

Affirmed and Opinion filed July 27, 2000.



In The

Fourteenth Court of Appeals

NO. 14-99-00726-CR

KANDY MOODY, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the 185th District Court
Harris County, Texas
Trial Court Cause No. 791,865**

OPINION

Appellant, Kandy Moody, was charged with delivery of a controlled substance weighing less than one gram. After a bench trial, appellant was convicted and sentenced to one year incarceration in the Texas Department of Criminal Justice, State Jail Division. In her appeal, appellant challenges both the legal and factual sufficiency of the evidence as to her identification. We affirm.

I.

Factual Background

According to the record, on August 26, 1998, H.P.D. Officer Craig Wurdeman observed appellant walking back and forth through the parking lot of a gas station in an area of Houston known for narcotics trafficking and prostitution. Wurdeman thought appellant might be a prostitute, so he offered to give her a ride. She accepted, and according to his testimony, got into his car and introduced herself as “Kandy.” She then asked him if he “liked to party.” Understanding her question to mean did he “smoke crack cocaine,” he answered that he did. Appellant directed him to an apartment complex, took his twenty-five dollars, and returned with two rocks of crack cocaine. Wurdeman recognized appellant from a previous investigation, and believing she might be able to assist him in a larger purchase of cocaine, he gave her his pager number and asked that she call him. Appellant asked Wurdeman if she could have some of his cocaine as payment for her services, but Wurdeman said he noticed she had already taken some. Appellant became angry and got out of Wurdeman’s car. Appellant was arrested later.

On appeal, appellant challenges the sufficiency of the evidence identifying her as the person who sold the cocaine to Wurdeman. Appellant explains that another woman who resembles appellant sold the cocaine to him. Appellant asserts Wurdeman and the other officers testifying for the State mistook this other woman for appellant.

II.

Sufficiency of the Evidence

A. Legal Sufficiency

We address the legal sufficiency challenge first because the factual sufficiency review begins with the 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 Santellan v. State*, 939 S.W.2d 155, 164 (Tex. Crim. App. 1997). In her first point of error,

appellant asserts the evidence is not legally sufficient to identify her as the person who sold narcotics to an undercover police officer. In reviewing legal sufficiency, 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 309; *see also Santellan*, 939 S.W.2d at 160.

The elements of the offense of delivery of a controlled substance are (1) a person, (2) knowingly or intentionally, (3) delivers, (4) a controlled substance. *See TEX. HEALTH & SAFETY CODE ANN. § 481.112(a)* (Vernon Supp. 2000); *see also Cornejo v. State*, 871 S.W.2d 752 (Tex. App.—Houston [1st Dist.] 1993, pet. ref'd). Appellant's appeal, however, is not based upon the State's failure to prove an element of the offense, but rather, its alleged failure to identify her as the person who sold cocaine to an undercover officer. Thus, we will examine the State's evidence to see if it is legally sufficient to identify appellant as the person who sold cocaine to Wurdeman.

The State's identification evidence consisted of the testimony of three H.P.D. officers. The first officer to testify was Wurdeman, who identified appellant as the woman who sold cocaine to him on August 26, 1998. He testified that he had been conducting an ongoing investigation of narcotics trafficking in the area where he met appellant. He also testified he heard appellant's name in connection with another investigation, viewed a picture of her from the H.P.D. photo lab, and saw her when she was pointed out by another person. Thus, when she entered his car on August 26, 1998, Wurdeman recognized appellant as the suspect with whom he was familiar from the previous investigation.

The other two officers who testified for the State were conducting surveillance for Officer Wurdeman. Officer Floyd Hubbard and Officer John Siewert were sitting in a vehicle in the parking lot adjacent to the apartment complex where Officer Wurdeman took appellant. They both testified that they watched appellant enter and exit Officer Wurdeman's car, approximately 50 feet from their vehicle. Both officers also testified they were certain appellant was the person they saw on that day. Viewing this identification evidence, we hold

a reasonable trier of fact could have found, beyond a reasonable doubt, that it was appellant who sold cocaine to Officer Wurdeman. Accordingly, we overrule appellant's first point of error.

B. Factual Sufficiency

In her second point of error, appellant challenges the factual sufficiency of the evidence identifying her as the individual who sold cocaine to Officer Wurdeman. 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." *Clewis v. State*, 922 S.W.2d 126, 129 (Tex. Crim. App. 1996).

Appellant offered the testimony of three witnesses to support her theory that another woman named Lisa, and not appellant, sold the cocaine to Wurdeman. First, appellant testified that she was babysitting at the time of the offense at her home, approximately seven miles from the scene of the offense. Further, she described a woman who lived in the area where the offense occurred named "Lisa" as resembling herself, but with "blonder" hair and blue eyes. Appellant theorized that it was Lisa who had sold the cocaine to Officer Wurdeman.

Second, Bonez Heflin testified that appellant was at home all day, babysitting the witness's daughter. This witness appeared confused about the date appellant babysat her child, but insisted that appellant remained in her home all day. Heflin further testified that she called appellant around noon to check on her daughter and that both appellant and Heflin's daughter were at appellant's home when she called.

Finally, appellant's boyfriend, Jimmy Creamer, testified that appellant's hair color on the date of the offense was red, just as it was in court. Creamer also corroborated appellant's testimony about the existence of Lisa and described her physical characteristics. According to Creamer, Lisa was blond and slightly heavier set than appellant. Creamer described Lisa as having blue eyes and being slightly shorter than appellant. He also testified that during the week the offense occurred, appellant was babysitting everyday from nine o'clock to four o'clock.

In contrast, the state offered testimony of three police officers who identified appellant as the person who committed the offense on August 26, 1998. As described above, the record shows that Officer Wurdeman had several opportunities to become familiar with appellant's identity. These opportunities include viewing pictures of appellant in connection with another investigation, having appellant pointed out on the street by another individual, and being in close proximity to her when the offense occurred. All three officers gave unambiguous testimony that the appellant and the person they witnessed selling cocaine were the same. When Officer Wurdeman was asked if there was a possibility that he could be identifying someone other than the appellant, he replied with certainty, "[n]one whatsoever."

Appellant's theory of mistaken identity does not outweigh the evidence provided by the officers. In his field notes, Officer Wurdeman listed the seller's eye color as green which is appellant's eye color and not that of "Lisa." The trier of fact could have reasonably determined that the officer was correct in identifying appellant. Additionally there are varying accounts of appellant's hair color. However, it is not the appellate court's responsibility to resolve all conflicts that appear in the record. *See Bowden v. State*, 628 S.W.2d 782, 784 (Tex. Crim. App. 1982). In reviewing the factual sufficiency of the judgment below, this Court should be ever mindful of the fact-finder's role in assessing the witnesses' credibility and resolving conflicts in the evidence. *See Bonham v. State*, 680 S.W.2d 815, 819 (Tex. Crim. App. 1984) (examining jury's role in evaluating witness' credibility); *Bowden*, 628 S.W.2d at 784 (examining jury's role in resolving conflicts). In this case, the Court has the responsibility of reviewing the facts only to ensure that the verdict is not so against the great weight of the evidence as to be manifestly unjust. *See Clewis*, 922 S.W.2d at 129. After viewing all the evidence, we cannot say the fact-finder's determination that Kandy Moody was correctly identified as the perpetrator is against the great weight of the evidence. *See id.* Accordingly, we overrule appellant's second point of error.

For the above reasons, 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 Amidei, Anderson, and Frost.

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