Affirmed and Opinion filed December 20, 2001.

In The

Fourteenth Court of Appeals

NO. 14-00-01289-CR

GEORGE NEAL WILLIAMS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 263rd District Court
Harris County, Texas
Trial Court Cause No. 833,993

O P I N I O N

Appellant, George Neal Williams, challenges the legal and factual sufficiency of the evidence supporting his conviction for possession of cocaine with intent to distribute. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

On January 19, 2000, Officer Michael Jones approached an automobile stopped in the middle of the road, blocking traffic. A man stood next to the vehicle conversing with

a female driver. Appellant sat in the passenger seat of the vehicle. Officer Jones saw what appeared to be a narcotics transfer between the male outside the car and the driver. He approached the vehicle and asked the driver to exit the car. After the driver exited the car, Officer Jones observed a substance, which looked like cocaine, on the driver's seat. The officer then instructed appellant, who had remained in the passenger seat, to exit the car. When Officer Jones performed a pat down search of appellant, he felt two hard chunks near his groin area. The substance was later determined to be cocaine.

Appellant was indicted for possession with intent to deliver more than four grams but less than 200 grams of cocaine, including any adulterants and dilutants. Appellant pleaded not guilty. Appellant admitted at trial that he bought the cocaine for his own personal use, but not for distribution or sale. A jury convicted him of the offense of possession with intent to distribute and sentenced him to confinement for life in the state penitentiary.

II. ISSUES AND ANALYSIS

In two points of error, appellant contends the evidence presented at trial is both legally and factually insufficient to support his conviction for possession with intent to distribute. In particular, appellant contends the evidence is insufficient to show the net percentage of cocaine (less adulterants and dilutants) he possessed.

In evaluating a legal sufficiency challenge, we view the evidence in the light most favorable to the verdict. *Weightman v. State*, 975 S.W.2d 621, 624 (Tex. Crim. App. 1998). As a reviewing court, it is not our duty to re-weigh the evidence from reading a cold record; rather, it is our duty to act as a due process safeguard, ensuring only the rationality of the fact-finder's decision. *Williams v. State*, 937 S.W.2d 479, 483 (Tex. Crim. App. 1996). We will not overturn the verdict unless it is irrational or unsupported by proof beyond a reasonable doubt. *Matson*, 819 S.W.2d at 846. The jury, as the trier of fact, "is the sole judge of the credibility of witnesses and of the strength of the evidence." *Fuentes v. State*,

991 S.W.2d 267, 271 (Tex. Crim. App. 1999). The jury may choose to believe or disbelieve any portion of the witnesses' testimony. *Sharp v. State*, 707 S.W.2d 611, 614 (Tex. Crim. App. 1986). When faced with conflicting evidence, we presume the trier of fact resolved conflicts in favor of the prevailing party. *Turro v. State*, 867 S.W.2d 43, 47 (Tex. Crim. App. 1993). Therefore, if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, we must affirm. *McDuff v. State*, 939 S.W.2d 607, 614 (Tex. Crim. App. 1997).

In contrast, when evaluating a challenge to the factual sufficiency of the evidence, we view all the evidence without the prism of "in the light most favorable to the prosecution" and set aside the verdict only if it is "so contrary to the overwhelming weight of the evidence to be clearly wrong and unjust." *Johnson v. State*, 23 S.W.3d 1, 6–7 (Tex. Crim. App. 2000) (citing *Clewis v. State*, 922 S.W.2d 126, 129 (Tex. Crim. App. 1996)). This concept embraces both "formulations utilized in civil jurisprudence, i.e., that evidence can be factually insufficient if (1) it is so weak as to be clearly wrong and manifestly unjust or (2) the adverse finding is against the great weight and preponderance of the available evidence." *Id.* at 11. Under this second formulation, the court essentially compares the evidence that tends to prove the existence of a fact with the evidence that tends to disprove that fact. *Jones v. State*, 944 S.W.2d 642, 647 (Tex. Crim. App. 1996). "In conducting the factual sufficiency review, we consider the fact-finder's weighing of evidence and can disagree with the fact finder's determination." *Clewis*, 922 S.W.2d at 133. Our evaluation should not intrude upon the fact-finder's role as the sole judge of the weight and credibility given to any witness's testimony. *See Cain v. State*, 958 S.W.2d 404 (Tex. Crim. App. 1997).

The indictment charged that on or about January 19, 2000, appellant "did then and there intentionally and knowingly possess, with intent to deliver, a controlled substance, namely cocaine, weighing by aggregate weight, including adulterants and dilutants, more than 4 grams and less than 200 grams." This is an offense of section 481.112 of the Texas

Health and Safety Code. TEX. HEALTH & SAFETY CODE ANN. § 481.112 (Vernon 1992).

