Affirmed and Opinion filed August 16, 2001.

In The

Fourteenth Court of Appeals

NO. 14-00-00125-CR

REGINALD EARL JACOBS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 228th District Court
Harris County, Texas
Trial Court Cause No. 826,782

O P I N I O N

The State charged appellant, Reginald Earl Jacobs, with the felony offense of possession with intent to manufacture or deliver cocaine, weighing more than four grams and less than 200 grams. The indictment contained one enhancement paragraph, which included appellant's prior conviction for criminal mischief. Over his plea of not guilty, a jury found appellant guilty as charged in the indictment. The court then sentenced appellant to 18 years' confinement in the Institutional Division of the Texas Department of Criminal Justice. Appellant presents this court with three points of error, complaining of the sufficiency of the evidence, the trial court's denial of one of appellant's challenges

for cause, and allegedly improper closing arguments made by the prosecutor. We affirm the trial court's judgment.

FACTUAL BACKGROUND

A confidential informant told Houston Police Officer Mike Burdick, of the narcotics division, that someone was selling narcotics out of a residence. Burdick then took the informant to that residence, gave him money with which to purchase narcotics, observed the informant entering the house, and observed the informant leaving the house several minutes later with crack cocaine. The confidential informant told Burdick that he purchased the crack cocaine from a man between the ages of 17 and 20. The informant went on to tell Burdick that several people were present in the house, who were both selling and smoking cocaine.

Burdick then obtained a search warrant, which authorized a search of the residence. A raid team executed the warrant. The raid team exited a van, and got into single file formation behind a fence. Burdick, armed with a shotgun with an attached flashlight, was in front of the line of officers. When Burdick rounded the fence, he noticed two to four people, including appellant, standing in front of the house. Burdick flashed his light at appellant, who then dropped a purple bag to the ground. Burdick shouted, "Police, stop where you're at." Appellant began running towards the back yard. Houston Police Officers Fuller and Gracia, both members of the raid team, chased appellant on foot. The chase went on for a few minutes until Fuller and Gracia caught up to appellant.

Burdick picked up the purple bag which appellant had dropped. Inside the bag, Burdick found 5.8 grams of crack cocaine in baggies and foil wrappers, a key, a razor blade, marijuana, and marijuana cigarettes. The key found in the bag fit a safe in a room in the house. Burdick testified that based on his training and experience, he concluded that the contents of the bag, and the way the contents were packaged, were consistent with possessing with intent to sell.

DISCUSSION AND HOLDINGS

A. SUFFICIENCY OF THE EVIDENCE

In appellant's first point of error, he challenges both the legal and factual sufficiency of the evidence to support his conviction for possession of a controlled substance with intent to deliver. Specifically, appellant challenges both Burdick's credibility in identifying appellant as the person who dropped the bag, and the fact that no fingerprints were taken off the bag.

We apply different standards when reviewing the evidence for legal and factual sufficiency. When reviewing the legal sufficiency of the evidence, we must view the evidence in the light most favorable to the prosecution and determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2780, 61 L.Ed.2d 560 (1979); *Garrett v. State*, 851 S.W.2d 853, 857 (Tex. Crim. App. 1993). This standard of review applies to cases involving both direct and circumstantial evidence. *King v. State*, 895 S.W.2d 701, 703 (Tex. Crim. App. 1995). On appeal, this court does not reevaluate the weight and credibility of the evidence, but we consider only whether the jury reached a rational decision. *Muniz v. State*, 851 S.W.2d 238, 246 (Tex. Crim. App. 1993).

When conducting a factual sufficiency review, we do not view the evidence in the light most favorable to the verdict, and we 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). To do this, "[t]he court reviews the evidence weighed by the jury that tends to prove the existence of the elemental fact in dispute and compares it with the evidence that tends to disprove that fact." *Johnson v. State*, 23 S.W.3d 1, 7 (Tex. Crim. App. 2000). Since the State bears the burden of proving each element of a criminal offense at trial, an appellant may challenge the sufficiency of the evidence used to establish an element of the offense by claiming that evidence supporting the adverse finding is "so weak as to be factually insufficient." *Id*. at 11. We

are mindful, however, that we must give appropriate, but not absolute, deference to the judgment of the fact finder so as not to supplant the fact finder's function as the exclusive judge of the weight and credibility given to witness testimony. *Id*. at 7.

