Affirmed and Opinion Filed November 7, 2017

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-16-00877-CR

ARCHIE LESEAN WILLIAMS, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the 382nd Judicial District Court
Rockwall County, Texas
Trial Court Cause No. 2-16-0307

MEMORANDUM OPINION

Before Justices Francis, Myers, and Whitehill
Opinion by Justice Whitehill

A jury found appellant guilty of tampering with or fabricating physical evidence after he threw a bag of marijuana out of the car window during a traffic stop. Appellant pled true to an enhancement paragraph in the indictment, and the jury assessed punishment at twenty years imprisonment and a $10,000 fine.

In a single issue, appellant argues that the evidence is insufficient to support his conviction because it does not establish that he knowingly or intentionally altered, destroyed, or concealed the marijuana, or that he intended to impair the availability of the evidence in the investigation.

We conclude that the evidence is sufficient because (i) appellant altered the amount of marijuana that was seized by causing it to dissipate when he threw it out the window and (ii) the

jury could reasonably infer that he did so with the required intent. We thus affirm the trial court's judgment.

I. Background

Tracey Gaines, a Rockwall police officer, was dispatched to respond to a theft at an Ulta store in Rockwall. He was told that a black Nissan with out-of-state plates was leaving the scene.

Gaines saw the Nissan go the wrong way in the turn lane before turning across traffic on the highway, activated his siren and lights, and pulled the vehicle over. Appellant was later identified as the vehicle's driver.

Upon contacting the vehicle, Gaines saw appellant making furtive movements, reaching between his legs and under the seat. Appellant then threw something out of the open passenger window. A dashcam video captured these events and was played for the jury at trial.

Gaines did not immediately see what appellant threw out the window because he thought appellant had a weapon and was focused on appellant's hands. But he saw peripherally that "some particulate" was thrown out the window.

Appellant and his female passenger were removed from the car, and Gaines recovered multiple fragrances that had been stolen from Ulta. Gaines also discovered that the particulate appellant threw out the window was marijuana.

Gaines found marijuana scattered on the driver's side floorboard, passenger seat, dashboard, on the ground outside the vehicle, and on the hood and bumper of an adjacent vehicle. Most, but not all of the marijuana was collected.[1]

[1] Officer Gaines estimated that the amount he recovered was approximately .30 ounce. Appellant was charged with possession of less than two ounces.

A jury convicted appellant of tampering with physical evidence. Appellant pled true to an enhancement paragraph, and the jury found it true and assessed punishment at twenty years imprisonment and a $10,000 fine. Appellant appealed from the ensuing judgment.

II. Analysis

A. Standard of Review and Applicable Law

We review the sufficiency of the evidence to support a conviction by viewing all of the evidence in the light most favorable to the verdict to 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 (1979).

This standard gives full play to the fact finder's responsibility to resolve testimonial conflicts, weigh the evidence, and draw reasonable inferences from basic facts to ultimate facts. *Id*. at 319; *Murray v. State*, 457 S.W.3d 446, 448 (Tex. Crim. App. 2015). The fact finder is the sole judge of the evidence's weight and credibility. *See* TEX. CODE CRIM. PROC. art. 38.04; *Dobbs v. State*, 434 S.W.3d 166, 170 (Tex. Crim. App. 2014).

Thus, when performing an evidentiary sufficiency review, we may not re-evaluate the weight and credibility of the evidence and substitute our judgment for that of the factfinder's. *See Montgomery v. State*, 369 S.W.3d 188, 192 (Tex. Crim. App. 2012). Instead, we determine whether the necessary inferences are reasonable based upon the cumulative force of the evidence when viewed in the light most favorable to the verdict. *Murra*y, 457 S.W.3d at 448. We must presume that the factfinder resolved any conflicting inferences in the verdict's favor and defer to that resolution. *Id.* at 448–49. The standard of review is the same for direct and circumstantial evidence cases; circumstantial evidence is as probative as direct evidence in establishing guilt. *Dobbs*, 434 S.W.3d at 170; *Acosta v. State*, 429 S.W.3d 621, 625 (Tex. Crim. App. 2014).

As applicable here, the penal code provides that a person commits the offense of tampering with, or fabricating physical evidence, if, knowing that an investigation or official proceeding is pending or in progress, he alters, destroys, or conceals any record, document, or thing with intent to impair its verity, legibility, or availability as evidence in the investigation or official proceeding. TEX. PENAL CODE § 37.09(a)(1); *State v. Zuniga*, 512 S.W.3d 902, 907 (Tex. Crim. App. 2017).[2]

As defined by the Texas Penal Code, "[a] person acts knowingly, or with knowledge, with respect . . . to circumstances surrounding his conduct when he is aware . . . that the circumstances exist." TEX. PENAL CODE § 6.03(b). In contrast, "[a] person acts intentionally, or with intent, with respect . . . to a result of his conduct when it is his conscious objective or desire to . . . cause the result." TEX. PENAL CODE § 6.03(a).

