Affirmed in part; Reversed and Remanded in part and Opinion filed November 15, 2001.

In The

Fourteenth Court of Appeals

NO. 14-00-00940-CR
NO. 14-00-00941-CR

DANNY ROY PROPHET, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from 232nd District Court
Harris County, Texas
Trial Court Cause Nos. 844,842 and 833,949

O P I N I O N

This is a consolidated appeal from convictions for delivery of a controlled substance and possession of a controlled substance. Appellant challenges (1) the punishments he received as exceeding the amount prescribed under the penal code and (2) the factual sufficiency of the evidence establishing him as the person who delivered crack cocaine to an undercover officer. Because we find the evidence that appellant delivered cocaine is factually sufficient in cause number 844842, we affirm the trial court's finding of guilt in that

cause. However, we also find the trial court assessed sentences outside the range of punishment allowable under the penal code; therefore, we reverse the sentences assessed in cause numbers 844842 and 833949 and remand those causes for the trial court to conduct new punishment hearings.

I. Background

Officer David R. Bearden was assigned to the narcotics division of the Houston Police Department ("HPD"). He had been with the HPD seven years at the time of trial. Officer Bearden was conducting an undercover investigation at about 1:00 p.m. on the day appellant was arrested. He was in an unmarked, black Dodge truck at the 5800 block of Belneath in Harris County, Texas. Serving as backup, Officer J. Leal of the HPD was in an unmarked vehicle. Officer Leal had been with the HPD nearly ten years at the time of appellant's trial, five of which he had worked in narcotics. Officer Leal had experience doing "buy busts," "street pops," executing narcotics warrants and conducting surveillance.

At the 5800 block of Belneath, Officer Bearden saw a black man outside a nearby blue Chevrolet Lumina. The man wore a light blue or white shirt, dark pants, and a baseball cap. He waived as Officer Bearden drove by. When Officer Bearden stopped his truck and backed up, the man approached the officer's window. Officer Bearden asked the man for someone named "Doug." The man responded that Doug was in jail and asked what Officer Bearden was looking for. Officer Bearden said he was looking for a little "rock," or "dime" (meaning ten dollars worth of crack cocaine), before he went to work. The man offered to take Officer Bearden to get the cocaine and got into the passenger side of Officer Bearden's truck. After driving at the man's direction for a short time, they stopped and the man asked Officer Bearden for ten dollars, which Officer Bearden gave him. The man removed the baseball cap from his head, retrieved something from underneath the brim, and handed what appeared to be a rock of crack cocaine to Officer Bearden. Officer Bearden described the

item as a small, beige, off-white substance in rock form. Officer Bearden argued with the man that the rock was not ten dollar's worth, but the man explained it was all he had and all that was in the area at the time. Officer Leal estimated the man was in Officer Bearden's truck for a "few," but no more than five, minutes. The man left the truck and walked behind it toward the blue Lumina. In doing so, he passed Officer Leal. Officer Bearden testified he was "pretty sure" the man got into the blue Lumina after leaving the truck. Officer Bearden called Officer Leal over his radio and told him "the deal was complete." Officer Bearden drove away, and Officer Leal maintained his surveillance of the Lumina.

Officer Leal lost sight of the Lumina for two to three minutes. Thereafter, Officers Leal and Bearden sat in a parking lot discussing the next step in their investigation when Officer Leal saw a blue Lumina stop at a signal light directly in front of him. One or both contacted dispatch and described the vehicle to be stopped. Another officer heard their request on the radio. Officer Bearden described its location and direction of travel to nearby patrol officers. The driver parked the Lumina at a nearby gas station or convenience store. An arresting officer, Sergeant Williams, took a Polaroid photo of appellant. Officer Leal took the photograph to Officer Bearden, and he positively identified appellant. Officer Bearden estimated that five minutes elapsed from the time he had last seen appellant until appellant's arrest. The State showed Officer Bearden the same picture during trial, and he testified appellant was the "same guy that sold me the rock-like substance."

Officer W.J. West had been with the HPD for a little over twenty-four years at the time of trial. He was a patrol officer the day of appellant's arrest. He received a call to go to a certain convenience store and assist narcotics officers in making an arrest. When he arrived, he received a description of the suspect as a black male wearing a black cap and green camouflage shirt. West went inside the store and arrested appellant for delivery of a controlled substance. West handcuffed and searched appellant and found a small crack pipe in the pocket of his shirt.

