Affirmed and Opinion filed October 26, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-98-01122-CR
NO. 14-98-01123-CR
NO. 14-98-01124-CR

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READELL JOHNSON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 262nd District Court
Harris County, Texas
Trial Court Cause Nos. 756,736; 703,243; & 687,191

O P I N I O N

Appellant, on probation for two separate convictions for drug offenses (Nos. 14-98-01123-CR and 14-98-01124-CR), was subsequently convicted by a jury for the offense of possession with intent to deliver cocaine weighing at least 400 grams. The trial judge assessed punishment at confinement for seventeen (17) years and revoked probation in each of the two cases for which he was on probation. These three cases are consolidated for disposition.

In the appeal from the jury conviction, appellant challenges the legal and factual sufficiency of the evidence and challenges four evidentiary trial court rulings. In the two revocation of probation cases, appellant challenges the legal sufficiency of the evidence to support the revocation order. We affirm.

Since appellant challenges the sufficiency of the evidence, a brief recitation is necessary.

This case involves an investigation by the Internal Affairs Division of the Houston Police Department of a suspected "drug rip-off ring." Such a ring is where a corrupt police officer confiscates drugs from a drug trafficker, releases that trafficker and then hands off the drugs to another drug trafficker for a share in the profits. One of the suspected police officers was James Hubbard. Sergeant Belk of the Internal Affairs Division put together the rather complex sting operation involving several different law enforcement organizations and two aircraft. The operation was planned for an area off the East Freeway in Houston outside the Loop to provide for easier tracking and to also place Officer Hubbard outside his patrol area.

A confidential informant, Hensley, gave information to the officers and agreed to assist in the operation. Hensley was given information to pass to the suspects that a relative of hers would be transporting a large amount of cocaine through Houston, would be driving a described automobile and would be staying at a described motel. On April 15, 1997, equipped with an electronic device to record conversations, and while under surveillance by undercover police officers, she made contact with several individuals at 4110 Larkspur. After a short time the informant got into a Cadillac, driven by Otis "Cadillac Boo" Patterson, and occupied by several other individuals one of whom was appellant, and drove off. Shortly, the Cadillac was stopped by Officer Hubbard in a marked Houston police patrol car and they were observed talking. Later Hensley met with the undercover officers and the recording device was recovered. It was determined that the officers would proceed and set up the sting operation for April 18 --- three days later.

Retlaw Green, a lieutenant with the Department of Public Safety, was set up as the narcotics trafficker. He testified that on April 18, 1997, he left the designated motel in a late model Buick automobile carrying five kilos of cocaine and another dummy package containing a radio tracking device, all contained in a black handbag. He was almost immediately stopped by Houston Police Officer Hubbard who required

Green to exit the Buick. After patting him down, Hubbard placed Green in the back of the patrol car. Hubbard then went to the Buick, removed the black bag, returned to the patrol car and placed the bag in the front seat of the patrol car. After some conversation, Hubbard opened the door, told Green he "never wanted to see me again" and pointed in an easterly direction advising "me that Louisiana/Mississippi is that way" and for me "to get the heck out of there."

All of the events testified to above by Green were observed by Lt. King and his crew from an overhead helicopter. Lt. King testified that as soon as Green was released by Hubbard, Hubbard immediately left, his patrol car and a blue Cadillac traveled together for some distance, during which time the patrol car initiated several stops of the blue Cadillac. The Cadillac was eventually stopped on Larkspur. Hubbard then placed the driver and his front seat passenger in the back of the patrol car and an occupant of the back seat of the patrol car entered the front seat of the patrol car.

It was at that time that the arrest signal was given. The occupants of the Cadillac attempted to flee. Appellant moved from the rear seat to the driver's seat of the Cadillac and attempted to speed away in reverse gear, but was stopped by police on the scene. He jumped from the automobile and hid under a house. As soon as all participants, including Hubbard, were under restraint, Lt. King was released to return to the airport.

Further testimony showed that appellant was observed in the back seat of the blue Cadillac acting as a "look-out" during the time that automobile was being driven around the location prior and during Hubbard's stop of the undercover officer. The evidence proved that the substance was cocaine weighing over 400 grams.

The trial was quite lengthy, many witnesses testified concerning a rather complex investigation and the record appears to be, at times, somewhat disjointed, but the above recitation sets forth sufficient facts to address appellant's complaints.

