Affirmed and Majority and Concurring and Dissenting Opinions filed February 17, 2000.

In The

Fourteenth Court of Appeals

NO. 14-98-00275-CR

ALLEN BERNARD HILL, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 228th District Court
Harris County, Texas
Trial Court Cause No. 756,770

M A J O R I T Y O P I N I O N

Allen Bernard Hill appeals a conviction for possession of cocaine weighing more than four grams and less than 200 grams with intent to deliver on the grounds that: (1) the trial court erred in failing to submit a jury charge instruction on a lesser-included offense; and (2) appellant was denied effective assistance of counsel. We affirm.

Background

On June 27, 1997, two Houston police officers pulled over the car appellant was driving after a computer search of the license plates revealed that there was an outstanding warrant for an unpaid ticket

connected with the car. Appellant was driving the car, a male passenger, Kenyada Boyd, was in the passenger seat beside him, and a female passenger was sitting in the back. As the officers approached the car, one officer saw Boyd reach toward the front floorboard. On closer inspection, the officer observed what he thought was a cookie of crack cocaine. The officers then detained the occupants of the car for a narcotics investigation.

When one of the officers asked appellant if he had any weapons on him, appellant handed the officer a pocketknife. The officer opened the knife and saw a white, chunky substance on the blade, which the officer believed to be cocaine. During the search of the car, the officers discovered a half-cookie of crack cocaine on the floorboard, a small plastic container with two small chunks of cocaine in the console between the front seats, and a clear plastic cassette tape box containing three larger chunks of cocaine. The cocaine found in the car weighed a total of 17.5 grams. Appellant was charged with possession of cocaine weighing more than four grams and less than 200 grams with intent to deliver. At trial, the jury found appellant guilty and assessed punishment at five years confinement.

Lesser Included Offense Instruction

Appellant's first point of error argues that the trial court erred in denying his request to include in the jury charge an instruction on the lesser included offense of possession of less than one gram of cocaine because no cocaine was found on appellant other than the trace amount on the pocketknife and because Boyd testified that appellant was unaware that there was any cocaine in the car.

For an instruction on a lesser included offense to be required: (1) the lesser offense must be included within the proof necessary to establish the offense charged; and (2) there must be some evidence in the record that would permit a jury rationally to find that if the defendant is guilty, he is guilty only of the lesser offense. *See Moore v. State*, 999 S.W.2d 385, 404 (Tex. Crim. App. 1999). A lesser included offense is raised if anything more than a scintilla of evidence either affirmatively refutes or negates an element establishing the greater offense, or the evidence on the issue is subject to two different interpretations, and one of the interpretations negates or rebuts an element of the greater offense. *See Arevalo v. State*, 943 S.W.2d 887, 889 n.5 (Tex. Crim. App. 1997).

A lesser included offense can be raised by any evidence from any source. *See Jones v. State*, 984 S.W.2d 254, 258 (Tex. Crim. App. 1998). Similarly, the trier of fact is free to believe selectively all or part of the testimony proffered and introduced by either side. *See id.* at 257. However, it is not enough that the jury may disbelieve crucial evidence pertaining to the greater offense. *See Skinner v. State*, 956 S.W.2d 532, 543 (Tex. Crim. App. 1997), *cert. denied*, 523 U.S. 1079 (1998); *Bignall v. State*, 887 S.W.2d 21, 24 (Tex. Crim. App. 1994). Rather, there must be some evidence directly germane to a lesser included offense for the fact finder to consider before a lesser included offense instruction is warranted. *See Skinner*, 956 S.W.2d at 543; *Bignall*, 887 S.W.2d at 24. Moreover, if a defendant either presents evidence that he committed no offense or presents no evidence, and there is no evidence otherwise showing he is guilty only of a lesser included offense, then a charge on a lesser included offense is not required. *See Bignall*, 887 S.W.2d at 24.

