**Affirmed and Opinion filed June 8, 2000.**

**In The**

# Fourteenth Court of Appeals

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**NO. 14-98-00857-CR**

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**KEVIN DEWAYNE LAVIGNE, Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

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**On Appeal from the 180th District Court**
**Harris County, Texas**
**Trial Court Cause No. 760,469**

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## O P I N I O N

A jury found Appellant Kevin Dewayne Lavigne guilty of tampering with physical evidence, swallowing rocks of crack cocaine, and assessed punishment at forty-five years' imprisonment. Appellant brings five points of error, appealing that (1) there was legally insufficient evidence that the substance he swallowed was cocaine; (2) there was factually insufficient evidence that the substance he swallowed was cocaine; (3) there was legally insufficient evidence that he "destroyed" evidence; (4) there was factually insufficient evidence that he "destroyed" evidence; and (5) the word "investigation" in the statute forbidding tampering with evidence is unconstitutionally vague. We affirm.

## BACKGROUND

Late one evening, two Houston police officers saw Appellant and two friends walking in the street. This area was known to be used by drug dealers who stand in the street to sell drugs to persons in automobiles. The officers stopped them for violating a city ordinance that prohibits walking in the street when sidewalks are provided. When one of the officers exited the patrol car and instructed Appellant to place his hands on the hood, Appellant instead moved to the rear of the car. The second police officer then exited the patrol car and shone his flashlight on Appellant. This officer noticed that Appellant, who had previously had his right hand clenched in a fist, was now using his hand to shovel what looked like crack cocaine into his mouth. Both officers ordered Appellant to spit the substance out, but he continued chewing. The officers began to struggle with him to force him to spit, and the three ended their struggle back near the patrol car's hood.

The officers bent Appellant over the hood while trying to subdue and handcuff him. At this point, Appellant reached into his pants pocket with his left hand, removed more crack-looking rocks, and shoved these in his mouth as well. When he did, a flake of white substance fell from his mouth onto the patrol car's hood. After subduing Appellant, the officers retrieved the flake from the hood. A chemist later confirmed that the flake contained 1.9 milligrams of pure cocaine.

After his arrest, Appellant was taken to a hospital emergency room for observation. At the hospital, Appellant began convulsing and fell unconscious. While hospitalized for the next seventeen days, Appellant confided to a hospital drug addiction counselor that he had swallowed a lot of cocaine to avoid arrest. This counselor also testified that Appellant's drug screening at the hospital was positive for cocaine.

## STANDARD OF REVIEW

When reviewing the legal 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).

When reviewing the factual sufficiency of the evidence, we view all the evidence without the prism of "in the light most favorable to the prosecution" and set aside the verdict only if it is "so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust." *Clewis v. State*, 922 S.W.2d 126, 129 (Tex. Crim. App. 1996). Although an appellate court is authorized to disagree with the verdict, a factual sufficiency review must be appropriately deferential so as to avoid substituting our judgment for that of the jury. *See id*. at 133; *Roberts v. State*, 987 S.W.2d at 163.

**EVIDENCE OF COCAINE**

In his first and second points of error, Appellant contends that the evidence was legally and factually insufficient to prove that the substance he destroyed was cocaine. A person commits the offense of tampering with evidence if, knowing that an investigation is in progress, he alters, destroys, or conceals any thing with the intent to impair its availability as evidence. *See* TEX. PEN. CODE ANN. § 37.09(a)(1) (Vernon 1994 & Supp. 2000). The only evidence that Appellant swallowed a substance other than cocaine was the testimony of a police officer, who testified that Appellant told the jail's doctor he swallowed Tylenol-3. However, one of the arresting officers testified that he saw Appellant putting what looked like crack cocaine rocks into his mouth and chewing them. He testified that while he and his partner were wrestling with Appellant, he saw some flakes fall from Appellant's mouth onto the hood of the patrol car. The officer testified that he later watched as his partner recovered the flakes from the hood. Further, a chemist with the Houston Police Crime Laboratory testified that the substance recovered from the hood of the patrol car tested positive in five different tests as cocaine.

The evidence also showed that Appellant's urine test at the hospital indicated cocaine use within the last three days, although the test could not show the amount of cocaine in Appellant's system or whether it had been ingested. Lastly, a drug addiction counselor at the hospital testified that Appellant told him that he "swallowed large amounts of cocaine to avoid arrest."

Considering the evidence in the light most favorable to the verdict and all the evidence without such deference, we find that the evidence is legally and factually sufficient to support the jury's finding that Appellant swallowed cocaine. Accordingly, we overrule points of error one and two.