In his first point of error appellant contends the evidence "is not legally sufficient to support a conviction in this case." The standard of review for such contention is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found beyond a reasonable doubt that appellant intentionally or knowingly possessed at least 400 grams of cocaine with

intent to deliver it. *See Jackson v. Virginia*, 443 U.S. 307(1979); *Johnson v. State*, 871 S.W.2d 183, 186 (Tex. Crim. App. 1993).

The judge instructed the jury on the law of parties. The evidence is sufficient to convict under the law of parties when the defendant is present during the commission of the offense and encourages by words or otherwise. *Ransom v. State*, 920 S.W.2d 288 (Tex. Crim. App. 1994), *cert. denied*, 519 U.S. 1030 (1996). A defendant who acts as a lookout is a party to the offense committed. *Cumpian v. State*, 812 S.W.2d 88, 90 (Tex. App.—San Antonio 1991, no pet.).

In this case the evidence showed, and the jury was entitled to believe, that appellant acted as a lookout throughout the transaction when the gang acquired the cocaine; he was present and an active participant during the planning stages, during the piracy of the cocaine and during its transfer; and that when surrounded by police officers when the "bust signal" was sounded, he attempted to flee- - -first in the Cadillac and, when prevented from doing so, on foot, hiding under a house. Based upon this evidence, we hold that *any* rational trier of fact could find guilt beyond a reasonable doubt. We overrule appellant's first point of error.

In his second point of error appellant contends the evidence "is not factually sufficient to support a conviction in this case." When addressing this challenge, we are not bound to view the evidence in the light most favorable to the prosecution and may consider testimony of defense witnesses and the existence of alternative hypothesis. *See Johnson v. State*, 23 S.W.3d 1, 6-7 (Tex. Crim. App. 2000). However, we begin our review with the assumption that the evidence supporting the verdict is legally sufficient. While we are authorized to disagree with the jury's determination, our review must be appropriately deferential so as to avoid an appellate court's substituting its judgment for that of the fact-finder. The verdict should be set aside only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *Johnson*, 23 S.W.3d at 7.

Examining the record in this case under this standard, it is appropriate to make several observations. First, while the defense recalled two state's witnesses (Daryl Gillespie, an accomplice, and Sergeant Belk) their testimony, so far as we can determine, added nothing new. The only other defense evidence presented was through the testimony of Santino Johnson, appellant's younger brother, and Zeffee

Lee Rhome, a friend of appellant and the sister of Cadillac Boo Patterson. We have read the testimony of each and, so far as we can determine, they only disputed whether appellant was present in the rip-off gang automobile on April 15th. They testified that about the time the officer said he saw appellant in the automobile, appellant was cutting hair at the apartment project. Second, appellant has not pointed out the existence of any alternative hypothesis nor has he detailed in any manner how the verdict is manifestly unjust, why it shocks the conscience or how it clearly demonstrates bias. Our review of the record fails to provide any basis for such finding. Accordingly, we overrule appellant's second point of error.

In his third point of error appellant contends the trial court "committed reversible error by overruling appellant's objection to the prosecutor's incorrect characterization of the evidence in argument and then commenting on the weight of the evidence."

The point of error is based upon the following exchange which occurred during the state's final argument at the guilt-innocence stage:

> Let's talk about Daryl Gillespie. What did he tell you about his relationship with Boo? They knew each other from the neighborhood, they were good friends, he trusted him. So when Boo brought Poo into this, Daryl went along with it. And what did he say about this? Well, this was Boo's hit. It was his deal. He was going to set it up. And what was his involvement? Well, Daryl had the police officers; he had James, he had Michael working with him and that's why they were going to get the bigger cut. He also told you something very crucial. He didn't take anyone else along unless they were going to get a cut. And why is that? Why would they ever take someone along that's not involved?
>
> Ladies and gentlemen, like it or not, in the streets, our streets, this is big business. This is a lot of money, Street value, I'm holding –
>
> Mr. Wilson: Your Honor, I'm going to object to this.
>
> The Court: Let's hear the objection.
>
> Mr. Wilson: My objection is that counsel is incorrect in characterizing the evidence. There was never a statement about they weren't taking anybody along unless they got a cut.
>
> The Court: That will be overruled.
>
> The jury will consider the reasonable deductions, if any, to be drawn from the evidence.

