exit at a "fairly rapid rate of speed," and there was a police officer running behind appellant's truck shouting "stop." The officer chasing appellant's truck then yelled at Collins to stop appellant's truck because appellant was "fleeing detention." Johnson and Collins received a radio dispatch informing them that one of the officers was almost struck by the vehicle, and the officer was trying to get it to stop. Johnson turned on his overhead lights and followed appellant at a distance of one to two car lengths, and manually operated his siren trying to get appellant to stop. Collins stated there were several places that appellant could have stopped, but he continued for about one-half of a mile before he stopped. Officer Collins got out of his police car, drew his gun, and approached appellant's truck. Collins stated his first reason for taking appellant into custody was to verify

appellant's reason for being at the apartment complex. Secondly, because of the way appellant responded to their attempt to stop him, Collins stated that he was unsure of what "might be going on," and wanted to further investigate. Collins checked the registration of appellant's vehicle, and determined it was registered to "Rodney E. Randolph." The registration showed appellant's address as different from the address of the apartment complex. Collins inventoried appellant's truck and found a plastic bag containing a crack pipe next to the hump on the floorboard of the truck, on the passenger side. Collins testified that the crack pipe was within two feet of appellant, and "you could reach it with your hand" from the driver's seat.

Officer Johnson stated that he and Collins were responding to citizens complaints about street level narcotics in the apartment complex, and also checking for trespassers. He stated that when he pulled up into the complex, he saw an officer chasing after appellant's truck yelling "stop" at appellant. When he saw Johnson, the officer also shouted at him to stop appellant because he was trying to flee detention. Johnson stated he followed appellant for about one-quarter of a mile, and there were plenty of places appellant could have stopped. After appellant stopped, Johnson detained him by putting him in the police car for identification purposes, and to determine if he was trespassing at the apartment complex. Collins inventoried appellant's truck and found the crack pipe. Appellant was charged only with possession of cocaine, not for trespassing or for any traffic violations.

Appellant testified that he took a friend, known only as "Opal," to the apartment complex. After Opal got out at the complex, appellant stated he had to back up to turn his truck around. He said when he started forward, someone came up and banged on the side of the truck. Appellant did not see who was banging on his truck, and he drove away. He stated he pulled his truck over as soon as possible after seeing Johnson's overhead lights flashing behind him. Although appellant stated he did not know who put the crack pipe in his truck, he said Opal had a plastic bag with her when he picked her up. The State proved appellant's two prior felony convictions used for enhancement by appellant's testimony.

II. DISCUSSION.

A. Legal and Factual Sufficiency of the Evidence. In his first point of error, appellant contends the evidence is legally insufficient to sustain his conviction because the State did not affirmatively

link appellant to the cocaine. In his second point of error, he contends that the same evidence is factually insufficient to show appellant possessed the cocaine as alleged in the indictment.

In reviewing the legal sufficiency of the evidence, we consider all the evidence, both State and defense, in the light most favorable to the verdict. *Houston v. State*, 663 S.W.2d 455, 456 (Tex.Crim.App.1984); *Garrett v. State*, 851 S.W.2d 853, 857 (Tex.Crim.App. 1993). In reviewing the sufficiency of the evidence in the light most favorable to the verdict or judgment, the appellate court is to determine whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *Ransom v. State*, 789 S.W.2d 572, 577 (Tex.Crim.App. 1989), *cert. denied*, 110 S.Ct. 3255 (1990). This standard is applied to both direct and circumstantial evidence cases. *Chambers v. State*, 711 S.W.2d 240, 245 (Tex.Crim.App. 1986). The jury is the exclusive judge of the facts, credibility of the witnesses, and the weight to be given to the evidence. *Chambers v. State*, 805 S.W.2d 459, 462 (Tex.Crim. App. 1991). In conducting this review, the appellate court is not to re-evaluate the weight and credibility of the evidence, but act only to ensure the jury reached a rational decision. *Muniz v. State*, 851 S.W.2d 238, 246 (Tex.Crim.App.1993); *Moreno v. State*, 755 S.W.2d 866, 867 (Tex.Crim.App1988). In making this determination, the jury can infer knowledge and intent from the acts, words, and conduct of the accused. *Dues v. State*, 634 S.W.2d 304, 305 (Tex.Crim.App.1982).