Appellant was charged by indictment with (1) delivery of less than one gram of a controlled substance, namely cocaine, in cause number 844842 and (2) possession of less than one gram of cocaine in cause number 833949. The indictment included two enhancement paragraphs.[1] After the cases were tried together, a jury found appellant guilty as charged in each case. The court found the allegations in the two enhancement paragraphs to be true and assessed punishment in each case at ten years' confinement in the Institutional Division of the Texas Department of Criminal Justice (TDCJ–ID).[2] In two points of error, appellant challenges the sentences he received in both cause numbers and the factual sufficiency of the evidence in cause number 844842.

II. Issues Presented for Review

In his first point of error, appellant contends the sentences he received in both causes exceed the range authorized by statute. In his second point of error, appellant contends the evidence in cause number 844842 was factually insufficient to prove appellant was the person who delivered crack cocaine to Officer Bearden.

III. Factual Sufficiency

In his first point of error, appellant contends the evidence is factually insufficient to prove, beyond a reasonable doubt,[3] he is the person who sold cocaine to Officer Bearden.

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[1] Because the State redacted all prior offenses during the punishment hearing –except those listed in the indictments– the two enhancement paragraphs in the indictments were the only prior convictions before the trial court.

[2] Although the reporter's record reveals that the trial court orally assessed punishment at ten years' confinement for each case, the judgments in the clerk's record reflect that the trial court assessed punishment at fifteen years' confinement. As the State concedes, the court's oral pronouncements of sentence control over the written judgments. *See Coffey v. State*, 979 S.W.2d 326, 328 (Tex. Crim. App. 1998).

[3] Although appellant phrases this point of error as a legal sufficiency challenge, he concedes that the evidence is legally sufficient and that he challenges only the *factual* insufficiency of the evidence.

As part of this claimed insufficiency, appellant contends the facts adduced at trial raised a reasonable alternative hypothesis that someone other than appellant sold the cocaine to Officer Bearden. An offense is committed when (1) a person (2) intentionally or knowingly (3) delivers (4) a controlled substance listed in Penalty Group I. TEX. HEALTH & SAFETY CODE ANN. § 481.112(a) (Vernon Supp. 2001). Cocaine is listed in Penalty Group I. *Id.* § 481.102(3)(D).

In reviewing the factual sufficiency of the evidence, we do not view the evidence in the light most favorable to the prosecution. *Cain v. State*, 958 S.W.2d 404, 407 (Tex. Crim. App. 1997). We consider all the evidence in the record related to appellant's sufficiency challenge, comparing the weight of the evidence that tends to prove guilt with the evidence that tends to disprove it. *Santellan v. State*, 939 S.W.2d 155, 164 (Tex. Crim. App. 1997). We are not free to re-weigh the evidence and set aside a jury verdict merely because we believe a different result is more reasonable. *Cain*, 958 S.W.2d at 407. To find the evidence factually insufficient to support a verdict, we must conclude that the jury's finding is manifestly unjust, shocks the conscience, or clearly demonstrates bias. *Jones v. State*, 944 S.W.2d 642 (Tex. Crim. App. 1996).

Appellant questions the accuracy of Officer Leal's identification of the Lumina's *driver* given his limited opportunity to see the driver. Appellant also questions Officer Leal's identification of the Lumina's *passenger* as appellant because he identified him by the black ball cap he wore. Appellant identifies additional inconsistencies within Officer Leal's testimony.

See Johnson v. State, 23 S.W.3d 1, 7 (Tex. Crim. App. 2000) ("It is also now beyond dispute that determining the legal and factual sufficiency of evidence requires the implementation of separate and distinct standards. A *legal sufficiency review* calls upon the reviewing court to view the relevant evidence in the light most favorable to the verdict and determine whether any rational trier of fact could have found the *essential elements of the crime beyond a reasonable doubt*)." (emphasis added). Accordingly, we will address this point only as a factual insufficiency claim.

Our review of the record indicates that part of Officer Leal's testimony was inconsistent. Officer Leal initially testified that when he saw the second Lumina twenty to thirty yards away at the stoplight —after having lost the one with the delivery man— he *immediately* recognized both the driver and passenger. However, on cross-examination he testified that he did not recognize the passenger until he got *behind* the Lumina. Officer Leal's also testified that he "assumed" it was the same Lumina he previously followed. Appellant argues that the second Lumina, therefore, could have been different from the first one.