In order to establish the unlawful possession of a controlled substance, the State must prove that the accused: (1) exercised care, control, or custody over the substance, and (2) knew that the matter possessed was contraband. *See* TEX. HEALTH & SAFETY CODE ANN. § 481.112(a) (Vernon Supp. 1998); *Brown v. State*, 911 S.W.2d 744, 747 (Tex. Crim. App. 1995). Evidence which affirmatively links the accused to the contraband suffices for proof that he possessed it knowingly. *See Brown*, 911 S.W.2d at 747. This evidence can be either direct or circumstantial. *See id.* In either case, the evidence must establish, to the requisite level of confidence, that the accused's connection with the drug was more than just fortuitous. *See id.* However, the evidence need not be so strong that it excludes every other outstanding reasonable hypothesis except the defendant's guilt. *See id.* at 748.

Because control over a place can be jointly exercised, when an accused is not in exclusive possession of a place where contraband is found, it cannot be concluded that the accused exercised control or had the requisite knowledge unless there are additional independent facts and circumstances which affirmatively link the accused to the contraband. *See Herndon v. State*, 787 S.W.2d 408, 409-10 (Tex. Crim. App. 1990). Factors that may establish such affirmative links include whether: (1) the contraband

was in plain view;[1] (2) the contraband was conveniently accessible to the accused;[2] (3) the accused was the driver of the automobile in which the contraband was found;[3] (4) paraphernalia to use the contraband was found on or in view of the accused;[4] and (5) affirmative statements connect the accused to the contraband.[5] *See Gilbert v. State*, 874 S.W.2d 290, 298 (Tex. App.–Houston [1st Dist.] 1994, pet. ref'd).

In the present case, neither party disputes that possession of less than one gram of cocaine is a lesser included offense of possession of more than four grams and less than 200 grams of cocaine with intent to deliver. Thus, the first prong of the test to determine whether a lesser included offense instruction is required has been met. *See Skinner*, 956 S.W.2d at 543.

Under the second prong, we review whether some evidence exists in the record that appellant was only guilty of knowingly or intentionally possessing less than one gram of cocaine. Officer Merrill, one of the arresting officers, testified that after he observed the cocaine on the pocket knife, he gave appellant his *Miranda*[6] warnings. After receiving the warnings, appellant stated that he knew the cocaine was in the car, that it was not his but belonged to Boyd, and that he had helped Boyd cut up the cocaine with his pocketknife.

Boyd testified that all of the cocaine in the car belonged to him and that appellant did not know anything about it.[7] Boyd stated that he had found the pocket knife by the radio and used it to cut the cookie of cocaine while appellant was in a house making a phone call. Before appellant returned to the

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1 *See Guiton v. State*, 742 S.W.2d 5, 8 (Tex. Crim. App. 1987).

2 *See Guiton*, 742 S.W.2d at 8.

3 *See Guiton*, 742 S.W.2d at 8.

4 *See Lewis v. State*, 664 S.W.2d 345, 349 (Tex. Crim. App. 1984).

5 *See Moulden v. State*, 576 S.W.2d 817, 820 (Tex. Crim. App. 1978).

6 *See Miranda v. Arizona*, 384 U.S. 436 (1966).

7 Conversely, at the time of the arrest, Boyd denied knowing that the cocaine was in the car.

car, Boyd threw the knife back down on the floor and, as far as he knew, it was still there when the police stopped the car.

Based on this evidence, a rational trier of fact could have determined either that appellant did not knowingly or intentionally possess *any* of the cocaine; or that appellant knowingly or intentionally possessed *all* of the cocaine.[8] However, there is no evidence in the record that if appellant was guilty, he was guilty only of possessing less than one gram of cocaine. Because appellant presented evidence that he committed no offense, and because there is no evidence showing that he is guilty of only the lesser included offense, appellant failed to meet the second prong of the test, and a charge on the lesser included offense was not required. Therefore, appellant's first point of error is overruled.