Under *Clewis v. State*, 922 S.W.2d 126, 133 (Tex.Crim.App.1996), a court of appeals reviews the factual sufficiency of the evidence when properly raised after a determination that the evidence is legally sufficient. *Id*. In conducting a factual sufficiency review, the court of appeals views all the evidence without the prism of "in the light most favorable to the prosecution" and sets aside the verdict only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *Id*. In conducting a factual sufficiency review, the court of appeals reviews the fact finder's weighing of the evidence and is authorized to disagree with the fact finder's determination. This review, however, must be appropriately deferential so as to avoid an appellate court's substituting its judgment for that of the jury. If the court of appeals reverses on factual sufficiency grounds, it must detail the evidence relevant to the issue in consideration and clearly state why the jury's finding is factually insufficient. The appropriate remedy on reversal is a remand for a new trial. *Id*.

A factual sufficiency review must be appropriately deferential so as to avoid the appellate court's substituting its own judgment for that of the fact finder. *Santellan v. State*, 939 S.W.2d 155, 164 (Tex.Crim.App.1997). This court's evaluation should not substantially intrude upon the fact finder's role as the sole judge of the weight and credibility of witness testimony. *Id*. The appellate court maintains this deference to the fact findings, by finding fault only when "the verdict is against the great weight of the evidence presented at trial so as to be clearly wrong and unjust." *Id*.

In this case, appellant was the owner and driver of the truck where the police found the crack pipe. The crack pipe was in a plastic bag within reach of appellant on the floorboard. Appellant claimed he did not know how the crack pipe got there, but that Opal had a plastic bag with her when she got in his truck. Appellant was alone in his truck. Appellant failed to immediately stop his truck when the officers turned on their overhead lights and siren to bring him to a stop.

To establish unlawful possession of a controlled substance, the State must prove beyond a reasonable doubt that the defendant exercised care, custody, control, and management over the contraband and that the defendant knew that the substance being possessed was contraband. TEX. HEALTH & SAFETY CODE ANN. § 481.115 (Vernon 1992 & Supp. 1999); *King v. State*, 895 S.W.2d 701, 703 (Tex.Crim.App.1995); *Palmer v. State*, 857 S.W.2d 898, 900 (Tex.App.--Houston [1st Dist.] 1993, no pet.). It is not sufficient for the State merely to show that the defendant was the only one in the vicinity of contraband or was driving a vehicle containing narcotics. *Palmer*, 857 S.W.2d at 900. To prove knowing possession, the State must present evidence that affirmatively links the defendant to the controlled substance. *Id*. at 900.

Taking the evidence in the light most favorable to the verdict, appellant was in his car by himself with a crack pipe in a bag that was in plain view; the crack pipe contained crack cocaine, and was within easy reach. Because appellant was exercising dominion and control over the car, an inference arises that he knew it contained contraband. *See Menchaca v. State*, 901 S.W.2d 640, 652 (Tex.App.--El Paso 1995, pet. ref'd) (holding appellant's control over vehicle raised inference he knew of marihuana in car's compartment); *Boughton v. State*, 643 S.W.2d 147, 149 (Tex.App.--Fort Worth 1982, no pet.) (holding contraband found in key box attached to steering column was affirmatively linked to defendant

because defendant was sole occupant of car and box found on defendant's side of car). *See also Harmond v. State,* 960 S.W.2d 404, 406 (Tex.App.–Houston[1st Dist.] 1998, no pet.).

Because appellant was alone in his car with drug paraphernalia in plain view and easily accessible to him, we find that a rational trier of fact could have found beyond a reasonable doubt that appellant exercised care, custody, control, and management over the contraband, and that appellant knew the substance possessed was contraband. We hold that the evidence was legally sufficient to sustain appellant's conviction for possession of cocaine, and we overrule appellant's point of error one.

