Opinion issued November 6, 2008

In The
Court of Appeals
For The
First District of Texas

NO. 01-07-01040-CR

MARIO PADIA, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 23rd District Court
Brazoria County, Texas
Trial Court Cause No. 52,336

MEMORANDUM OPINION

A jury found appellant, Mario Padia, guilty of the offenses of possession of a

cellular telephone while an inmate of a correctional facility[1] and possession of a controlled substance, namely, marijuana, while on property owned, used, and controlled by the Texas Department of Criminal Justice.[2] After finding true the allegation in an enhancement paragraph that appellant had a prior felony conviction, the trial court assessed his punishment at confinement for twelve years. In two issues, appellant contends that the trial court erred in not instructing the jury to infer that destroyed evidence would have been exculpatory and in not instructing the jury on the legal definition of possession.

We affirm.

Factual and Procedural Background

Texas Department of Criminal Justice Sergeant L. Ching testified that on March 16, 2005, during a walk-through of Darrington Correctional Facility, he smelled a fermenting odor emanating from the cell of appellant. Ching tried to convince appellant to come out of his cell in order to investigate the odor, but appellant was "taking a nap or something." So Ching walked on. A few minutes later Ching returned to appellant's cell and again tried to convince him to come out of the cell, but appellant refused to leave. Appellant then began tearing paper and flushing

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1 *See* TEX. PENAL CODE ANN. § 38.11(j) (Vernon Supp. 2008).

2 *See* TEX. PENAL CODE ANN. § 38.11(d)(1)(A) (Vernon Supp. 2008).

it down the toilet. Ching called in a five-man "shake down team" to forcibly remove appellant from his cell. One of the members of the shake down team talked to appellant who eventually agreed to leave his cell. On cross-examination, Ching conceded that the shake down team had with it a video camera, which had been activated at some point. However, Ching explained that the video camera had been on for only about one minute and that he did not operate the video camera. Ching admitted that the tape was not saved.

After appellant left his cell, Sergeant Ching performed a search and found a cellular telephone and six plastic bags of marijuana. Ching found three of the bags with the cellular telephone covered in newspaper, and he found the other three bags of marijuana inside of a tennis shoe. Ching also found a homemade charger for the cellular telephone. On cross-examination, Ching agreed that it was possible that items could have been thrown onto appellant's row of cells from the second floor of cells. However, on redirect examination, Ching explained that it would be impossible to throw an item from the second floor into appellant's cell. He also stated that he found the cellular telephone away from the entrance of appellant's cell and the tennis shoe containing the marijuana closer to the cell door. On re-direct examination, Sergeant Ching also said that appellant lived alone in a single cell.

A.M.X. Stringfellow Unit Senior Warden J. Mossbarger testified that the

Darrington Correctional Facility's policy allows inmates only one pair of tennis shoes and one pair of state shoes. The policy also requires that tennis shoes be clearly marked with an inmate's identification number.

Inspector General Office's Investigator C. Cegielski testified that he handled the evidence recovered from appellant's cell. He stated that in his experience boots and shoes recovered from the correctional facility are not always marked with identification numbers and, when they are marked, the numbers are often "defaced in one way or another." In examining the cellular telephone recovered from appellant's cell, Cegielski found a number of text messages dated from February 2005 through March 2005. He identified fifteen exhibits as accurate photographs of these text messages. Although the content of the messages was redacted by the trial court, the exhibits contained the telephone number from which the text messages were sent along with the time and date of each message.

Carolina Martinez testified that she recognized the telephone number in the text messages because she had purchased a cellular telephone with that number for her cousin, Michelle Trevino, in early 2005. Trevino verified that Martinez had purchased a cellular telephone for her and that she and appellant had been involved in a relationship. Trevino, however, did not recall sending any text messages to appellant, explaining that she "was on drugs at the time."

Destroyed Evidence

In his first issue, appellant argues that the trial court erred in denying his requested charge to the jury because the State, in violation of the United States and Texas Constitutions, destroyed "potentially useful evidence." *See* U.S. CONST. amend. VI, XIV; TEX. CONST. art. I, § 19.

The State's duty to preserve evidence is limited to evidence that possesses an exculpatory value that was apparent before the evidence was destroyed. *California v. Trombetta*, 467 U.S. 479, 488, 104 S. Ct. 2528, 2534 (1984); *Mahaffey v. State*, 937 S.W.2d 51, 53 (Tex. App.—Houston [1st Dist.] 1996, no pet.). To show a violation of due process, a defendant must make "some showing that the evidence lost would be both material and favorable to the defense." *U.S. v. Valenzuela-Bernal*, 458 U.S. 858, 873, 102 S. Ct. 3440, 3449 (1982); *Mahaffey*, 937 S.W.2d at 53. Evidence that is only potentially useful, i.e., evidence that *might have* exonerated the defendant, is not material to a defendant's case. *Arizona v. Youngblood*, 488 U.S. 51, 58, 109 S. Ct. 333, 337 (1988); *Mahaffey*, 937 S.W.2d at 53. When evidence is only potentially useful, a defendant must show that the evidence was destroyed in bad faith to establish a violation of due process or due course of law rights. *Youngblood*, 488 U.S. at 58, 109 S. Ct. at 337; *Neal v. State*, 256 S.W.3d 264, 280 (Tex. Crim. App. 2008); *Mahaffey*, 937 S.W.2d at 53; *see also* U.S. CONST. amend. XIV, § 1 (due

process clause); TEX. CONST. art. I, § 19 (due course of law provision).