1. Possession of Cocaine

A person commits an unlawful offense if that person knowingly or intentionally manufactures, delivers, or possesses cocaine. TEX. HEALTH & SAFETY CODE ANN. § 481.116(a) (Vernon Supp. 2000). When an accused is charged with unlawful possession of cocaine, the State must prove two things. First, the State must show that the defendant exercised actual care, custody, control, or management over the contraband. *McGoldrick v. State*, 682 S.W.2d 573, 578 (Tex. Crim. App. 1985); *Grant v. State*, 989 S.W.2d 428, 433 (Tex. App.–Houston [14th Dist.] 1999, no pet.). Second, the State must show that the accused knew the object he possessed was contraband. *Grant*, 989 S.W.2d at 433. Without an admission by the accused, the knowledge element of the crime may be inferred, due to its subjective nature. *McGoldrick*, 682 S.W.2d at 578; *Grant*, 989 S.W.2d at 433. The elements of possession may be proven by circumstantial evidence. *Williams v. State*, 859 S.W.2d 99, 101 (Tex. App.–Houston [1st Dist.] 1993, pet. ref'd). The Texas Penal Code defines possession as a voluntary act if the possessor had knowledge or control over an object long enough to enable him to terminate control over it. TEX. PEN. CODE ANN. § 6.01(b) (Vernon 1994).

"[W]hen the contraband is not found on the accused's person, or it is not in the exclusive possession of the accused, additional facts must affirmatively link the accused to the contraband" so that one may reasonably infer that the defendant knew of the contraband's existence and exercised control over it. *Jones v. State*, 963 S.W.2d 826, 830 (Tex. App.–Texarkana 1998, pet. ref'd). Affirmative links may be established by facts and circumstances that indicate the accused's knowledge of and control over the contraband. *Grant*, 989 S.W.2d at 433. Included among these factors are (1) whether the contraband was in open or plain view; (2) whether it was in close proximity to the accused; (3) whether

the amount of the substance was large enough to indicate appellant knew of its presence; (4) whether the accused owned or was closely related to the owner of the vehicle in which the substance was found; and (5) whether the accused made furtive gestures. *Jones*, 963 S.W.2d at 830. All facts do not necessarily need to point directly or indirectly to the defendant's guilt; the evidence is legally sufficient if the combined and cumulative effect of all the incriminating circumstances point to the defendant's guilt. *Russell v. State*, 665 S.W.2d 771, 776 (Tex. Crim. App. 1983).

Appellant argues that the State failed to affirmatively link him to possession of the cocaine. In support of this argument he states that (1) Burdick did not make a description of the person who dropped the bag; (2) Burdick testified that he only saw one person running from the house, while Fuller testified that everyone there was running, and that another person who was running in front of appellant got away; (3) the person described in the search and arrest warrant was described as being between 17 and 20 years of age, while appellant is 38 years old; (4) it was dark outside when the search was occurring; (5) no fingerprints were taken; and (6) multiple people were on the scene. Appellant contends that these factors show that the evidence at trial was legally and factually insufficient to support this conviction.

Contrary to appellant's assertions, Burdick did identify appellant as the one whom he saw drop the purple bag. Burdick and Fuller both testified that the reason only Burdick saw the bag being dropped was because Burdick was at the front of the line of the raid team. As soon as appellant saw Burdick, he dropped the bag and ran. As for the lack of fingerprints, Burdick testified that it would have been difficult to lift fingerprints from a cloth bag, and that he typically does not lift fingerprints when he sees a suspect in possession of something, as he did in this case.

After viewing this evidence in the light most favorable to the prosecution, we believe that any rational trier of fact could have found the essential elements of the offense of possession of cocaine. Accordingly, we overrule appellant's first point of error.

Furthermore, we do not find evidence in the record that greatly outweighs the evidence supporting the trial court's judgment. In conducting a factual sufficiency review, we only exercise our fact jurisdiction to prevent a manifestly unjust result. *Clewis*, 922 S.W.2d at 135. No such result obtains under this evidence. We conclude that the evidence is factually sufficient to support appellant's conviction for possession of cocaine and overrule this portion of his first point of error.

2. Intent to Distribute Cocaine

Appellant also contends that the State's evidence against him on possession of cocaine with intent to distribute it, if any, was legally and factually insufficient to support the conviction.

"An intent to deliver a controlled substance may be prove[n] by circumstantial evidence." *Williams v. State*, 902 S.W.2d 505, 507 (Tex. App.—Houston [1st Dist.] 1994, pet. ref'd). Factors considered by courts to determine whether an accused had an intent to deliver crack cocaine include the quantity of drugs possessed, the manner of packaging and whether the rock was sufficiently large to be split up and sold. *Id*.

Here, appellant possessed 5.58 grams of crack cocaine, split up into rocks. The rocks were packaged in baggies and foil wrappers. Burdick testified that based on his training and experience, the contents of the bag, and the way in which those contents were packaged, indicated that appellant possessed this cocaine with the intent to sell it.

After viewing this evidence in the light most favorable to the prosecution, we believe that any rational trier of fact could have found the essential elements of the offense of intent to distribute cocaine.

