Affirmed and Substitute Opinion filed June 1, 2000.

In The

Fourteenth Court of Appeals

NO. 14-99-00538-CR

JAMES EDWARD LEWIS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 209th District Court
Harris County, Texas
Trial Court Cause No. 792,577

O P I N I O N

Appellant was charged by indictment with the offense of delivery of a controlled substance, namely cocaine, weighing more than 200 but less than 400 grams. A jury convicted appellant of the charged offense and assessed punishment at 50 years confinement in the Texas Department of Criminal Justice--Institutional Division and a fine of $2,500.00. Appellant raises two points of error. We affirm.

I. Factual Sufficiency

A. Standard of Review

The first point of error contends the evidence is factually insufficient. When we address such a contention we employ one of the two factual sufficiency formulations recognized in *Johnson v. State*, ___ S.W.2d ___ (Tex. Crim. App. 2000). In cases, such as this, where the appellant attacks the factual sufficiency of an adverse finding on an issue to which he did not bear the burden of proof, the appellant must demonstrate there is insufficient evidence to support the adverse finding. *Id*. Under a factual sufficiency challenge, the evidence is viewed without the prism of "in the light most favorable to the prosecution" but rather "in a neutral light, favoring neither party." *Id*. A reversal is necessary only if the evidence standing alone is so weak as to be clearly wrong and manifestly unjust. *Id*. (Internal quotations removed). The *Johnson* Court reaffirmed the requirement that in conducting a factual sufficiency review the appellate court must employ appropriate deference to avoid substituting its judgment for that of the fact finder. To ensure this level of deference the court of appeals, before ordering a reversal, should provide a detailed explanation supporting its finding of factual insufficiency by clearly stating why the fact finder's finding is insufficient and the court should state in what regard the evidence is so weak as to be clearly wrong and manifestly unjust. *Id*.

B. Factual Summary

Appellant arrived at the home of Kimberly Smith on September 9, 1998. The purpose of appellant's visit was to supply Smith with an amount of cocaine that Smith could re-sell. Unbeknownst to appellant, Smith was working as a paid police informant and was wearing a recording device. Additionally, Smith's home was under surveillance.

Appellant entered the home holding a baggie, which contained a substance later determined to be cocaine. While in the home, appellant delivered the cocaine to Smith at which time Smith stated that appellant had just handed her the "cheese," a slang term for crack cocaine. This term was heard by the surveillants. Smith placed the cocaine in a pouch.

Appellant and Smith, with the cocaine in her possession, left the home, entered appellant's vehicle and drove to the I-10 Cabaret, a predetermined location where Smith had agreed to take appellant

following the transfer of the cocaine. While in the car, Smith and appellant discussed the weight of the cocaine when it was transferred from powder to crack cocaine. When they arrive at the cabaret, Smith exited, leaving the cocaine in the back seat of appellant's vehicle. Smith entered the cabaret and was handcuffed. Appellant was arrested in the parking lot. The cocaine was seized and determined by the Houston Police Department Crime Lab to weigh approximately 239 grams. Smith was paid $650.00 for her participation in this case.

C. Analysis

Appellant's factual sufficiency challenge rests entirely on the credibility of Smith. Appellant contends Smith was unworthy of belief and, therefore, appellant's conviction is manifestly unjust.[1]

Smith had a long and checkered past; a past fully exposed to the jury. During the direct and cross-examination, the jury learned Smith had either been convicted of, or arrested for, possession of a controlled substance (1995), theft of cable services (1995), delivery of a controlled substance (1997), delivery of a controlled substance (1998), and theft (1999). At the time of her testimony, Smith had received yet another conviction for delivery of a controlled substance and was awaiting transfer to begin serving a six year sentence in the Texas Department of Criminal Justice—Institutional Division. Additionally, Smith testified she had sold drugs from her home on numerous occasions. Smith candidly admitted to being both a liar and a thief.

We are mindful that in a factual sufficiency review, the appellate court must be appropriately deferential to avoid substituting its judgment for the fact finder's. *See Johnson, supra, Santellan v. State*, 939 S.W.2d 155, 164 (Tex. Crim. App. 1997); *Clewis*, 922 S.W.2d at 133. This level of deference ensures that the appellate court will not substantially intrude upon the jury's role as the sole judge of the weight and credibility of witness testimony. *See Jones*, 944 S.W.2d 642, 648 (Tex. Crim. App. 1996). While appellant recognizes our deferential role, he nevertheless asks us to "compare the weight of

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[1] To this end, appellant argues: "The only evidence appellant even touched the controlled substance was from a convicted drug dealer and thief; someone who would say or 'would do anything to keep from going to the penitentiary.'" "Here there is no credible evidence to establish that appellant ever possessed the drugs."; and "Smith's testimony is simply incredible and unworthy of belief."

the evidence tending to support the verdict with the weight of the evidence tending not to support the verdict." We read appellant's brief as asking us to reassess Smith's credibility and to essentially hold, as a matter of fact, that she is not credible.

