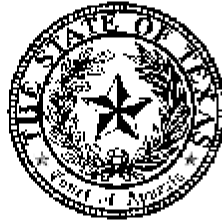
Affirmed and Opinion filed June 8, 2000.



In The

Fourteenth Court of Appeals

NO. 14-98-00308-CR

LORRIN W. SCRANTON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 155th District Court
Austin County, Texas
Trial Court Cause No. 97R-044

O P I N I O N

A jury found Appellant Lorrin W. Scranton guilty of two counts of delivery of a controlled substance, and the trial court sentenced him to one year's imprisonment in a state jail, probated for five years. Appellant contends in four points of error that (1) there was legally insufficient evidence of "actual transfer" of a controlled substance; (2) there was insufficient evidence that the substance was cocaine; (3) the jury charge was defective; and (4) there was insufficient evidence of intent.

STANDARD OF REVIEW

We will first address Appellant's three points of error challenging the sufficiency of the evidence. When reviewing the sufficiency of the evidence, we look at the evidence in the light most favorable to the verdict and determine whether any rational trier of fact could have found the essential elements of the crime

beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed.2d 560 (1979); *Mason v. State*, 905 S.W.2d 570, 574 (Tex. Crim. App. 1995); *Roberts v. State*, 987 S.W.2d 160, 163 (Tex. App.–Houston [14th Dist.] 1999, pet ref'd). The jury is the exclusive judge of the credibility of witnesses and of the weight to be given their testimony. *See Jones v. State*, 944 S.W.2d 642, 647 (Tex. Crim. App. 1996). Likewise, reconciliation of conflicts in the evidence is within the exclusive province of the jury. *See id.* This standard of review is the same for both direct and circumstantial evidence cases. *See Chambers v. State*, 711 S.W.2d 240, 245 (Tex. Crim. App. 1986).

EVIDENCE OF "ACTUAL TRANSFER"

In his first point of error, Appellant challenges the legal sufficiency of the evidence that he actually transferred cocaine. Under Texas law, there are three ways to deliver a controlled substance: actual transfer, constructive transfer, or an offer to sell. *See* TEX. HEALTH & SAFETY CODE ANN. § 481.002(8) (Vernon 1992). An "actual transfer" occurs when a seller "transfers actual possession and control of a controlled substance to another person." *Thomas v. State*, 832 S.W.2d 47, 50 (Tex. Crim. App. 1992); *Stolz v. State*, 962 S.W.2d 81, 82 (Tex. App.–Houston [14th Dist.] 1997, pet. ref'd).

The State offered the testimony of undercover narcotics officer Jason L. Scales. Officer Scales testified that when he went to Appellant's home and asked to buy a "rock," Appellant physically handed him a rock of crack cocaine in exchange for twenty dollars. Officer Scales also testified that an hour after the first purchase, he bought a second rock of crack cocaine from Appellant. Again, Appellant personally handed the cocaine to the undercover officer. Appellant contends that this testimony is insufficient unless it is corroborated by another witness or by such evidence as pictures, videotape, or audio tape. Such a contention is incorrect. The undercover officer's testimony regarding the drug transaction was legally sufficient evidence of actual transfer. Accordingly, we overrule point of error one.

EVIDENCE THAT SUBSTANCE WAS COCAINE

In his second point of error, Appellant argues that the evidence is insufficient to show that the substance he delivered was cocaine. Citing *Cawthon v. State*, 849 S.W.2d 346, 348-49 (Tex. Crim. App. 1992), he argues that when adulterants and dilutants are alleged to have been added to a substance, the State must prove that the substance has not been altered to such an extent that it becomes another legal

chemical substance. However, at trial, Appellant stipulated that a chemist, if called as a witness, would testify that State's Exhibits 1 and 2 each contained cocaine in an amount of less than one gram. Appellant and his trial counsel signed the stipulation, and the trial court admitted it into evidence.

Although Appellant now claims that the existence of an illegal substance cannot be agreed upon by stipulation, he offers no case law to support his argument. To the contrary, parties often stipulate to evidence. *See, e.g., Oler v. State*, 998 S.W.2d 363, 366 (Tex. App.–Dallas 1999, pet. ref'd, untimely filed); *McClendon v. State*, 994 S.W.2d 706, 707 (Tex. App.–Houston [14th Dist.] 1999), *rev'd*, 13 S.W.3d 406 (Tex. (Tex. Crim. App. 2000). Thus, the jury could properly consider the stipulation, and it is legally sufficient evidence that each substance handed to the undercover officer was cocaine weighing less than one gram. Accordingly, we overrule point of error two.