Furthermore, we do not find evidence in the record that greatly outweighs the evidence supporting the trial court's judgment, nor is the jury's decision so contrary to the weight of the evidence to be clearly wrong and unjust. *See Clewis*, 922 S.W.2d at 135. We conclude that the evidence is factually sufficient to support appellant's conviction for

possession with intent to distribute cocaine. We overrule his first point of error.

B. VOIR DIRE

In appellant's second point of error, he contends that the trial court erred in denying his challenge for cause as to veniremember Davenport. During voir dire, the trial court informed the venire that a defendant has a Fifth Amendment right not to testify against himself. The prosecutor also informed the jury panel of this, and asked if any of the veniremembers would penalize the defendant for exercising his right not to testify. Davenport did not respond at this point. However, later, when defense counsel asked whether anyone felt as if appellant should speak in his defense, Davenport responded in the affirmative. The court then called Davenport to the bench for further questioning. There, Davenport stated that he had earlier indicated that if the defendant did not testify, he would not hold that against him. Upon further reflection, Davenport stated that he would wonder why the defendant was not speaking in his own defense. The following exchange then occurred:

DEFENSE: Sure. And as a matter of fact, if you went in the jury room and deliberated, you would think about that; wouldn't you?

DAVENPORT: Most likely.

DEFENSE: And if the prosecutor or the Court instructed you, "Well, that's his constitutional right," you still would think about that? The couldn't change your thought pattern, could they?

DAVENPORT: It would depend on the – it would depend on the case, how the case was presented.

DEFENSE: Sure. In other words, right now that's the way you feel?

DAVENPORT: Right now that's the way I feel.

. . .

STATE: . . . If the judge gives you an instruction, Mr. Davenport, that you're not to consider the fact that the defendant exercises his right to remain silent . . . can you respect that instruction?

DAVENPORT: Yes.

STATE: Basically, you could follow the law in this case?

DAVENPORT: Yes, I can.

Then, the court went on to confirm that Davenport would follow the law on appellant's Fifth Amendment right not to testify. Defense counsel then challenged Davenport for cause. The trial court overruled defense counsel's challenge. Defense counsel went on to preserve error for appeal by exercising all of his peremptory strikes, and before tendering his strikes, asking for two additional peremptory strikes, and identifying two objectionable jurors who were on the jury panel whom he would have used his peremptory strikes on, but for being forced to use the strike on Davenport. Defense counsel then objected to the composition of the jury, and the trial court overruled defense counsel's objection.

If a veniremember unequivocally testifies that he or she can follow the law, despite personal prejudices, then the trial court abuses its discretion in allowing a challenge for cause on that basis. *Brown v. State*, 913 S.W.2d 577, 580 (Tex. Crim. App. 1996). Conversely, if a veniremember unequivocally testifies that he or she cannot follow the law due to personal biases, then the trial court abuses its discretion in failing to grant a challenge for cause on that basis. *Id.* When a veniremember equivocates on his or her ability to follow the law, we must defer to the trial court's judgment on a challenge for cause. *Id.*

Upon careful review of Davenport's testimony, we conclude that Davenport did vacillate in his testimony. He vacillated, not between two definitives – that is, between stating that he definitely would not follow the law, to stating that he definitely would follow the law – but between stating that he would wonder why the defendant was not testifying in his own defense, to stating that he would be able to follow the law that he cannot hold a defendant's exercise of his right not to testify against him. When the record reflects that a veniremember vacillated, the reviewing court is bound by the trial court's

judgment in the matter. *Id*.; *Riley v. State*, 889 S.W.2d 290, 300 (Tex. Crim. App. 1993). Accordingly, we overrule appellant's second point of error.

C. CLOSING ARGUMENT

In appellant's final point of error, he contends that the trial court erred in overruling the objections and motions for mistrial that defense counsel made in response to arguments advanced by the State during closing argument. The first of four arguments that appellant complains of occurred as follows:

DEFENSE: I oft times find myself only speaking to one, one person with some courage, one person who said, "You know, I think I would have wanted just a little more"; one person who can maybe have to stand up against 12; one person who . . . can go within themselves and stand up to the rest and say, "You know, I'm not going to do it. . . ."

But once again, whatever you do, if you have to stand by yourself, I'll ask that you find the courage within yourself to do [so]. Thank you once again. It's my pleasure speaking to you, number one.

THE COURT: Mr. Freyer?

THE STATE: Basically, that means he want [sic] you to hang.

DEFENSE: Objection, Your Honor. That's totally improper.

THE COURT: Ladies and gentlemen, you'll disregard the last statement.

DEFENSE: Your Honor, I would respectfully move for a mistrial.

THE COURT: That will be overruled.

Appellant contends that the prosecutor's comment was prohibited because it was a reference to defense counsel's strategy, and therefore, the trial court should have granted his motion for mistrial.