Ineffective Assistance

Appellant's second point of error argues that he received ineffective assistance of counsel during the guilt/innocence phase of trial because his attorney failed to object to the officer's testimony regarding appellant's oral statement that he helped cut the cocaine.[9]

To demonstrate ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and prejudiced the defense. *See Strickland v. Washington*, 466 U.S. 668, 687, 692 (1984); *Busby v. State*, 990 S.W.2d 263, 268 (Tex. Crim. App. 1999).[10] To make this showing, a defendant must overcome a strong presumption that the challenged action was sound trial strategy. *See Strickland*, 466 U.S. at 689; *Busby*, 990 S.W.2d at 268-69. Ordinarily, that

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8 The jury was authorized by the charge to find appellant guilty of possession as a principal actor or as a party to possession of the cocaine.

9 No oral statement of an accused made as a result of custodial interrogation is admissible against the accused in a criminal proceeding unless an electronic recording is made of the statement. *See* TEX. CODE CRIM. PROC. ANN. art. 38.22, § 3(a) (Vernon Supp. 1999). Merrill testified at trial without objection that, after appellant was placed under custodial arrest, he made an oral statement that he knew about the cocaine in the car. Among other things, appellant's counsel argued in closing argument that appellant was not guilty because he did not know the drugs were in the car.

10 The Texas Constitution affords no greater right to effective assistance of counsel than that provided by *Strickland*. *See Hernandez v. State*, 726 S.W.2d 53, 56 (Tex. Crim. App. 1986).

presumption cannot be overcome without evidence in the record of the attorney's reasons for his actions. *See Busby*, 990 S.W.2d at 269.[11]

Because the record in this case is silent as to why appellant's trial counsel failed to object to the admission of this oral statement, appellant has not overcome the presumption that his counsel's action was sound trial strategy. Because his second point of error thus fails to satisfy the first prong of the *Strickland* test, it is overruled, and the judgment of the trial court is affirmed.

/s/ Richard H. Edelman
Justice

Judgment rendered and Opinion filed February 17, 2000.

Panel consists of Justices Hudson, Edelman, and Wittig.

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[11] *See also Jackson v. State*, 877 S.W.2d 768,771 (Tex. Crim. App. 1994)(holding that the court was unable to conclude that counsel's performance was deficient due to the lack of evidence in the record regarding counsel's reasons for not challenging or striking a venire member); *Davis v. State*, 930 S.W.2d 765,769 (Tex. App.—Houston [1st Dist.] 1996, pet. ref"d)(stating that appellant failed to satisfy the first prong of *Strickland* because the court could not meaningfully address counsel's reasons for not filing a motion to suppress or the basis for a specific objection without testimony from the trial counsel).

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CONCURRING AND DISSENTING OPINION

The principle issue presented, is whether the trial court and the court of appeals should deny the right of an accused to a lesser included charge on the basis of one witness's credibility. Because this answer is obvious, I must dissent and briefly write on the lesser included issue. While the majority correctly recites the standard of review, it fails to properly apply the standard. I concur on the effectiveness of counsel issue.

Appellant properly requested a charge on the lesser included offense of possession of less than one gram of cocaine. The request was refused by the trial court apparently because he observed "all you got is this admitted liar and conviction." The government argues with clever syllogistic sophistry which is then adopted by the majority without critical analysis.

The false syllogism is based on the testimony of Boyd. The argument starts that co-indicted and convicted Boyd said the cocaine was his. Boyd further avers that appellant knew nothing about it–even that Boyd, not appellant, used the knife found on appellant to cut the cocaine. From this the government and majority conclude either appellant knowingly possessed all the cocaine or none of the cocaine. Hence, there is no evidence if appellant committed an offense he is guilty of only the lesser offense. As pointed out by appellant, this is a false premise initiated by the trial judge, promoted by the government and now adopted by the majority.

The legal issue is whether there is some evidence directly germane to a lesser included offense for the fact finder to consider. *See Rousseau v. State,* 855 S.W.2d. 666 (Tex. Crim. App.) *cert. denied,* 114 S.Ct. 313 (1993). And as the majority notes, this evidence would permit a jury rationally to find that if the defendant is guilty, he is guilty only of the lesser offense. *See Moore, supra*. We are in accord on the applicable principles of law. Only the actual facts and their analysis separate our opinions.