Appellant further contends the evidence is factually insufficient under *Clewis* to show he knowingly possessed cocaine. Appellant testified he did not know the plastic bag contained a crack pipe, and he had no idea where the bag and pipe came from. What weight to give contradictory testimonial evidence is within the sole province of the trier of the fact, because it turns on an evaluation of credibility and demeanor. *Cain v. State,* 958 S.W.2d 404, 408-09 (Tex.Crim.App.1997). Accordingly, we must show deference to the jury's findings. *Id*. at 409. A decision is not manifestly unjust merely because the jury resolved conflicting views of the evidence in favor of the State. *Id*. at 410. In performing a factual sufficiency review, the courts of appeals are required to give deference to the jury verdict, examine *all* of the evidence impartially, and set aside the jury verdict "only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust." *Cain*, 958 S.W.2d at 410; *Clewis,* 922 S.W.2d at 129. After reviewing the record, we conclude the jury's finding that appellant knowingly possessed the drugs is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. We find the evidence is factually sufficient to sustain appellant's conviction, and we overrule his point of error two.

B. Prosecutorial Misconduct. In point three, appellant asserts trial court erred in denying appellant's motion for mistrial after the prosecutor engaged in improper closing argument. Specifically, appellant contends the prosecutor struck at him over his counsel's shoulder when he made the following argument.

> He [appellant] couldn't explain where the bag came from and he's a convicted felon. He's been to the penitentiary four times. Ask yourself: Whose got the most at stake here? He does. That's why his lawyer tried a trespass case. That's why y'all got to see that little stunt with the tin foil in voir dire.

Appellant's trial counsel objected, the trial court sustained the objection, and the trial court instructed the jury to disregard. Appellant's trial counsel moved for a mistrial, and the trial court denied the motion.

Permissible jury argument is limited to four areas: (1) summation of the evidence; (2) reasonable deductions from the evidence; (3) responses to opposing counsel's argument; and, (4) pleas for law enforcement. *Dinkins v. State*, 894 S.W.2d 330, 357 (Tex.Crim.App. 1995), *cert. denied*, 116 S.Ct. 106 (1996); *Coble v. State*, 871 S.W.2d 192, 204 (Tex.Crim.App.1993); *Felder v. State*, 848 S.W.2d 85, 94-95 (Tex.Crim.App.1992); and, *Todd v. State*, 598 S.W.2d 286, 296-297 (Tex.Crim.App.1980). Generally, when an argument falls outside of these areas, error occurs. However, an instruction to disregard the argument generally cures the error. *McGee v. State*, 774 S.W.2d 229, 238 (Tex.Crim.App.1989); and, *Anderson v. State*, 633 S.W.2d 851, 855 (Tex.Crim.App.1982).

In *Dinkins*, the court of criminal appeals found a statement by the prosecutor to be harmless error, to wit: "[N]ow, [Defense Counsel] wants to mislead you a little bit by saying if you find –." *Dinkins*, 894 S.W.2d at 357. The trial court sustained appellant's objection, instructed the jury to disregard, and overruled appellant's motion for mistrial. The court of criminal appeals stated, in pertinent part:

> We disagree with the State that the prosecutor's comment was permissible as rebuttal to defense counsel's prior argument concerning the voluntariness of appellant's confession. Although the prosecutor's statements may have been intended as a rebuttal, they also cast aspersion on defense counsel's veracity with the jury. Compare, *Lopez*, 500 S.W.2d at 846 (reversible error occurred at comment that defense counsel and defendants were liars when pled not guilty). *But see, Gorman v. State*, 480 S.W.2d 188, 190 (Tex.Crim.App.1972) (comment "don't let [defense counsel] smoke-screen you" was permissible rebuttal). Nonetheless, the prosecutor's comment was not as egregious as those in *Gomez*, supra, (reversible error resulted from comment that defense counsel was paid to "manufacture evidence" and "get this defendant off the hook"); and, *Bray v. State*, 478 S.W.2d 89, 89-90 (Tex.Crim.App.1972) (reversible error resulted from comment that prosecutor was grateful for not having to represent someone like defendant). Moreover, the trial judge sustained appellant's objection and instructed the jury to disregard the statement. Finally the State made no further comments impugning defense counsel's veracity. We therefore hold the error was harmless.

Dinkins, 894 S.W.2d at 357(citations omitted).

An instruction to the jury was held to cure the prosecutor's statement that "defense sounds kind of like a courthouse defense more than the truth to me, but I am not going to attack Mr. Mitchell's (defense counsel) character in this cause . . . ." *Pogue v. State*, 474 S.W.2d 492, 496 (Tex.Crim.App. 1971).