A mistrial is an extreme remedy for prejudicial events which occur during the trial process. *Bauder v. State*, 921 S.W.2d 696, 698 (Tex. Crim. App. 1996). The trial court's

ruling on a motion for mistrial is reviewed under the abuse of discretion standard. *Id*. at 698. Further, an instruction to disregard was given to the jury. Such an instruction generally serves to cure any error committed by the argument. *See Audujo v. State*, 755 S.W.2d 138, 144 (Tex. Crim. App.1988). Except in extreme cases where it appears that the evidence is clearly calculated to inflame the minds of the jury and is of such a character as to suggest the impossibility of cure absent a mistrial, an instruction renders the error harmless. *Coe v. State*, 683 S.W.2d 431, 436 (Tex. Crim. App. 1984). In this case, the prosecutor's comment that the defense counsel was asking for a hung jury was not so inflammatory that an instruction to disregard could not have cured any prejudicial effect.

The second complained of argument occurred as follows:

THE STATE: I didn't bring Officer Chapman because he didn't have anything to do with this. Officer chapman, he had nothing to with [sic] this case.

DEFENSE: Objection, Your Honor. That's totally improper. That's not in evidence.

THE COURT: Be overruled.

During trial, Burdick testified that he was the only officer out of the entire raid team who saw appellant drop the purple bag. In closing arguments, over the State's objection, defense counsel stated that Officer Chapman stayed with the bag in front of the house. Defense counsel went on to criticize the State for not bringing Officer Chapman to court to testify about whether he stood with the bag. Succinctly, the defense counsel asked, "Why not?"

Proper closing argument must fall within one of four areas: (1) summation of the evidence; (2) reasonable deduction from the evidence; (3) answer to opposing counsel's arguments; or (4) a plea for law enforcement. *Brandley v. State*, 691 S.W.2d 699, 712 (Tex. Crim. App. 1985). Improper closing arguments include references to facts not in evidence or incorrect statements of law. *Burke v. State*, 652 S.W.2d 788, 790 (Tex. Crim. App. 1983). An argument must be considered in light of the record as a whole, and, to constitute reversible error, the argument must be extreme or manifestly improper, violate

a mandatory statute, or inject new facts, harmful to the accused, into the trial proceedings. *Brandley*, 691 S.W.2d at 712-13. Very clearly, the State's argument that Chapman had nothing to do with the case was an answer to the argument of opposing counsel. In addition, this was a reasonable deduction from the testimony of Burdick, Fuller, and Gracia, who all testified that only Burdick saw appellant drop the bag, and that Burdick was the only one who recovered it. We hold that the prosecutor's arguments fell within the range of proper closing argument

The third jury argument which appellant complains of occurred as follows:

THE STATE: Why did he run? Why do you run away if you're so doggone innocent? He doesn't bring the other witnesses that were out there that could say how innocent he was.

DEFENSE: Your Honor, I would object. He's infringing upon his 5th Amendment privileges.

THE COURT: The door was open, be overruled.

Appellant's complaint is meritless. *Sonnier v. State*, 913 S.W.2d 511, 523 (Tex. Crim. App. 1995). It is permissible for the State to comment on the failure of the defendant to call competent and material witnesses. *Id.*; *Reynolds v. State*, 848 S.W.2d 785, 790 (Tex. App.—Houston [14th Dist.] 1993, pet. ref'd). When the State does make such an argument, if the State's remarks can be reasonably construed as referring only to the defendant's failure to present evidence through witnesses other than himself, reversal is not required. *Livingston v. State*, 739 S.W.2d 311, 338 (Tex. Crim. App. 1987). Here, we find that the prosecution's statement can only reasonably be construed as referring to appellant's failure to bring other witnesses on his behalf. It in no way comments on appellant's failure to testify on his own behalf.

The final jury argument complained of by appellant occurred as follows:

THE STATE: Bear with me, he's not a young man, he's not a good man; he is a drug dealer.

DEFENSE: Your Honor, I would object to that fact, not a good man; that's totally improper.

On appeal, appellant complains that the statement that appellant was not a good man was derogatory and prohibited. He complains that the reference to his livelihood as a drug dealer was improper.

As to the second complaint, appellant waived error by failing to object to that reference at trial. TEX. R. APP. P. 33.1(a). As to the first complaint, the evidence at trial showed that appellant was a person who illegally possessed, with the intent to deliver, a large amount of cocaine. We hold that saying appellant was "not a good man" was a reasonable deduction from the evidence, and therefore was proper in closing argument. We therefore overrule appellant's third point of error.

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

/s/ Wanda McKee Fowler
Justice

Judgment rendered and Opinion filed August 16, 2001.
Panel consists of Justices Fowler, Wittig, and Amidei.[1]
Do Not Publish — TEX. R. APP. P. 47.3(b)._

[1] Senior Justice Maurice E. Amidei sitting by assignment.