The State then went on to discuss the amount of money involved in the gang's business and the gang's complicated communication procedures.

The state challenges our consideration of this point on the merits because it is multifarious. We agree.

A complaint renders nothing for review if it combines more than one contention in a single point. *Sterling v. State*, 800 S.W.2d 513, 521 (Tex. Crim. App. 1990), *cert. denied*, 501 U.S. 1213 (1991). Appellant argues not only that the state made an improper argument to the jury but that the trial court also made an improper comment on the weight of the evidence. Thus, he has preserved neither of these issues for review. We therefore overrule the point.

In his fourth point of error appellant contends the trial court committed reversible error in permitting Gillespie to testify that he and appellant planned an alibi after they were arrested.

Daryl Gillespie, one of the five people in the Cadillac, both at the time Hubbard took the cocaine from the DPS lieutenant he had stopped and when the police bust occurred, testified as a witness for the state. Toward the end of his direct examination, the prosecutor approached the bench and advised the court and defense counsel that she was about to offer testimony concerning an alibi appellant and the witness had concocted, which had been testified to at a previous trial and referenced in that record. The trial court requested counsel for both sides to present authority on the issue and recessed the trial to the following morning.

After hearing argument from both sides, the trial court ruled the evidence admissible. Questioning of the witness continued, and the following testimony, which forms the basis for appellant's contention, was adduced:

Q. Now, after you had been taken into custody you and Readell had the opportunity to talk, didn't you?

A. Yes, ma'am.

Q. And were you trying to plan an alibi to tell the police what happened to show that you-all didn't have any involvement in this?

A. Yes, we did.

Q. Now, at this point you weren't working for the State, were you?

A. No.

Q. You were trying to basically save yourself, right?

A. Yes.

Q. And you had agreed to promote any story that Readell had, and was his agreement to promote your story?

A. Well, to promote both our story.

Q. Okay. Can you tell the jury about that?

A. We had —

Mr. Wilson: Your Honor, I'm going to object as to leading: can you tell the jury about that.

The Court: All right. The leading objection is overruled.

Q. (By Ms. Williford) Can you tell the jury about that?

Yes. Well, when we were arrested, we were taken to internal affairs division and they put us in separate rooms. And at one point they put me and Readell in the same room, and it was something like a table in between us. And we were trying to speak to each other about keeping quite, but it was [a]n officer standing in the doorway, and we couldn't clearly carry out what we had planned, what we wanted to plan.

And later on they took us down to the Houston Police Department fingerprinting – in fingerprinting they put everybody together except for the police officers; they took him [to] a separate place. And while we were there we tried to come up with a plan to – because when we first were arrested I didn't think the police officers had –

Mr. Wilson: Your Honor, I object to the narrative.

The Court: All right. Let's proceed by question and answer.

Ms. Williford: Yes, Your Honor.

Q. (By Ms. Williford) Well, Daryl, what story were you going to tell the police and did you ask Readell to tell the police about your involvement in this?

A. Tell them he didn't see me, and I was going to in return tell them that he was sleeping the whole time in the car, and – because the police didn't see me running in the house. At least I thought they didn't. And that's what I was going to do with, because I didn't think they saw me run in the house. Because I heard their conversation. While I was in the house I heard it outside while they was standing by the window.

Q. And in regard to Readell's involvement in the case what were you supposed to tell the police specifically about him to show that he didn't have any involvement in this case?

A. Just tell them he had went along to watch the car, and he had fell asleep in the back seat. That way he could not identify me.

Q. Okay. Now, was that the truth about what had happened?

A. No.

The state challenges our consideration of appellant's point of error, pointing out that appellant failed to make an objection. We agree.

Appellant's present contention that trial counsel did object on the basis of hearsay, and his cite to the record to support same, is incorrect. Those conversations, to which a hearsay objection was made, were made in the Cadillac automobile prior to the police bust. Having failed to object, appellant is in no position to complain on appeal. Accordingly, we overrule this point of error.

In his fifth point of error appellant contends the trial court committed reversible error "by denying appellant's motion for mistrial after the state's witness interjected before the jury the hearsay statement that the CI had identified appellant."

