Affirmed and Opinion filed September 20, 2001.

In The

Fourteenth Court of Appeals

NO. 14-00-00915-CR

VU HOANG NGUYEN, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 174th District Court
Harris County, Texas
Trial Court Cause No. 820,240

O P I N I O N

Appellant was charged by indictment with the offense of possession with intent to deliver a controlled substance, namely cocaine. A jury convicted appellant of the charged offense. The trial court assessed punishment at fifteen years confinement in the Texas Department of Criminal Justice--Institutional Division and a fine of $10,000.00. In two points of error, appellant contends the evidence is legally and factually insufficient to support the jury's verdict. We affirm.

I. Forfeiture of Sufficiency Challenges.

The State argues these points of error have been forfeited for two reasons. First, the State contends forfeiture occurred because appellant did not raise the sufficiency challenges in the trial court. We reject this argument because our law is clear that on appeal a convicted defendant may question the sufficiency of the evidence even though that issue was not raised in the trial court. *Flanary v. State*, 166 Tex.Crim. 495, 316 S.W.2d 897, 898 (Tex. Crim. App. 1958) (op. on reh'g); *Givens v. State*, 26 S.W.3d 739, 740-41 (Tex. App.–Austin 2000, pet. ref'd).

Second, the State contends the appellate record is incomplete. Specifically, the State argues the record is deficient because it does not contain a videotape that was admitted into evidence. This argument is premised upon Texas Rule of Appellate Procedure 34.6(b)(5), which imposes upon an appellant seeking to challenge the sufficiency of the evidence the burden of bringing forward an appellate record that includes all of the evidence admitted before the trier of fact. *O'Neal v. State*, 826 S.W.2d 172, 173 (Tex. Crim. App. 1992). The question before us is whether the appellate record must contain an audio or video exhibit before a sufficiency challenge can be resolved. We answer that question in the negative.

Under rule 34.6(b)(5) the record must include all of the evidence admitted at the guilt phase of the trial. This rule prevents a party from prevailing on appeal after failing to discharge its burden of providing the appellate court with a sufficient record. *Stacy v. State*, 819 S.W.2d 860, 864 (Tex. Crim. App. 1991) (Baird, J., dissenting). Rule 34.6(b)(5) does not specifically address audio and video recordings, which are routinely admitted in criminal cases. Indeed, it is exceedingly rare that such exhibits are not admitted in driving while intoxicated or pornography cases. When such exhibits are admitted into evidence, the appellate court is in the same position as the jury to view and/or hear the exhibit.

The videotape in the instant case is a depiction of the alleged drug transaction. Officer Steve Duong testified to the events that took place on the videotape. According to Officer Duong, the conversations recorded on the videotape were conducted in Vietnamese.

Therefore, our review of appellant's points of error is not impeded by the absence of the videotape.

Having determined that neither of the State's forfeiture arguments are valid, we will now address the merits of appellant's sufficiency challenges.

II. Standards of Appellate Review.

When we are asked to determine whether the evidence is legally sufficient to sustain a conviction we employ the standard of *Jackson v. Virginia* and ask "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). However, under a factual sufficiency review, the evidence is viewed in a neutral light favoring neither party. *Clewis v. State*, 922 S.W.2d at 134. In this light, "the appellate court reviews the fact finder's weighing of the evidence and is authorized to disagree with the fact finder's determination." *Id.* at 133. However, this review must employ appropriate deference to prevent an appellate court from substituting its judgment for that of the fact finder. *Johnson v. State*, 23 S.W.3d 1, 7 (Tex. Crim. App. 2000). The degree of deference a reviewing court provides must be proportionate with the facts it can accurately glean from the trial record. *Id.* at 8. A factual sufficiency analysis can consider only those few matters bearing on credibility that can be fully determined from a cold appellate record. Under *Johnson*, if the complaining party is attacking the factual sufficiency of an adverse finding on an issue on which he did *not* have the burden of proof, he must demonstrate that there is insufficient evidence to support the adverse finding. In reviewing an insufficiency of the evidence challenge, the court of appeals must first consider, weigh, and examine all of the evidence that supports and that is contrary to the jury's determination. Having done so, the court should set aside the verdict only if the evidence standing alone is so weak as to be clearly wrong and manifestly unjust. *Id.* at 10.

III. Factual Summary.

In this summary, the testimony of three witnesses is essential. Officer Steve Duong of the Westside Narcotics Task Force worked with an undercover informant named Phuc Vu.[1] Vu told Officer Duong that Vinh Truong was attempting to sell a kilogram of cocaine. Truong later telephoned Officer Duong and negotiations began.[2] Eventually, the principals agreed to a price, an exchange date, and a location. Officer Duong notified his lieutenant of these details and a surveillance team was formed.

Truong drove to the predetermined location accompanied by Vu in the front passenger seat; and appellant, who was seated in the rear seat behind the driver. Truong parked the vehicle, Vu exited and approached Officer Duong; Vu told Duong the cocaine was under the passenger seat. Officer Duong approached Truong's vehicle, and leaned through the rear window. Appellant pulled out the box that contained the cocaine, showed it to Officer Duong, and stated: "That's good stuff. You can check it out." Officer Duong said he was going to get the money, and then gave the bust signal. The surveillance team responded to the signal and Vu, Truong and appellant were arrested.