Appellant further argues that the behavior of the occupants in the second Lumina gives rise to a reasonable alternative hypothesis that the second Lumina was not the Lumina previously observed by officers. Appellant argues (1) the first Lumina's occupants clearly knew Officer Leal was pursuing them; (2) Officer Leal lost the first Lumina due to the driver's evasive driving (i.e., quickly turning corners and speeding), yet the driver of the second Lumina took no evasive action despite the occupants' opportunity to see Officer Leal; (3) a blue Lumina was sighted in the same spot where another blue Lumina was lost less than three minutes earlier without any matching of license plate numbers. Appellant questions why a suspect who seemed to know that police were chasing him would choose to go back to the very location where he previously eluded police to buy beer that he could have purchased elsewhere. Appellant also contends that if Officer Leal's testimony —that he pulled alongside the second Lumina and then backed away— were true, the occupants would still be attempting to elude police.

Appellant argues that other factors, including the officers' uncertainty, indicate he was not the delivery man. Appellant points out that (1) the officers did not arrest the driver of the Lumina even though, if it were the same vehicle they lost, the driver was a party to the offense of delivery of a controlled substance; (2) the person who delivered the cocaine wore a blue shirt, while appellant wore a camouflage shirt when he was arrested just minutes after

the delivery; and (3) appellant did not have in his possession the blue shirt purportedly worn by the "delivery" man. Appellant also points out that the marked money with which Officer Bearden bought the rock was not found on appellant or the driver. NO witness explained the absence of marked money during trial, and too little time had elapsed after the drug transaction for the money to have been spent.

Appellant also questions Officer Bearden's and Officer Leal's identification of appellant as inherently unreliable because the officer was only able to view the "delivery" man for a few seconds. Appellant also complains that Officer Bearden identified appellant from a Polaroid photograph when he already knew appellant was guilty for the offense of possessing a pipe laden with cocaine residue.

Our review of the record shows that the investigation at issue was conducted around 1:30 p.m. During appellant's first contact with Officer Bearden, appellant was less than two feet away from him. Appellant got into Officer Bearden's truck and rode alone with him for a short time. Thus, Officer Bearden had a good opportunity to observe the "delivery" man. Moreover, appellant was arrested and a photograph taken of him only minutes after Officer Bearden bought the rock. Notwithstanding appellant's apparent change in clothing —from a blue shirt when Officer Bearden bought the rock to a camouflage shirt in the picture taken when he was arrested— Officer Bearden testified he was absolutely sure the person in the picture was the same person who sold the rock to him. Officer Bearden also testified that when he and Officer Leal saw the Lumina again at the stoplight, "Officer Leal got real good surveillance on it."

Additionally, Officer Leal testified he got a good look at the "delivery" man as he walked past the passenger side of his police vehicle and got into the passenger side of the Lumina. Leal and Officer Bearden were in a parking lot discussing what to do next, Officer Leal saw the Lumina and said, "Look, there is the car right there. There is [sic] the two

guys." Officer Leal testified that when he followed the Lumina the second time, he thought the Lumina's occupants did not notice him. This may explain why the driver did not take evasive action at that point. Officer Leal saw someone resembling appellant enter the convenience store. He recognized that appellant's clothing was different. He was wearing a "camo" shirt. Officer Leal testified that when appellant was brought outside the store, he "spotted and confirmed that that was the defendant that came out of Officer Bearden's vehicle." When the prosecutor showed Officer Leal a picture of appellant taken at the scene, Officer Leal testified he was one-hundred percent sure it was the same person who had been in Officer Bearden's vehicle. In following the second Lumina, Officer Leal pulled alongside it to make sure the occupants were the same people involved in the investigation. He immediately backed off and followed the Lumina from a distance. Although he did not record the license number, he testified that he recited it to the patrol units. Officer Leal testified that he also gave a description of the vehicle, plates, and people inside (two black males) each time he had the vehicle in sight, although he could not see exactly what they were wearing. Officer Leal acknowledged that the description of "two black males" covers many people in Harris County, but then stated that he recognized the driver and passenger as the persons involved in the earlier investigation. Officer Leal testified that he remembered the driver wore a white shirt and that he recognized the driver's face.

