Affirmed and Opinion filed July 27, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-99-00477-CR

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CHRISTINE GANDY a/k/a
CHRISTINE GANDY MCNICKLES, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 178TH District Court
Harris County, Texas
Trial Court Cause No. 791,220

O P I N I O N

Appellant Christine Gandy was convicted by a jury of the felony offense of possession with intent to deliver a controlled substance. After her conviction, appellant pleaded "true" to two enhancement paragraphs. Based on her plea, the trial court sentenced the appellant to twenty-five years confinement in the Texas Department of Criminal Justice, Institutional Division. In four points of error, appellant challenges her conviction claiming: (1) the evidence is factually insufficient to support a conviction; (2) the evidence is legally insufficient to support a conviction; (3) the trial court erred in denying a request for a mistrial

after the State repeatedly violated an order on a motion in limine, and (4) the trial court erred in denying appellant's motion to suppress. We affirm.

I.
Factual Background

On August 25, 1998, police in Hedwig Village stopped a vehicle driven by Royce Boutte for defective equipment. After arresting Boutte for outstanding warrants, police conducted an inventory search of Boutte's car and discovered crack cocaine in a clear plastic bag on the front seat. On the way to the station, and while under arrest, Boutte voluntarily told the police he bought the cocaine from the appellant and where she could be found. After consulting with the Harris County District Attorney's office, the arresting officer made arrangements for Boutte to take him to appellant's location. Boutte telephoned appellant and made arrangements to purchase more cocaine from her. With the police officers out of view, Boutte knocked on the door of appellant's hotel room. When appellant opened the door, she stepped away, allowing the officers with Boutte to observe cocaine inside the room.

II.
Sufficiency of the Evidence

In her first two points of error, appellant challenges the legal and factual sufficiency of her conviction. Although she does not, we will address the legal sufficiency challenge first because the factual sufficiency review begins with an assumption that the evidence is legally sufficient under the test set out in *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979); *see also Santellan v. State*, 939 S.W.2d 155, 164 (Tex.Crim.App. 1997).

A. Legal Sufficiency

In her second point of error, appellant asserts that the evidence is legally insufficient to support her conviction. In viewing a legal sufficiency challenge, we view the evidence in the light most favorable to the verdict, and ask whether any rational trier of fact could have found

beyond a reasonable doubt all of the elements of the offense. *See Jackson*, 443 U.S. at 319, 99 S.Ct. at 2789; *see also Santellan*. 939 S.W.2d at 164.

The elements of the offense with which appellant was charged are: (1) a person; (2) knowingly or intentionally possesses; (3) with intent to deliver; (4) a controlled substance listed in Penalty Group 1. *See* TEX. HEALTH & SAFETY CODE ANN. § 481.112(a) (Vernon Supp. 2000); *see also* TEX. HEALTH & SAFETY CODE ANN. § 481.102(3)(D) (cocaine is a Penalty Group 1 controlled substance). To convict, the State must show that appellant exercised care, control, and management over the contraband; and that appellant knew that what she possessed was contraband. *See Abdel-Sater v. State*, 852 S.W.2d 671, 675 (Tex. App.—Houston [14th Dist.] 1993, pet. ref'd). In a possession with intent to deliver case, intent to deliver may be proved by circumstantial evidence. *See Moss v. State*, 850 S.W.2d 788, 797 (Tex. App.—Houston [14th Dist.] 1993, pet. ref'd). Further, intent is a question of fact to be determined by the trier of fact based upon circumstantial evidence adduced at trial. *See Puente v. State*, 888 S.W.2d 521, 527 (Tex. App.—San Antonio 1994, no pet.). Intent can be inferred from the words or conduct of the accused. *See id.* Finally, the control over the contraband need not be exclusive, but can be jointly exercised by more than one person. *See McGoldrick v. State*, 682 S.W.2d 573, 578 (Tex. Crim. App. 1985).

When the accused is not in exclusive possession of the place where the contraband was found, it can not be concluded that appellant had knowledge of or control over the contraband unless there are additional independent facts and circumstances that affirmatively link appellant to the contraband. *See Cude v. State*, 716 S.W.2d 46, 47 (Tex. Crim. App. 1986). The facts and circumstances must create a reasonable inference that appellant knew of the controlled substance's existence and exercised control over it. *See Dickey v. State*, 693 S.W.2d 386, 389 (Tex. Crim. App. 1984). An independent fact, indicating appellant's knowledge and control of the contraband, exists if the contraband was in close proximity to appellant and readily accessible to her. *See Abdel-Sater*, 852 S.W.2d at 676. Also, an independent fact exists if the amount of contraband found is large enough to indicate that appellant knew of its presence.