Vu testified he was an undercover narcotics informant who received ten percent of retail value of each bust he arranged. Vu had worked with Truong and learned that he was involved in narcotics. Vu got Officer Duong and Truong in contact. As a part of his attempt to set up the instant narcotics transaction, Vu saw appellant get into Truong's automobile while carrying a bag. Vu and Truong entered the vehicle, Vu asked to see the contraband, and appellant handed it to Vu. Vu examined the substance, returned it to appellant and asked it if was "good stuff." Appellant responded in the affirmative. Vu then called Officer Duong and arranged the transaction. Upon arrival at the scene, Vu exited the vehicle and spoke to Officer Duong. Officer Duong then went to Truong's vehicle and asked to see the

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[1] This witness was later identified as Vu Phuc Hoang. Hereafter he will be referred to simply as Vu.

[2] These negotiations were conducted in Vietnamese.

contraband. Vu saw appellant hand the cocaine to Officer Duong. The bust signal was then given and Vu was arrested along with Truong and appellant.

Appellant testified that he went to eat with a friend. After their meal, appellant asked to be taken home. The friend was occupied, but said he would arrange a ride for appellant. The friend later introduced appellant to Truong and Vu. As the three left the restaurant, appellant saw a fourth man place a box underneath the seat of Truong's vehicle. Appellant then left in Truong's vehicle with Truong and Vu, and traveled to the bust location. Officer Duong approached Truong's vehicle and spoke to Truong. At that point, Truong took the cocaine from underneath the seat and placed it on the back seat. Then Officer Duong opened the box containing the cocaine. He then tasted the substance, which was the first time appellant realized he was present at a drug transaction. When Officer Duong mentioned money, appellant said that he knew nothing of the drugs. Appellant was later arrested.

IV. Arguments and Analysis.

Appellant contends the evidence is legally and factually insufficient to establish his guilt as a party to the offense of possession with intent to deliver a controlled substance. The trial court instructed the jury on the law of parties as follows:

> All persons are parties to an offense who are guilty of acting together in the commission of the offense. A person is criminally responsible as a party to an offense if the offense is committed by his own conduct, by the conduct of another for which he is criminally responsible, or by both.
>
> A person is criminally responsible for an offense committed by the conduct of another if, acting with intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense. Mere presence alone will not constitute one a party to an offense.

The application paragraph authorized the jury to convict appellant either as the principal or a party to the charged offense.

Regarding the legal sufficiency challenge, appellant argues the direct conflict between Officer Duong and appellant renders the evidence insufficient. As noted above, our role

requires us to determine whether after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. at 319. In that role, we should not position ourselves as a thirteenth juror in assessing the evidence. Rather, our position is to ensure the rationality of the verdict. *Moreno v. State*, 755 S.W.2d 866, 867 (Tex. Crim. App. 1988). Under our law, the jury is the sole judge of the credibility of the witnesses and of the weight to be given their testimony. TEX. CODE CRIM. PROC. ANN. art. 38.04*; Penagraph v. State*, 623 S.W.2d 341, 343 (Tex. Crim. App. 1981). A jury may therefore accept one interpretation of the facts and reject another, or reject any or all of a witness's testimony. *Pizano v. State*, 489 S.W.2d 284, 285 (Tex. Crim. App. 1973).

In the instant case, Officer Duong's testimony established appellant personally possessed the contraband, that he delivered same, and vouched for the quality of the substance. The jury chose to believe this testimony. On the other hand, the jury rejected appellant's testimony that he did not possess or know of the contraband. This was precisely the credibility determination article 38.04 prescribes. We cannot say the jury's decision to believe Officer Duong that appellant was an active participant in the charged offense, and its decision to disbelieve appellant that he was merely present was irrational. Consequently, the first point of error is overruled.

Regarding the second point of error, contending the evidence is factually insufficient, appellant again raises the conflict of testimony argument. This argument is better suited for factual sufficiency claims where appellate courts view the evidence in a neutral light favoring neither party. *Clewis*, 922 S.W.2d at 134. Under this standard of review, we are authorized to disagree with the jury's verdict. *Id.* at 133. However, a factual sufficiency analysis can consider only those matters bearing on credibility that can be fully determined from a cold appellate record. *Johnson*, 23 S.W.3d at 8.

The instant case, however, does not present two contradictory versions of a single set of events where one version is corroborated by independent and seemingly impartial

evidence. Instead, this case presents the classic swearing match where the ultimate issue is one of credibility. Therefore, although we are authorized to disagree with the jury, the record before us does not sanction that disagreement. When we employ the appropriate level of deference to the verdict to prevent the substitution of our judgment for that of the jury's, we find the evidence is factually sufficient. The second point of error is overruled.

The judgment of the trial court is affirmed.

/s/ Charles F. Baird[3]
Justice

Judgment rendered and Opinion filed September 20, 2001.
Panel consists of Justices Hudson, Seymore, and Baird.
Do Not Publish — TEX. R. APP. P. 47.3(b).

[3] Former Justice Charles F. Baird sitting by assignment.