The prosecutor in this case did not say appellant's counsel was dishonest, untruthful, or misleading. We find that error, if any, was cured by the trial court's instruction to the jury. We overrule this contention under point three.

Appellant further contends in his brief the trial court erred in making comments to the jury by telling appellant's trial counsel to restrict her argument to matters in evidence. Appellant's trial counsel did not object to the trial court's comments. To preserve error, the complaining party must have objected to the judge's comment or the objection is waived. *See Sharpe v. State*, 648 S.W.2d 705, 706 (Tex.Crim.App.1983); *see also Nevarez v. State*, 671 S.W.2d 90, 93 (Tex.App.--El Paso 1984, no pet.) (defendant's complaint that the trial court improperly commented on the weight of the evidence was not preserved for error because defense counsel did not object). Because appellant did not object to the trial court's remarks, his complaint on appeal is waived. We overrule appellant's point of error three.

C. Excluded Testimony of Eric Samet. In his fourth point, appellant contends the trial court erred in refusing to admit the testimony of Eric Samet, the owner of the apartment complex at the time the trespass affidavit was executed in 1995. The trial court heard Mr. Samet's testimony out of the presence of the jury. Mr. Samet stated he was not the owner of the premises on the date of the offense, but he was the lienholder. He stated he never notified the police that their authority to investigate trespass complaints was withdrawn. The trial court found Mr. Samet's testimony was not relevant to the proceedings, and excluded his testimony. On appeal, appellant argues that the police had no authority to investigate trespass claims, and therefore, the police had no probable cause to detain or arrest him.

Evidence is "relevant" that has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." TEX. R. EVID. 401; *Montgomery v. State*, 810 S.W.2d 372, 386 (Tex.Crim.App.1990) (op. on rehearing). Questions of relevance should be left largely to the trial court, relying on its own observations and experience, and will not be reversed absent an abuse of discretion.

Id. at 391; *Moreno v. State*, 858 S.W.2d 453, 463 (Tex.Crim.App.1993), *cert. denied*, 510 U.S. 966, 114 S.Ct. 445, 126 L.Ed.2d 378 (1993); *see also Goff v. State*, 931 S.W.2d 537, 553 (Tex.Crim.App. 1996), *cert. denied*, 117 S.Ct. 1438 (1996).

At trial, the judge determined that the authority given the officers to investigate was never terminated, and ruled that Samet's testimony was not relevant. Appellant did not attempt to explain to the trial court why this affidavit had anything to do with probable cause for the police to arrest appellant for possession of cocaine. Appellant was not charged with criminal trespass, and the police had probable cause to arrest appellant for fleeing from a police officer after the officer signaled with his lights and siren for appellant to stop. *See* TEX. TRANSPORTATION CODE §545.421. The fact that appellant was stopped for fleeing or attempting to elude a police officer rather than trespass is inconsequential because we review whether the facts and circumstances known to the officers *objectively* constituted a lawful basis for arrest, regardless of the officers' *subjective* understanding of the motivation or purpose of their actions. *See Garcia v. State*, 827 S.W.2d 937, 944 (Tex.Crim.App.1992); *Blount v. State*, 965 S.W.2d 53, 55 (Tex.App.-Houston [1st Dist.] 1998, pet. ref'd). Appellant has not demonstrated any abuse of discretion by the trial court. Because appellant's arrest and the search of his car were lawful apart from the trespass affidavit, appellant's arguments concerning the trespass affidavit are without merit. We overrule appellant's point of error four.

D. Ineffective Assistance of Counsel. Appellant alleges his trial counsel was ineffective for the following reasons:

1. Counsel failed to file a motion to suppress the evidence, argue same, and failed to request a jury instruction on illegal arrest and search.

2. Counsel failed to have the crack pipe examined to determine that his fingerprints were not on it.

3. Counsel failed to properly cross-examine Officer Collins with the parole hearing tape after numerous inconsistencies were established.

4. Counsel failed to obtain the testimony of Officer Garza who had been subpoened but did not appear. Trial counsel should have moved for continuance, but did not do so.