While the *Johnson* formulation permits some credibility assessment, that assessment is only appropriate where the appellate record clearly reveals a different result is necessary. Here the record does not offer such a revelation. The testimony of Smith was corroborated to some extent by the recording of her conversations with appellant. On this recording, Smith used the word "cheese," which she stated was slang for crack cocaine. The recording also contains conversation of how crack cocaine is produced. Further corroboration was the cocaine recovered from the back seat of appellant's vehicle, approximately 239 grams.

We are permitted to disagree with the fact finder's verdict only when the record clearly indicates such a step is necessary to arrest the occurrence of a manifest injustice. *Id*. Such a step is not necessary in this case when due deference is afforded the jury's determination of Smith's credibility and the appellate record reflects independent corroboration of her testimony. For these reasons, we do not find the evidence so weak as to be clearly wrong and manifestly unjust. Accordingly, we hold the evidence is factually sufficient to sustain the jury's verdict. Appellant's first point of error is overruled.

II. Impeachment

The second point of error contends the trial court erred in not admitting into evidence a tape, which would have impeached the State's main witness, Smith.

A. Factual Summary

After the State rested its case-in-chief and outside the presence of the jury, appellant played a tape for the court. Following the playing of the tape, appellant called Joyce Duggar as a witness. Duggar testified that she met with Smith regarding the instant case and recorded their conversation. Appellant's attorney argued that, during Smith's conversation with Duggar, Smith admitted that she obtained the cocaine for the transaction with appellant from her brother instead of from appellant. Appellant attempted to introduce the tape as a prior inconsistent statement.

During appellant's cross-examination of Smith, the following exchange occurred:

Q. Did you ever talk to anybody else about this incident?

A. What incident?

Q. About what had happened, other than the DA's office and the Police Department.

A. Are you talking about this case with [appellant].

Q. Yes.

A. No, I have not.

Q. Did you ever talk to anybody about it with a story that's different than what you're testifying to right now?

A. No, I have not.

Q. Do you remember a woman named Joyce?

A. No, I don't.

Q. Do you remember talking to a woman named Joyce about it?

A. No, I do not.

B. Analysis

This issue is governed by Texas Rule of Evidence 613(a), which provides:

Examining Witness Concerning Prior Inconsistent Statement. In examining a witness concerning a prior inconsistent statement made by the witness, whether oral or written, and before further cross-examination concerning, or extrinsic evidence of, such statement may be allowed, the witness must be told the contents of such statement and the time and place and the person to whom it was made, and must be afforded an opportunity to explain or deny such statement. If written, the writing need not be shown to the witness at that time,

> but on request the same shall be shown to opposing counsel. If the witness unequivocally admits having made such statement, extrinsic evidence of same shall not be admitted. This provision does not apply to admissions of a party-opponent as defined in Rule 801(e)(2).

The State argues appellant failed to lay the predicate for impeachment. To lay a proper predicate, an attorney must ask the witness if he made the contradictory statement at a certain place and time and to a certain person. *See Haynes v. State*, 627 S.W.2d 710, 712 (Tex. Crim. App. 1982). The State argues appellant did not tell Smith of the contents of the statement, did not provide the time and place, and did not give Smith an opportunity to explain or deny the statement. In response to the State's argument, appellant refers us to *McGary v. State*, 750 S.W.2d 782, 786 (Tex. Crim. App. 1988), which dealt with the improper admission of a prior inconsistent statement. The *McGary* court reversed, holding the statement was not admissible because the witness had admitted making the statement. Consequently, *McGary* is inapposite to the case at bar.

We are persuaded by the reasoning in *Fields v. State*, 966 S.W.2d 736 (Tex. App.—San Antonio 1998), *rev'd on other grounds*, 1 S.W.3d 687 (Tex. Crim. App. 1999), where the attorney twice asked the witness "if he had ever told a different story about the alleged robbery and shooting incident." *Id.* at 740. The *Fields* court held the proper predicate had not been laid. Specifically, the court stated:

> Here, the two questions suggesting a prior inconsistent statement did not give [the witness] enough information to explain, deny, or admit his prior statements. Asking [the witness] if he had ever said anything different to anyone at any time left [the witness] in the dark as to what the attorney might be referring to. Even the most forthcoming witness might not be able to adequately respond to such a question. Therefore, we hold that a proper predicate was not laid for the introduction of extrinsic evidence to prove prior inconsistent statements.

Id. at 741.

Similarly, we hold appellant did not establish the predicate for the admission of the tape as extrinsic evidence for impeachment. The second point of error is overruled.

The judgment of the trial court is affirmed.

/s/ Charles F. Baird
Justice

Judgment rendered and Opinion filed June 1, 2000.

Panel consists of Chief Justice Murphy and Justices Wittig and Baird.[2]

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

[2] Former Judge Charles F. Baird sitting by assignment.