Confronted with the somewhat conflicting evidence about which appellant complains, the jury was required to judge the credibility of the witnesses and obviously resolved the issue against appellant. The fact finder is the exclusive judge of the credibility of the witnesses and the weight to be given their testimony. *Mosley v. State*, 983 S.W.2d 249, 254 (Tex. Crim. App. 1998). Reviewing the evidence with appropriate deference to the jury's verdict, and notwithstanding some contradictions and weaknesses in the testimony, we find that the evidence is not so weak as to be factually insufficient. After comparing the evidence

that proves appellant's identity to the evidence that disproves it, we hold that this evidence is factually sufficient to support the jury's verdict.

We overrule appellant's second point of error.

IV. SENTENCE

In his first point of error, appellants complains that the punishment assessed in both cause numbers (833949 and 844842) exceeded the range authorized by statute. We agree.

Appellant did not object to the sentences he received at trial. However, an objection to a void sentence may be raised for the first time on appeal. *See Heath v. State*, 817 S.W.2d 335, 339 (Tex. Crim. App. 1991).

The indictments in cause numbers 833949 and 844842 each contained the same two enhancement paragraphs alleging appellant's prior convictions for forgery and possession of a controlled substance: (1) in the first paragraph, it is alleged that appellant was convicted in March of 1987 for the felony offense of forgery; and (2) in the second paragraph it is alleged that, after the conviction in the felony forgery was final, appellant was convicted in July of 1996 for felony possession of a controlled substance. In each cause, the trial court found the enhancement paragraphs were true and assessed appellant's punishment at confinement for ten years in the TDCJ–ID.

The offenses for which appellant was charged —possession of a controlled substance weighing less than one gram (in cause number 833949) and delivery of a controlled substance weighing less than one gram (in cause number 844842)— are state jail felonies. *See* TEX. HEALTH & SAFETY CODE ANN. § 481.112(b) (Vernon Supp. 2001). The Texas Penal Code provides that an individual adjudged guilty of a state jail felony shall be punished by confinement in a state jail facility for no more than two years or less than 180 days and may be assessed a fine no greater than $10,000. TEX. PEN. CODE Ann. § 12.35(a)&(b)

(Vernon 1994). Texas Penal Code section 12.42(a)(2) requires the trial court to punish a state jail felony as a second-degree felony when a defendant has been previously and finally convicted of two sequential felonies.[4] *See* TEX. PEN. CODE Ann. § 12.42(a)(2) (Vernon Supp. 2001). The forgery offense included in the first enhancement paragraph was a third degree felony. The cocaine possession offense –alleged in the second enhancement paragraph– was a state jail felony. Thus, the issue here is whether a state jail felony is considered a "felony" for enhancement purposes under section 12.42(a)(2).

Both the State and appellant point us to a relatively recent Court of Criminal Appeals' opinion addressing this very issue. *See Campbell v. State*, 49 S.W.3d 874 (Tex. Crim. App. 2001). In *Campbell*, the court held that the term "two felonies" in section 12.42(a)(2) does not include state jail felonies: "The statute . . . does not impose an increased punishment for offenders who have two previous convictions in the form of both a single prior state jail felony and a single prior non-state jail felony." *Id.* The State disagrees with the Court's holding but acknowledges that we are bound by the decision in *Campbell*.

Accordingly, we find that the punishment assessed in cause numbers 844842 and 833949 is excessive and therefore void. Because, under *Campbell*, the indictment paragraphs at issue cannot enhance the offenses for which appellant is charged beyond a state jail felony, the trial court must reassess appellant's punishment within the range provided for a state jail felony (180 days to two years' confinement in a state jail with an optional fine up to $10,000).

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[4] Section 12.42 in relevant part provides:

> If it is shown on the trial of a state jail felony punishable under Section 12.35(a) that the defendant has previously been finally convicted of two felonies, and the second previous felony conviction is for an offense that occurred subsequent to the first previous conviction having become final, on conviction the defendant shall be punished for a second-degree felony.

TEX. PEN. CODE ANN. § 12.42(a)(2) (Vernon Supp. 2001).

Appellant's second point of error is sustained.

We affirm the trial court's finding of guilt in cause number 844842 but reverse both causes (844842 and 833949) and remand with instructions for the trial court to conduct a new punishment hearing for these causes consistent with our decision.

/s/ Charles W. Seymore
Justice

Judgment rendered and Opinion filed November 15, 2001.

Panel consists of Chief Justice Brister and Justices Fowler and Seymore.

Do not publish — TEX. R. APP. P. 47.3(b).