The U.S. Supreme Court established a two prong test to determine whether counsel is ineffective at the guilt/innocence phase of a trial. First, appellant must demonstrate that counsel's performance was deficient and not reasonably effective. Second, appellant must demonstrate that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984). Essentially, appellant must show (1) that his counsel's representation fell below an objective standard of reasonableness, based on prevailing professional norms, and (2) that there is a reasonable probability that, but for his counsel's unprofessional errors, the result of the proceeding would have been different. *Id*; *Hathorn v. State*, 848 S.W.2d 101, 118 (Tex.Crim.App.1992), *cert. denied*, 113 S.Ct. 3062 (1993). A reasonable probability is defined as probability sufficient to undermine confidence in the outcome. *Miniel v. State*, 831 S.W.2d 310, 323 (Tex.Crim.App.1992).

Judicial scrutiny of counsel's performance must be highly deferential. A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Strickland*, 466 U.S. at 689. An ineffectiveness claim cannot be demonstrated by isolating one portion of counsel's representation. *McFarland v. State*, 845 S.W.2d 824, 843 (Tex.Crim.App.1993). Therefore, in determining whether the *Strickland* test has been met, counsel's performance must be judged on the totality of the representation. *Strickland*, 466 U.S. at 670. The defendant must prove ineffective assistance of counsel by a preponderance of the evidence. *Cannon v. State*, 668 S.W.2d 401, 403 (Tex.Crim.App.1984). *Strickland* applies to ineffective assistance of counsel claims at noncapital punishment proceedings. *Hernadez v. State*, 988 S.W.2d 770, 773-774 (Tex.Crim.App.1999).

In any case analyzing the effective assistance of counsel, we begin with the presumption that counsel was effective. *Jackson v. State*, 877 S.W.2d 768, 771 (Tex.Crim.App.1994)(en banc). We assume counsel's actions and decisions were reasonably professional and that they were motivated by sound trial strategy. *Id.* Moreover, it is the appellant's burden to rebut this presumption via evidence illustrating why trial counsel did what he did. *Id.* In *Jackson*, the court of criminal appeals refused to hold counsel's

performance deficient given the absence of evidence concerning counsel's reasons for choosing the course he did. *Id*. at 772. *See also Jackson v. State*, 973 S.W.2d 954, 956-957 (Tex.Crim.App.1998) (inadequate record on direct appeal to evaluate that trial counsel provided ineffective assistance).

Appellant did not file a motion for a new trial, and therefore failed to develop evidence of trial counsel's strategy as was suggested by Judge Baird in his concurring opinion in *Jackson*, 877 S.W.2d at 772. *See Kemp v. State*, 892 S.W.2d 112, 115 (Tex.App.–Houston[1st Dist.] 1994, pet. ref'd) (generally, trial court record is inadequate to properly evaluate ineffective assistance of counsel claim; in order to properly evaluate an ineffective assistance claim, a court needs to examine a record focused specifically on the conduct of trial counsel such as a hearing on application for writ of habeas corpus or motion for new trial); *Phetvongkham v. State*, 841 S.W.2d 928, 932 (Tex.App.–Corpus Christi 1992, pet. ref'd, untimely filed) (inadequate record to evaluate ineffective assistance claim). *See also Beck v. State*, 976 S.W.2d 265, 266 (Tex.App.–Amarillo 1998, pet. ref'd) (inadequate record for ineffective assistance claim, citing numerous other cases with inadequate records to support ineffective assistance claim).

In the present case, the record is silent as to the reasons appellant's trial counsel chose the course she did. The first prong of *Strickland* is not met in this case. *Jackson*, 877 S.W.2d at 771; *Jackson*, 973 S.W.2d at 957. Due to the lack of evidence in the record concerning trial counsel's reasons for these alleged acts of ineffectiveness, we are unable to conclude that appellant's trial counsel's performance was deficient. *Id*. Because appellant produced no evidence concerning trial counsel's reasons for choosing the course he did, nor did he demonstrate prejudice to his defense, we overrule appellant's contention in point of error five that his trial counsel was ineffective.

We affirm the judgment of the trial court.

/s/ Bill Cannon
Justice

Judgment rendered and Opinion filed January 20, 2000.

Panel consists of Justices Cannon, Draughn, and Lee[1]

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

[1] Senior Justices Bill Cannon, Joe L. Draughn, and Norman Lee sitting by assignment.