Affirmed and Opinion filed March 8, 2001.

In The

Fourteenth Court of Appeals

NO. 14-98-01232-CR

ALEX BROWN, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 230th District Court
Harris County, Texas
Trial Court Cause No. 768,419

O P I N I O N

A jury found appellant, Alex Brown, guilty of possession of at least 400 grams of cocaine with intent to deliver, and the trial court assessed punishment at twenty-five years' imprisonment. Brown appeals in three issues, contending that the trial court erred in failing to charge the jury on a lesser included offense, in failing to grant a mistrial for improper jury argument, and in admitting the prior consistent statement of a witness. We affirm his conviction.

BACKGROUND

Brown, his pregnant girlfriend, and a friend drove from Mississippi to Houston. The girlfriend, Ranada Dixon, stayed in their hotel room in Houston for two days while Brown and his other friend left for extended periods. When he returned to the hotel room, Brown told Dixon that she was going to fly back to Mississippi with drugs strapped to her body. When she protested, he threatened to leave her in Houston without money. Then, using plastic wrap, he helped to strap a package to her body. Brown then gave her money for a taxi ride to the airport and an airplane ticket.

At the airport, police stopped Dixon and found the package strapped to her. It was covered in duct tape and contained 500 grams of cocaine. After her arrest and statement to them, the police arrested Brown and his friend when they left the hotel in a car. In a search of the car, police found duct tape and plastic wrap in Brown's bag in the trunk.

LESSER INCLUDED OFFENSE

In his first issue, Brown contends that the trial court erred in failing to charge the jury on the lesser included offense of mere possession of the cocaine. To determine whether a charge on a lesser included offense is required, we apply a two-prong test. *Rousseau v. State*, 855 S.W.2d 666, 673 (Tex. Crim. App. 1993). First, the lesser included offense must be included within the proof necessary to establish the offense charged. *Id.* Our analysis of whether an offense is a lesser included offense must be made on a case-by-case basis. *Bartholomew v. State*, 871 S.W.2d 210, 212 (Tex. Crim. App. 1994). Second, some evidence must exist 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. *Rousseau*, 855 S.W.2d at 673. If there is evidence from any source that negates or refutes the element establishing the greater offense, or if the evidence is so weak that it is subject to more than one reasonable inference regarding the aggravating element, the jury should be charged on the lesser

included offense. *Robertson v. State*, 871 S.W.2d 701, 706 (Tex. Crim. App. 1993). Regardless of the strength or weakness of the evidence or whether it is contradicted, if there is any evidence that would permit a jury to find that a defendant is guilty only of the lesser included offense, the court should charge the jury on the lesser offense. *Saunders v. State*, 840 S.W.2d 390, 391 (Tex. Crim. App. 1992).

In this case, Brown requested a charge on mere possession, but the trial court denied this request. The State does not dispute that possession is a lesser included offense of possession with intent to deliver. Thus, the question before this court revolves around the second prong: whether any evidence exists from which a jury could rationally determine that Brown was guilty only of possession of cocaine. Brown argues that some evidence showed his girlfriend was smuggling the drugs on her own. However, the only place in the record that such a theory was advanced was outside the presence of the jury. There is no evidence before the jury that suggests his girlfriend acted alone or that Brown merely possessed the drugs without the intent to deliver them. Accordingly, we overrule Brown's first issue.

IMPROPER ARGUMENT

In his second issue, Brown contends that the trial court erred in failing to grant a mistrial after the State made an improper jury argument. The general areas of proper jury argument are (1) summation of the evidence, (2) reasonable deductions from the evidence, (3) answer to the argument of opposing counsel, and (4) pleas for law enforcement. *Wilson v. State*, 938 S.W.2d 57, 59 (Tex. Crim. App. 1996). If the argument exceeds the permissible bounds of the above areas, no reversible error occurs unless the argument violates a statute, injects new facts harmful to the accused, or is manifestly improper, harmful, and prejudicial to the accused's rights. *Id.* In determining whether comments by the prosecutor constitute reversible error, the argument is viewed in light of the facts adduced at trial and in the context of the entire argument. *McGee v. State*, 774 S.W.2d 229, 239 (Tex. Crim. App. 1989).

During its closing argument, the State pointed out that Brown had the trial court swear in a friend, the third person on the trip from Mississippi, but had failed to call him as a witness. The State argued that if that friend's version of events contradicted the testimony of Brown's girlfriend, Brown would have called him as a witness "in a heartbeat." Brown objected to speculation. The trial court sustained the objection and instructed the jury to disregard the argument, but denied a mistrial. Assuming the argument was improper, an instruction to disregard improper jury argument is generally sufficient to cure error. *Dinkins v. State*, 894 S.W.2d 330, 357 (Tex. Crim. App. 1995). After reviewing the record and argument, we agree with the State that the instruction cured any harm in this particular case. *See Ransom v. State*, 920 S.W.2d 288, 303 (Tex. Crim. App. 1996). Accordingly, we overrule issue two.

PRIOR CONSISTENT STATEMENT

In his final issue, Brown argues that the trial court erred in admitting Ranada Dixon's written confession to the police as a prior consistent statement. Under the Texas Rules of Evidence, a witness's prior consistent statement is inadmissible except to rebut a charge of recent fabrication, improper influence, or motive. TEX. R. EVID. 613(c) & 801(e)(1)(B). Further, to be admissible, the prior statement must have been made before the motive to fabricate arose. *Dowthitt v. State*, 931 S.W.2d 244, 263 (Tex. Crim. App. 1996).

In cross-examination of Dixon, Brown's attorney questioned her about the agreement she recently made with the State. Cross-examination revealed that the State first approached her to make a deal a week after her baby was born. Instead of receiving the minimum mandatory imprisonment of fifteen years for possession with intent to deliver, in exchange for her testimony, the State would recommend ten years' probation to the trial court. In light of the implication of recent fabrication and motive in this cross-examination, it was proper to admit her earlier statement to the police, which was made while she was detained at the airport. *Id.*

Nonetheless, Brown contends that Dixon's motive to fabricate her story arose when she was caught by police at the airport. He argues that because she knew she was one month pregnant at that time, only by cooperating with police could she stay out of jail and give birth. The Texas Court of Criminal Appeals addressed such an argument in *Dowthitt*. While a motive to fabricate may have also arisen before the witness's plea bargain, it is unnecessary for Rule 801(e)(1)(B) that a prior consistent statement be made before all motives to fabricate arose. *Id.* at 264. Instead, the "rule requires merely that the witness's prior consistent statement be offered 'to rebut an express or implied charge against him of recent fabrication or improper influence or motive.'" Because Brown's cross-examination about Dixon's deal with the State implied recent fabrication and improper motive, Dixon's prior consistent statement was properly admitted. Thus, we overrule point of error three.

Having overruled Brown's three issues, we affirm the trial court's judgment.

/s/ D. Camille Hutson-Dunn
Justice

Judgment rendered and Opinion filed March 8, 2001.

Panel consists of Justices Draughn, Amidei, and Hutson-Dunn.*

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

* Senior Justice Joe L. Draughn, Former Justice Maurice E. Amidei, and Senior Justice D. Camille Hutson-Dunn sitting by assignment.