There is much more proof requiring the lesser charge than is addressed by the government's argument adopted by the majority. First, I note there is no requirement for the fact finder to believe all, any, or the majority of Boyd's–or any other witnesses'-- testimony. *Brown v. State,* 906 S.W.2d 565,566 (Tex. App.–Houston [14th Dist.] 1995) *aff'd,* 955 S.W.2d 276 (Tex. Crim. App. 1997) (holding defendant entitled to defensive instruction regardless of whether it is strong, feeble, unimpeached and even if trial court does not believe it). Yet the government argues a false "all or nothing" notion based upon the credibility of Boyd. If you believe Boyd's testimony, then appellant had nothing to do with the cocaine including that found on the knife. If you disbelieve (all of) Boyd's testimony, then appellant jointly possessed all the cocaine and there is no proper lesser included offense. If that were all the evidence, the

argument might have some merit. Then the trial court would also have been correct but not for its erroneous "credibility" observation.

Let's look at some of the physical and testimonial evidence overlooked by the majority's own affirmative links analysis:

1. The only visible cocaine was seen by officers on the passenger side, not the driver's side. (None was seen on the driver's side.) (Officer and physical evidence.)

2. While Appellant was the driver of the vehicle, significantly, the owner of the vehicle was in the back seat. (Officer and Boyd.)

3. Boyd reached for the cocaine on the passenger floorboard when stopped by police.(Officer and physical evidence) Appellant did not ever demonstrate any knowing possession of this cocaine.(Officer.)

4. Appellant told police the cocaine found in the car was not his.(Officer and appellant.)

5. Most of the cocaine was hidden from appellant in two boxes secreted in the console–the critical amounts necessary for the greater charge.(Officer, physical evidence and chemist.)

6. Appellant told police the cocaine belonged to Boyd, not him. (Officer and appellant.)

7. Appellant admitted cutting the cocaine with the pocket knife he handed to police.(Officer and appellant.)

8. The pocket knife had a trace of cocaine, less than one gram thus admitting to the lesser charge and at the same time negating the greater charge. (Officer, chemist and appellant.)

9. Boyd testified appellant had no idea about the cocaine in the car. (Boyd)

10. Boyd at first denied then later admitted ownership and possession the cocaine. (Boyd and Officer.)

It should at once be obvious there are more than two possible scenarios from the evidence, not simply that presented by the equivocal Boyd testimony. Submission of the lesser charge is thus required by multiple sources of evidence: police testimony, appellant's statements to police, the chemist, part of Boyd's testimony, as well as the undisputed physical evidence. While the analysis of the majority may suffice for a legal sufficiency challenge, it simply fails to address the many factors that demand the lesser included charge. Unquestionably, a rational jury could have found appellant guilty of only the lesser charge.

In determining whether to submit a lesser charge, evidence from *any* source must be considered. *See Saunders v. State*, 840 S.W.2d. 390, 391 (Tex. Crim. App. 1992). We are specifically charged not to consider *credibility* and whether the evidence *conflicts* with other evidence. *Id; see also Thomas*, 699 S.W.2d. at 849; *Jones v. State* 900 S.W.2d 103, 105 (Tex. App.–Houston [14th Dist.] 1995, no pet.); *Brown v. State*, 906 S.W.2d 565 (Tex. App.–Houston [14th Dist.] 1995).[1] Thus if any evidence, regardless of source or strength, raises the issue that appellant is guilty only of the lesser charge, it must be given.

Appellant incurred substantial harm and was deprived of a fair trial. The evidence more than justified a jury finding of possession less than a gram. Hence he was convicted of a first degree felony rather than the possibility of a state jail felony. Appellant was sentenced to five years rather than the possibility of 180 days to two years. TEX. PEN. CODE ANN. §§ 12.32 & 12.35. Appellant was given at least 3 years more than the lesser offence would have allowed. Also appellant was subjected to a possible penalty of up to life imprisonment. The harm is further evident by the fact that the appellant received the minimum sentence allowable under a first degree felony. I would reverse and remand for a new trial.

/s/ Don Wittig
Justice

[1] Hudson, J., concurred in the result.

Judgment rendered and Opinion filed February 17, 2000.

Panel consists of Justices Hudson, Edelman, and Wittig.

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