EVIDENCE OF INTENT

In his fourth point of error, Appellant contends that the State failed to offer sufficient evidence that he had the requisite culpable mental state for delivery of a controlled substance. For delivery of cocaine in an amount less than one gram, a defendant must knowingly or intentionally deliver the substance. *See* TEX. HEALTH & SAFETY CODE ANN. § 481.112(a). The intent to deliver narcotics can be inferred from circumstantial evidence. *See Williams v. State*, 902 S.W.2d 505, 507 (Tex. App.–Houston [1st Dist.] 1994, pet. ref'd).

The evidence shows that when Officer Scales first visited Appellant's home, he told Appellant that he wanted to get a ten-dollar-rock. Appellant replied that he only had "twenties." Officer Scales testified that a rock is a piece of crack cocaine, and such cocaine is usually sold in amounts worth ten, twenty, thirty, forty, or fifty dollars. Officer Scales also testified that Appellant invited him into the house, where Appellant retrieved a matchbox with four or five rocks inside. Officer Scales testified that he told Appellant the rocks were small for twenty dollars. Appellant replied that "nobody else in town has anything right now." Officer Scales then testified that Appellant handed him the rock, and he gave twenty dollars to Appellant.

The second time that Officer Scales bought crack cocaine from Appellant, about an hour after the first sale, Appellant was in front of his home in his truck. When Officer Scales asked to buy another rock of crack, Appellant told him that there was only one remaining. Appellant retrieved his matchbox from the

house, returned to his driveway, handed Officer Scales the rock of crack cocaine, and took Officer Scales's twenty dollars. Officer Scales's testimony is ample proof of Appellant's intent to deliver. *See Clark v. State*, 777 S.W.2d 723, 724 (Tex. App.–Beaumont 1989, no pet.). Because there is legally sufficient evidence of Appellant's mental state, we overrule point of error four.

DEFECTIVE JURY CHARGE

In his third point of error, Appellant contends that the jury charge was defective because it asked the jury to convict him on a charge not alleged in the indictment. However, at trial, Appellant did not object to the jury charge as required to preserve error. *See* TEX. CODE CRIM. PROC. ANN. arts. 36.14-36.19 (Vernon 1981 & Supp. 2000).

Because Appellant did not object at trial to error in the court's charge , we must next decide whether the error was so egregious and created such harm that Appellant did not have a fair and impartial trial–in short, that "egregious harm" has occurred. *See Abdnor v. State*, 871 S.W.2d 726, 732 (Tex. Crim. App. 1994). In making this determination, "the actual degree of harm must be assayed in light of the entire jury charge, the state of the evidence, including the contested issues and weight of probative evidence, the argument of counsel, and any other relevant information revealed by the record of the trial as a whole." *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985). The purpose of this review is to illuminate the actual, not just theoretical, harm to the accused. *See id.* at 174.

The jury charge in this case tracked the language of the indictment, and the indictment itself meets the requirements of article 21.02 of the Code of Criminal Procedure. Further, the indictment alleges offenses as set forth in section 481.112 of the Health and Safety Code. This section makes delivery of cocaine a state jail felony if the cocaine has an aggregate weight of less than one gram, including adulterants or dilutants. *Id.* § 481.112(b). Thus, in light of the indictment, jury charge, and entire record of trial, we find no error in the charge that created egregious harm. Accordingly, we overrule point of error three.

Lastly, we note that in one of his points of error, Appellant argues that the State, through Officer Scales, illegally entrapped him. Should this be construed as a separate point of error under a very liberal reading of Appellant's brief, we find that he has waived error. Entrapment is a defense to a crime. *See* TEX. PEN. CODE ANN. § 8.06 (Vernon 1994). Evidence of entrapment must be presented at trial and the issue must be submitted to the jury. *See* TEX. PEN. CODE ANN. § 2.03. Appellant did not request

a jury instruction on the issue, and he cannot raise entrapment for the first time on appeal. *See* TEX. R. APP. P. 33.1.

Having overruled all four of Appellant's points of error, we affirm the judgment of the trial court.

/s/ Ross A. Sears
Justice

Judgment rendered and Opinion filed June 8, 2000.

Panel consists of Justices Sears, Cannon, and Hutson-Dunn.*

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

Vote to publish:

RAS: Yes ___ No ___

WBC: Yes ___ No ___

DCD: Yes ___ No ___

Retain for more than 10 years?

RAS: Yes ___ No ___

WBC: Yes ___ No ___

DCD: Yes ___ No ___

* Senior Justices Ross A. Sears, Bill Cannon, and D. Camille Hutson-Dunn sitting by assignment.