B. Was the evidence altered, destroyed, or concealed?

Appellant argues that the evidence is insufficient to establish that he altered, destroyed, or concealed the evidence. He alternatively argues that the evidence supports attempted tampering, and asks that we reform his conviction to this lesser-included offense.

The indictment alleged that appellant "did then and there knowing that an investigation was pending or in progress, intentionally or knowingly alter, destroy, or conceal marihuana, with intent to impair its availability as evidence in the investigation." When the State pleads a specific element of a penal offense that has statutory alternatives for that element, the sufficiency of the evidence is measured by the element that was pled, not any alternative statutory elements. *See Rabb v. State*, 434 S.W.3d 613, 616 (Tex. Crim. App. 2014). Here, however, the indictment

[2] *In Pannell v. State*, 7 S.W.3d 222, 223 (Tex. App.—Dallas 1999, pet ref'd), we held that the defendant had to be aware that the thing he altered, destroyed, or concealed was evidence in the investigation as it existed at the time of the alteration, destruction, or concealment. *Id.* Thus, throwing marijuana out the window at the time of a traffic stop did not satisfy the statutory knowledge requirement because the defendant did not know there was a marijuana investigation at the time of the traffic stop. *Id.* The court of criminal appeals, however, rejected this approach, stating that *Pannell* included an extra element with no statutory foundation that "renders the statute impractical and unfit for its purpose." *Williams v. State*, 270 S.W.3d 140, 144 (Tex. Crim. App. 2008). Moreover, in this case, appellant does not dispute his knowledge of an investigation in progress.

alleges all three alternatives, so the State met its burden if the evidence is sufficient on any such alternative. *See Anderson v. State*, 416 S.W.3d 884, 889 (Tex. Crim. App. 2013) (verdict will be upheld if evidence is sufficient on any theory authorized by the charge).

To alter evidence means to change, make different, or modify it. *See Williams*, 270 S.W.3d at 145. The evidence here initially was an unknown quantity of marijuana greater than the amount recovered during the investigation. The quantity is unknown because it dispersed when appellant threw it out the window.

Although appellant emphasizes Gaines's testimony that he did not believe the marijuana had been altered, Gaines also said he did not recover all of the marijuana at the scene. That is, the quantity was different because appellant threw it out of the window. Thus, the evidence supports a conclusion that the quantity of marijuana was changed, modified, or made different.

This court considered a similar situation in *Blanton v. State*, Nos. 05-05-01060, 01061-CR, 2006 WL 2036615, at *2 (Tex. App.—Dallas July 21, 2006, pet ref'd) (mem. op.) In that case, the defendant argued that because he threw a baggie of cocaine out in front of the officer, the State failed to prove that he destroyed or concealed the evidence. *Id*. This court agreed, but concluded that "from the evidence showing that the bag was ripped with its content spilling onto the roadway, the jury could rationally have inferred that [defendant] altered the evidence." *Id.* The evidence here supports a similar inference.

C. Did appellant intend to impair the availability of the evidence?

Appellant also argues the evidence is insufficient for the jury to have found that he intended to impair the availability of the marijuana as evidence because he could not possibly have had any such conscious purpose when he threw the marijuana out of the window in full view of the officer. To this end, appellant relies on *Thornton v. State*, 425 S.W.3d 289, 304 (Tex. Crim. App. 2014), where the court stated, "[t]here may be cases in which the most

inculpating inference the evidence would suggest is that the accused simply intended to dispossess himself of the object in order to plausibly disclaim any connection to it." But the court also went on to say that when there is evidence other than the mere act of disposing of the evidence in question, it is within the province of the fact finder to draw reasonable inferences from that evidence. *Id.*

Here, appellant threw the marijuana out of the window in full view of the officer. It is therefore not reasonable to infer that he sought to disclaim any connection to it. Moreover, appellant did not just dispossess himself of the marijuana—he threw it out of an open window and caused it to scatter and disperse. Thus, it was within the jury's province to reasonably infer from these facts that appellant intended to impair the evidence's future availability.

III. Conclusion

We conclude that the evidence is sufficient to establish that appellant altered the evidence with the intent to impair the investigation, resolve appellant's sole issue against him, and affirm the trial court's judgment.

/Bill Whitehill/
BILL WHITEHILL
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

ARCHIE LESEAN WILLIAMS, Appellant

No. 05-16-00877-CR V.

THE STATE OF TEXAS, Appellee

On Appeal from the 382nd Judicial District Court, Rockwall County, Texas
Trial Court Cause No. 2-16-0307.
Opinion delivered by Justice Whitehill.
Justices Francis and Myers participating.

Based on the Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

Judgment entered November 7, 2017.