Appellant asserts that the videotape would have shown what appellant "was or was not wearing, . . . [a]ppellant's demeanor, the view of his cell from the run, and the dynamic between the prison guards and [a]ppellant at the time prior to the search." Appellant asserts that the tennis shoe would likely have been marked with the owner's identification number which "would very likely have been independent evidence of ownership." If the shoe belonged to someone else, this "would have introduced doubts about [a]ppellant's alleged knowing possession."

Appellant's arguments do not demonstrate that the lost evidence was both favorable and material to his case. *Valenzuela-Bernal*, 458 U.S. at 873, 102 S. Ct. at 3449. Such evidence would have been no more than "potentially useful." Moreover, nothing in the record or in appellant's arguments on appeal indicates that the State destroyed the evidence in bad faith.

Accordingly, we hold that the trial court did not err in denying appellant's requested charge.

We overrule appellant's first issue.

Possession

In his second issue, appellant argues that he was egregiously harmed by the

trial court's not instructing the jury on the legal definition of "possession"[3] because the absence of the definition allowed the jury to convict him "based on a broader conception of 'possession' than the law allows."

The State concedes that the trial court erred in not including the definition of "possession." A trial court is responsible for delivering a written charge to the jury. TEX. CODE CRIM. PROC. ANN. art. 36.14 (Vernon 2007). The charge must set "forth the law applicable to the case." *Id.* A charge cannot fully set forth the law of the case "without including the definitions of those words and phrases that have been legislatively provided." *Arline v. State*, 721 S.W.2d 348, 352 n.4 (Tex. Crim. App. 1986); *MacDougall v. State*, 702 S.W.2d 650, 652 (Tex. Crim. App. 1986); *see* TEX. PENAL CODE ANN. § 1.07(a)(39) (Vernon Supp. 2008) (defining possession). Accordingly, we hold that the trial court erred in not including a definition of "possession" in the jury charge.

Appellant did not object to the charge; therefore, we reverse only if appellant suffered egregious harm. *Bluitt v. State*, 137 S.W.3d 51, 53 (Tex. Crim. App. 2004); *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985) ("[I]f no proper objection was made at trial and the accused must claim that the error was

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[3] *See* TEX. CODE CRIM. PROC. ANN. art. 36.14 (Vernon 2007); *Arline v. State*, 721 S.W.2d 348, 352 n.4 (Tex. Crim. App. 1986).

'fundamental,' he will obtain a reversal only if the error is so egregious and created such harm that he 'has not had a fair and impartial trial'—in short 'egregious harm.'"). Egregious harm consists of error that affects the very basis of the case, deprives the defendant of a valuable right, or vitally affects a defensive theory. *Warner v. State*, 245 S.W.3d 458, 461–62 (Tex. Crim. App. 2008). Egregious harm is a difficult standard to prove and must be determined on a case-by-case analysis. *Ellison v. State*, 86 S.W.3d 226, 227 (Tex. Crim. App. 2002). To determine whether appellant has sustained harm from a non-objected-to instruction, we consider (1) the entire jury charge, (2) the state of the evidence, including the contested issues and weight of the probative evidence, (3) the argument of counsel, and (4) any other relevant information revealed by the record of the trial as a whole. *Almanza*, 686 S.W.2d at 171. In considering these factors, we must determine whether appellant has suffered actual, rather than merely theoretical, harm. *Id.*

Here, appellant asserts that "there [is] no direct evidence that [a]ppellant exercised *actual* care, custody, control, or management of the marijuana." *See* TEX. PENAL CODE ANN. § 1.07(a)(39) (Vernon Supp. 2008) (defining possession as "actual care, custody, control, or management"). Although the cellular telephone and marijuana were found in appellant's cell, appellant asserts that "there was no evidence suggesting he had exclusive control over the cell, no evidence regarding who else had

access to the cell, no evidence about whether other inmates could visit him there, and no evidence to suggest he had any knowledge of the contents of the items containing the contraband." Without the legal definition of "possession," appellant argues that "the jury could have wrongfully assumed a more expansive definition" and convicted him based merely on his proximity to contraband.