Appellant argues the State is required to prove whether the cocaine contained any adulterants or dilutants and, if so, how much those substances add to the total weight. He contends that, because the laboratory tests performed did not determine how much of the cocaine substance contained adulterants and dilutants, the evidence is insufficient to show that he possessed more than four grams of cocaine. Appellant further contends that, if an adulterant or dilutant affects the chemical activity and makeup of the substance, the substance should not be considered a controlled substance. In support of his contention, appellant cites the Texas Court of Criminal Appeals' opinions in *Reeves v. State*, 806 S.W.2d 540 (Tex. Crim. App. 1990); *Engelking v. State*, 750 S.W.2d 213 (Tex. Crim. App. 1988); and *McGlothlin v. State*, 749 S.W.2d 856 (Tex. Crim. App. 1988). These cases were decided before the legislature defined adulterants and dilutants. *See* TEX. HEALTH & SAFETY CODE ANN. § 481.002(49) (Vernon Supp. 2001). For this reason, appellant's reliance on them is misplaced.

Before the legislature defined adulterant or dilutant, the State, when charging that adulterants or dilutants constitute a part of the weight used to reach the total weight of the controlled substance, was required to show that the adulterants or dilutants were substances added to the controlled substance either "(1) with the intent to increase the bulk of the product, or (2) to increase the quantity of the final product without affecting its activity." *Cawthorn v. State,* 849 S.W.2d 346 (Tex. Crim. App. 1992). The legislature, however, has since amended the law to provide that "any material that increases the bulk or quantity of a controlled substance is an adulterant or dilutant." TEX. HEALTH & SAFETY CODE ANN. § 481.002(49). This statutory definition of "adulterant or dilutant" was in effect at the time appellant committed the crime for which he was convicted and, therefore, it applies to this

case.[1] Under this definition, all of the material in addition to the cocaine was an adulterant or dilutant. Thus, the State need only have proved that a controlled substance, plus adulterants and dilutants, weighed at least as much as the minimum weight alleged in the indictment. *Reeves*, 806 S.W.2d at 542. Testimony as to the gross weight of the controlled substance appellant possessed is sufficient. *Williams v. State*, 936 S.W.2d 399, 405-06 (Tex. App.–Fort Worth 1996, pet. ref'd). The State is no longer required to prove whether the added adulterants or dilutants affected the chemical activity of a controlled substance. *Warren v. State*, 971 S.W.2d 656, 660 (Tex. App.–Dallas 1998, no pet.).

Carolyn Gamble, a chemist employed by the Houston Police Department, testified that she performed tests on the substance confiscated from appellant. She stated the tests revealed that the substance contained cocaine together with adulterants and dilutants, and weighed approximately 160.3 grams. Although Gamble did not testify as to the exact percentage of cocaine contained in the net weight, such testimony is no longer required. *See Williams,* 936 S.W.2d at 405. The State only need demonstrate that part of a substance is a controlled substance and that the aggregate weight exceeds the minimum statutory amount. *Id.*

We find that when viewed in the light most favorable to the prosecution, a rational trier of fact could have found beyond a reasonable doubt that appellant possessed a controlled substance, cocaine, in an amount of less than 200 grams but at least four grams, regardless of whether it contained adulterants and dilutants. *See Collins v. State,* 969 S.W.2d 114, 116 (Tex. App.–Texarkana 1998, pet ref'd.). Accordingly, we overrule appellant's legal sufficiency challenge.

---

[1] The legislature amended Section 481.002 of the Texas Health and Safety Code to include a definition for adulterants and dilutants in 1993. The amendment, effective September 1, 1994, applies to this case because appellant is alleged to have committed the offense of possession with intent to distribute on or about January 19, 2000. *See, e.g., Hines v. State,* 976 S.W.2d 912, 913 (Tex. App.–Beaumont 1998, no pet.).

In applying the factual sufficiency standard, we note that appellant did not produce any evidence controverting the weight or purity of the cocaine in support of his theory challenging the State's evidence. The verdict is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *See Clewis*, 922 S.W.2d at 135. Accordingly, we find the evidence factually sufficient to support appellant's conviction and overrule his second point of error.

Having overruled appellant's challenges to the legal and factual sufficiency of the evidence, we affirm the judgment of the trial court.

/s/ Kem Thompson Frost
Justice

Judgment rendered and Opinion filed December 20, 2001.

Panel consists of Justices Anderson, Hudson, and Frost.

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