See Hill v. State, 755 S.W.2d 197, 120 (Tex. App.—Houston [14th Dist.] 1988, pet. ref'd).

Evidence in the record indicates that appellant both knew of the presence of the cocaine and had control over it. First, the cocaine found in appellant's hotel room was located both on a night stand next to the bed, as well as in appellant's make-up container. These locations were readily accessible to appellant, and at least one witness testified the make-up container was appellant's. Second, Sergeant Pynes, the arresting officer, testified the amount of cocaine was substantial, and was, in his experience, more than someone would possess for personal use. These independent, circumstantial facts were sufficient to create a reasonable inference that the appellant knew of the cocaine's existence and exercised control over it. *See Abdel-Sater*, 852 S.W.2d at 675. Further, appellant's intent to deliver can be inferred from her previous sales of cocaine to Boutte, and from her act of opening her hotel room door to admit Boutte after receiving his telephone call in which he requested more cocaine.

Viewing this evidence in the light most favorable to the verdict, a rational trier of fact could have found beyond a reasonable doubt that the appellant possessed crack cocaine with the intent to deliver. *See Santellan*, 939 S.W.2d at 675. Therefore, the evidence was legally sufficient to convict appellant of possession of cocaine with intent to deliver. Accordingly, appellant's second point of error is overruled.

B. Factual Sufficiency

In her first point of error, appellant challenges the factual sufficiency of the evidence underlying her conviction. In reviewing a factual sufficiency challenge, the court of appeals "views all the evidence without the prism of 'in the light most favorable to the prosecution' and sets aside the verdict only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust." *See Clewis v. State*, 922 S.W.2d 126, 129 (Tex.Crim.App. 1996). An appellate court must defer to jury findings, and may find the evidence factually insufficient only where necessary to prevent manifest injustice. *See Cain v. State*, 958 S.W.2d 404, 407 (Tex. Crim. App. 1997).

In her brief, appellant argues the State did not sufficiently prove that the cocaine recovered from the hotel room belonged to her. Appellant testified in her own defense that the cocaine recovered from the hotel room was not hers; however, appellant also admitted she had been living in the hotel room for three days, had a bad drug habit, and had smoked cocaine with another adult in the hotel room the day of her arrest. Balancing this evidence with the State's evidence discussed above, we can not say the verdict was so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Therefore, the evidence was factually sufficient to convict appellant of possession of cocaine with intent to deliver. Accordingly, we overrule appellant's first point of error.

II.

Motion in Limine

In her third point of error, appellant asserts the trial court erred by failing to grant a mistrial when the State repeatedly violated the court's order on appellant's motion in limine. A motion in limine seeks to exclude objectionable matters from coming before the jury through a posed question, jury argument, or other means. *See Norman v. State*, 523 S.W.2d 669, 671 (Tex. Crim. App.1975); *see also Wade v. State*, 814 S.W.2d 763, 764 (Tex. App. —Waco 1991, no pet.)

With her motion in limine, appellant sought to preclude the State from questioning its witnesses concerning Boutte's previous purchases of cocaine from appellant. *See* TEX. R. EVID. 404(b); *see also Montgomery v. State*, 810 S.W.2d 372, 394 (Tex.Crim.App.1990) At a pretrial hearing in January 1999, the trial court granted appellant's motion. However, as the State points out, in a later, March 1999, pretrial hearing, the trial court reversed its prior ruling by denying appellant's objection to mentioning "hearsay statements [of] Mr. Boutte [concerning prior purchases of cocaine from appellant] during [the State's] opening statement or during questioning of any of the police officers." The court clarified that appellant was asking that the court "instruct the prosecutor not to mention any hearsay statement at this time," and denied the motion. Based on the court's reversal of its prior ruling, there was no

order on a motion in limine to preclude the State from questioning Boutte or any of the police officers about the prior purchases.

If *arguendo*, there were an order on a motion in limine that limited the State's questioning in this regard, the State did not violate the order with its line of questioning. The two instances cited in appellant's brief where she alleges the State violated the order were both instances of proper questioning. First, while questioning Sergeant Pynes, the State merely asked whether Boutte, "gave you a name of a person?" Pynes responded, "[y]eah. He told me Chris Gandy. He said he had purchased from her in the past as well." While the first part of this response answered the State's question, the second was not elicited, and was, therefore, non-responsive. *See Barnett v. State*, 733 S.W.2d 342, 346-47 (Tex. App. —Houston [14th Dist.] 1987, pet. ref'd) (concluding State's question was legitimately posed and witness' non-responsive answer did not constitute a State violation of the in limine order). Here, because this answer was not in response to the State's legitimately posed question, the State did not violate the any order in limine.