**EVIDENCE OF DESTRUCTION**

In points of error three and four, Appellant contends that there is legally and factually insufficient evidence that he "destroyed" evidence. Specifically, Appellant argues that the flake of cocaine was retrieved, not destroyed, and was used to convict him for possession of cocaine. In support of his argument, he cites *Spector v. State*, 746 S.W.2d 945 (Tex. App.–Austin 1998, pet. ref'd), in which a defendant tore a marijuana cigarette in two pieces and threw them in a ditch. The police in *Spector* recovered part of the cigarette and used it to convict the defendant of both possession of marijuana and destruction of evidence. On appeal, the court reversed the conviction for destruction of evidence, holding that something is destroyed when its evidentiary value is destroyed. *Id*. at 946. Because the marijuana recovered was sufficient to test and to convict the defendant for possession of a usable amount of marijuana, it was not destroyed. *Id*.

However, the court in *Spector* also held that "the only way evidence can be destroyed when part is recovered is when the part recovered has less evidentiary value than the whole." *Id*. The cocaine flake recovered in this case was mere residue weighing just 1.9 milligrams. The evidence shows that the portion Appellant chewed and swallowed was substantially greater. The arresting officer testified that Appellant shoveled a "handful" of crack cocaine rocks into his mouth. This officer testified that in his experience, crack rocks are the size of small dice. He also testified that Appellant removed multiple "objects" from his left pocket and swallowed these objects. Lastly, the drug addiction counselor testified that Appellant had confessed to swallowing "large amounts of cocaine."

Possession of a larger amount of cocaine has greater evidentiary value because it elevates the seriousness of the offense and the range of punishment available. Based on the weight of the residue collected, Appellant's possession conviction could only be considered a state jail felony, the lowest felony possible. *See* TEX. HEALTH & SAFETY CODE ANN. § 481.112(b) (Vernon Supp. 2000). However, possession of one to four grams of cocaine, including the weight of adulterants and dilutants, is a second

degree felony. *See id.* § 481.112(c). Possession of four to two hundred grams, including the weight of adulterants and dilutants, is a first degree felony. *See id.* § 481.112(d). Thus, when Appellant swallowed all but a minuscule amount of his crack cocaine, he deprived the State of the whole's greater evidentiary value. Because the part recovered had less evidentiary value than that destroyed, we hold that there is legally and factually sufficient evidence that Appellant "destroyed" evidence. We overrule points of error three and four.

**CONSTITUTIONALITY OF STATUTE**

In his fifth point of error, Appellant contends that section 37.09(a)(1) of the Penal Code is unconstitutionally vague because the word "investigation" is inadequately defined. Appellant argues that the due process clause to the Fourteenth Amendment of the United States Constitution and Article 1, section 19 of the Texas Constitution prohibit holding an individual "criminally responsible for conduct which he could not reasonably understand to be proscribed." *United States v. Harris*, 347 U.S. 612, 74 S. Ct. 808, 98 L. Ed.2d 989 (1954); *McCarty v. State*, 616 S.W.2d 194, 195-96 (Tex. Crim. App. 1981).

The law that Appellant claims is void reads:

> (a) A person commits an offense if, knowing that an investigation or official proceeding is pending or is in progress, he:
>
> (1) alters, destroys, or conceals any record, document, or thing with intent to impair its verity, legibility, or availability as evidence in the investigation or official proceeding.

While the word "investigation" is not defined, the mere lack of a definition does not make a statute unconstitutionally vague. *See Engelking v. State*, 750 S.W.2d 213, 215 (Tex. Crim. App. 1988). Instead, the word must be read in the context in which it is used and construed according to the rules of grammar and common usage. *See Bynum v. State*, 767 S.W.2d 769, 773 (Tex. Crim. App. 1989).

"Investigation" is defined as "the action or process of investigating: detailed examination" and "a searching inquiry; an official probe." WEBSTER'S THIRD INTERNATIONAL DICTIONARY 1189 (1993). We have previously held that the term "investigation" in section 37.09, "is not so vague as to make persons

of common intelligence guess as to its meaning." *Cuadra v. State*, 715 S.W.2d 723, 724 (Tex. App.–Houston [14th Dist.] 1986, pet. ref'd). We thus apply the statute to the context of Appellant's arrest, bearing in mind the common meaning of "investigation." *See id.*

The police officers in this case instructed Appellant to place his hands on the hood of their car when they first encountered him walking in the road. Appellant understood that this was the start of an investigation because, as he told the hospital drug addiction counselor, he began swallowing his cocaine to avoid arrest. Further, even if the police first stopped Appellant only for walking in the street, their inquiry quickly broadened when they saw the crack cocaine rocks in his right hand. An officer may make an arrest for another offense discovered during an investigation after a bona fide stop for an offense. *See Lee v. State*, 686 S.W.2d 255, 257 (Tex. App.–Houston [14th Dist.] 1985, pet. ref'd.). The officers instructed Appellant to spit out the crack rocks, thus placing him on notice that their investigation now encompassed his drug activity. Appellant ignored this instruction as well and continued to chew and swallow the cocaine. Because the word "investigation" in the statute was understood by Appellant in the context of the facts of this case, it is not unconstitutionally vague. Accordingly, we hold that the statute is not void, and we overrule point of error five. Having overruled all five 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).

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