The complained-of testimony occurred during the direct examination of Houston Police Officer Ong. Officer Ong had assisted in placing the recording device on the confidential informant, Hensley, on April 15th. After Hensley met with the individuals and had recorded the conversations, as previously pointed out, she met with the Internal Affairs Police Officers who recovered the recording device and tape. Additionally, the officers were attempting to establish the identity of the individuals who had been in the automobile. While questioning Ong, the prosecutor asked him:

> Q. Now, in regard to this defendant, Readell Johnson, did you ever specifically question Poo about whether or not she could recognize him and identify him as one of the parties involved in this case?
>
> A. Yes, ma'am.
>
> Q. And what did you specifically do in regard to her identification of this defendant?
>
> A. Well, we talked about it. I asked her if she thought she could pick him out and –
>
> Mr. Wilson: Your Honor, I'm going to have to object.
>
> The Court: That's sustained.
>
> Q. (By Ms. Williford) I want to go through simply what you said to her, not what she responded. Okay? So just go through what you represented to her.
>
> A. I asked her if she could recognize this fellow again, she said yes.
>
> The Court: Don't go into what she said.
>
> Ms. Williford: Let me stop you.

Mr. Wilson: Your Honor, may we approach?

(Discussion at the bench).

The Court: Objection sustained. The jury will disregard the statement made. Motion for mistrial will be denied.

Ms. Williford: Can I give an instruction?

The Court: Witness, do not blurt out matter where you've been previously instructed.

The Witness: Yes, sir.

Officer Ong then stated without objection that he showed a picture of appellant to Hensley for purposes of identification.

The state challenges our consideration of this point, contending, among other things, that appellant failed to properly object on the record, and that, therefore, since his complaint on appeal does not comport with a trial objection, nothing is presented for review.

This record presents a prime example of the practice we often observe in the appellate record of so many trial lawyers "approaching the bench" to make objections that cannot be recorded by the court reporter. Technically, we agree with the state that error has not been properly preserved, but we opt to address the contention on the merits.

Error in the admission of improper testimony is generally cured by an instruction to disregard, except in extreme cases where the improper testimony is clearly calculated to inflame the minds of the jurors and is of such a character as to suggest the impossibility of withdrawing the impression produced on their minds. *Franklin v. State*, 693 S.W.2d 420, 428 (Tex. Crim. App. 1985), *cert. denied*, 475 U.S. 1031 (1986).

In this case the officer's statement was not clearly calculated to inflame the minds of the jurors. It did not inform the jurors that Hensley had in fact identified appellant from a photograph. Furthermore, such evidence was quite irrelevant because appellant was identified by several witnesses during the trial as a party to the offense. Under all these circumstances the trial court's instruction was sufficient to cure the error of the officer's non-responsive answer. We overrule this point of error.

In his sixth point of error appellant contends that the trial court erred "by refusing to allow appellant to play before the jury the tapes of the conversation concerning the alleged drug transaction."

Appellant states in his brief that he requested permission of the trial court to play before the jury the entirety of State's Exhibits 28 and 29 (the tapes made on a tape recorder worn by Hensley, the confidential informant). Appellant's cite to the record for such request does not support his contention that he requested permission to pay State's Exhibit 28, and we find no such request. The reporter's record shows in two separate places that "State's Exhibit 29 is played for the jury." In this state of the record there is nothing presented for our consideration. Appellant's sixth point of error is overruled.

In his seventh point of error appellant contends that the evidence "is not legally sufficient to support the trial court's revocation of probation" in the two cases referred to above.

The record shows that the motion to revoke probation in both Cause No. 703,243 and 687,191, based upon the offense alleged in Cause No. 756,736 (the offense on trial), was read to the defendant and that he entered a plea of "not true" to each. The prosecutor "re-offered" all the evidence heard by the court. The appellant, through his trial counsel, stipulated that appellant was the same person who had been placed on probation in each of the referenced cause numbers.

Appellant's only argument in support of this point of error is that "the evidence is legally insufficient to support a conviction in cause number 756,736 and is further insufficient to support the court's order of revocation of probation in cause numbers 687,191 and 703,242."

We interpret this to merely reiterate his argument in support of his first point of error. We have already disposed of that contention. We need not further discuss the matter. Appellant's seventh point of error is overruled.

The judgment of the trial court in each of the three cases is affirmed.

/s/ Sam Robertson
Justice

Judgment rendered and Opinion filed October 26, 2000.

Panel consists of Justices Robertson, Sears, and Dunn.*

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

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