The second alleged violation entails similar analysis. Appellant argues the State also violated the court's order on her motion in limine when the following exchange occurred at trial:

> Q. [The State] And what was the basis for that search [of the hotel room]?
>
> A. [Sergeant Pynes] We suspected there was other narcotics she was dealing out of this room. Mr. Boutte said she –
>
> [Appellant's Attorney] Judge can we approach again?

Appellant objected that both the question and the answer violated the ruling on the motion in limine, but the court overruled the objection. Again, we hold the question posed was legitimate because it did not require that the witness answer with testimony about appellant's prior sales of cocaine to Boutte.

We hold that because the State did not violate the order on the motion in limine, the trial court did not err by refusing to grant appellant's motion for mistrial based on the alleged violation. Mistrials should be granted only when an objectionable event is so emotionally inflammatory that curative instructions are not likely to prevent the jury from being unfairly prejudiced against the defendant. *See Bauder v. State*, 921 S.W.2d 696, 698 (Tex. Crim. App.1996); *see also Janney v. State*, 938 S.W.2d 770, 772 (Tex. App.—Houston [14th Dist.] 1997, no pet.). Because curative instructions are presumed efficacious to withdraw from jury consideration almost any evidence or argument which is objectionable, trial conditions must be extreme before a mistrial is warranted. *See id.* This presumption applies even where the instruction follows a violation of a court's ruling on a motion in limine. *See id.*; *see also Lynn v. State*, 860 S.W.2d 599, 604-05 (Tex. App.—Corpus Christi 1993, pet. ref'd). Here, there was no violation of the order on the motion in limine, and the trial court instructed the jury to disregard the witness' non-responsive statements. Therefore, the trial court correctly denied appellant's motion for mistrial. Accordingly, we overrule appellant's third point of error.

IV.

Motion to Suppress

In her fourth and final point of error, appellant argues the trial court erred by denying her motion to suppress. Appellant insists the search of her hotel room was illegal, thus the narcotics and drug paraphernalia discovered there should have been suppressed. We disagree.

A police officer may arrest a party without a warrant for any offense committed within the officer's presence or view. *See* TEX. CODE CRIM. PROC. ANN. Art. 14.01(B) (Vernon 1994). The test for whether the officer had probable cause for a warrantless arrest is whether at the moment of arrest, the facts and circumstances within the officer's knowledge and of which the officer had reasonably trustworthy information were sufficient to warrant a prudent person in believing that the arrested person had committed or was committing an offense. *See Guzman v. State*, 955 S.W.2d at 90. A police officer may seize evidence in plain view if the officer has the right to be where the discovery is made and if it is immediately apparent to the

officer that the item is evidence, that is, if the officer has probable cause to associate the property with criminal activity. *See Haley v. State*, 811 S.W.2d 600, 603 (Tex.Crim.App.1991); *see also Franklin v. State*, 855 S.W.2d 114, 115 (Tex. App.—Houston [14th Dist.] 1993, no pet.). The plain view doctrine allows the officer to seize contraband. *See DeLao v. State*, 550 S.W.2d 289, 291 (Tex.Crim.App.1977); *see also Hillsman v. State*, 999 S.W.2d 157, 161 (Tex. App.—Houston [14th Dist.] 1999, no pet. h.).

Here, the record demonstrates the officers had probable cause to arrest appellant, and the search of her hotel room was lawful. First, possession of cocaine is an offense. *See* TEX. HEALTH & SAFETY CODE ANN. § 481.115(a) (Vernon Supp. 2000). Thus, when appellant opened the door to her hotel room, thereby allowing several police officers to observe rocks of crack cocaine on the night stand in plain view, the officers were entitled to believe she had committed an offense. Second, once the officers observed the cocaine from the doorway of the hotel, they could seize it because they observed it from a lawful advantage, and it was immediately apparent to all that they were looking at an illegal substance. Although appellant testified that she did not see the cocaine on the night stand, the jury was entitled to disbelieve her testimony and believe that of the arresting officers. *See Jones v. State*, 921 S.W.2d 361, 364 (Tex. App.—Houston [1st Dist.] 1996, pet. ref'd) (noting a jury, as the trier of fact, is entitled to believe all or part of the conflicting testimony proffered and introduced by either side). Because the arrest and search were lawful, the trial court correctly denied appellant's motion to suppress. Therefore, we overrule appellant's final point of error.

Accordingly, we affirm the judgment of the trial court.

/s/ John S. Anderson
Justice

Judgment rendered and Opinion filed July 27, 2000.

Panel consists of Justices Anderson, Frost, and Lee[1].

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

[1] Senior Justice Norman Lee sitting by assignment.