We first consider the entire jury charge. *Almanza*, 686 S.W.2d at 171. The relevant portion of the jury charge states the following:

> Our law provides that any person who is an inmate in a correctional facility shall not intentionally and knowingly possess a cellular telephone or a controlled substance.
>
> "Controlled substance" means a substance, including a drug, an adulterant, and a dilutant, listed in Schedules I through V. The term includes the aggregate weight of any mixture, solution, or other substance containing a controlled substance.
>
> A person acts intentionally or with intent with respect to the nature of his conduct when it is his conscious objective or desire to engage in the conduct.
>
> A person acts knowingly or with knowledge, with respect to the nature of his conduct or to circumstances surrounding his conduct, when he is aware of the nature of his conduct or that the circumstances exist.

Although "possession" is not defined, the charge does include definitions of "intentionally" and "knowingly." Therefore, at a minimum, the jury could not have convicted appellant in accordance with the jury charge unless it concluded that

appellant had knowledge of the contraband in his cell.

We next consider the state of the evidence, including the contested issues and the weight of the probative evidence. *Almanza*, 686 S.W.2d at 171. The State had to prove that appellant exercised actual control, management, or care over the marijuana and cellular telephone and that appellant knew they were contraband. *Evans v. State*, 202 S.W.3d 158, 161 (Tex. Crim. App. 2006). The State had to establish that appellant's connection with the contraband was more than fortuitous. *Id.* Mere proximity to the contraband is not sufficient to establish possession beyond a reasonable doubt without direct or circumstantial evidence. *Id.* at 162.

In support of his argument that the evidence did not establish possession, appellant relies on *Humason v. State*, 728 S.W.2d 363 (Tex. Crim. App. 1987). In *Humason*, the trial court found the defendant guilty of intentionally and knowingly possessing cocaine. *Id.* at 364. The State introduced the following evidence against the defendant: (1) the defendant was the sole occupant of a pick-up truck when a police officer stopped him; (2) the police officer discovered cocaine in an unzipped cloth gym bag in the seat next to the defendant; (3) the defendant did not admit or deny that the cocaine belonged to him; and (4) there was no proof that the defendant "recently had sole access to the truck." *Id.* at 366–67. The Court of Criminal Appeals reversed, holding that this evidence "failed to eliminate the reasonable

hypothesis that appellant was entirely unaware of the presence of cocaine."[4] *Id.* at 367.

Here, however, the State produced evidence that appellant had sole access to his one-person cell before the contraband was found in his cell. Sergeant Ching described the circumstances in which appellant was found in the presence of the cellular telephone and marijuana. The contraband was found in appellant's locked, correctional facility cell. Some of the contraband was stuffed in a shoe, and the rest was concealed under crushed newspapers. Ching also found a homemade charger for the cellular telephone in appellant's cell. Appellant did not share his cell with anyone as it was a single cell, and Ching testified that it would have been impossible for another inmate to throw an item into appellant's cell. The State also produced evidence that appellant had used the cellular telephone to receive text messages in February and March of 2005 from his girlfriend. Appellant presented no evidence to challenge this circumstantial evidence, which served to link appellant to the contraband. *See Evans*, 202 S.W.3d at 162 n.12 (listing some factors "that Texas courts have recognized as sufficient, either singly or in combination, to establish a person's possession of contraband"). Here, the evidence eliminated any reasonable

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[4] The Court later clarified this language from *Humason*, stating "It is really another way of saying that hypothetical ignorance can be disproven with satisfactory evidence of actual knowledge." *Brown v. State*, 911 S.W.2d 744, 747 (Tex. Crim. App. 1995).

hypothesis that appellant was entirely unaware of the presence of the contraband. *Brown*, 911 S.W.2d at 747; *Humason*, 728 S.W.2d at 367.

Moreover, nothing in the arguments of counsel demonstrates egregious harm. During closing arguments, the State did not argue that appellant should be convicted based merely on his proximity to the contraband. The State noted that appellant "was the single occupant of" the cell in which the cellular telephone was found and that appellant's girlfriend had sent messages to that cellular telephone. The State argued that because appellant "intentionally and knowingly possessed" the contraband, the jury should convict him. Appellant had the opportunity to respond to the State's arguments and did argue that appellant was unaware of the contraband.

Finally, appellant does not present, nor does the record show, any other relevant information which demonstrates that he suffered egregious harm, i.e., an actual harm which affected the very basis of the case or deprived him of a valuable right. *Warner*, 245 S.W.3d at 461–62. Although "possession" was not defined in the jury charge, the charge did not allow the jury to convict appellant based merely on his proximity to the contraband, and the State produced satisfactory evidence of appellant's knowledge of the contraband. *Evans*, 202 S.W.3d at 161; *Brown*, 911 S.W.2d at 747.

Accordingly, we hold that appellant has not demonstrated that he was

egregiously harmed by the lack of a definition of "possession" in the jury charge.

We overrule appellant's second issue.

Conclusion

We affirm the judgment of the trial court.

Terry Jennings
Justice

Panel consists of Justices Jennings, Hanks, and Bland.

Do not publish. TEX. R. APP. P. 47.2(b).