In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-11-00277-CR

ROSE CHARLES, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 252nd District Court
Jefferson County, Texas
Trial Cause No. 10-10442

MEMORANDUM OPINION

A jury convicted Rose Charles of possession of a prohibited item in a correctional facility and sentenced Charles to five years in prison, but recommended that the sentence be suspended. The trial court suspended imposition of sentence and placed Charles on ten years' community supervision. In two appellate issues, Charles challenges the legal sufficiency of the evidence to sustain her conviction and the trial court's decision to admit a recorded interview into evidence. We affirm the trial court's judgment.

Factual Background

According to the record, the correctional officers at the Stiles Unit planned a lunch spread on the day of the alleged offense. Charles, then a sergeant for the Stiles Unit, testified that she brought several items for the spread, including a bottle of diet cherry Coke and a bottle of diet Dr Pepper. Johnnie Arline Walton, Charles's mother, testified that Charles had two bottles of soda and other items for the spread, but not a bottle of Dr Pepper or cellular telephones. She testified that she had no Dr Pepper in her house and that Charles was running late that day and would not have obtained a Dr Pepper from somewhere else.

Correctional Officers Melvin Reeves and Karol Young and Sergeant Reginald Chambers saw Charles carrying a plastic bag that contained three bottles of soda. Reeves identified the bottles as two-liter, but Young gave conflicting testimony as to whether the bottles were two liters or three liters. Reeves and Sergeant Jerry Bordelon identified the bottles as diet Dr Pepper, cherry Dr Pepper, and regular Dr Pepper. Reeves and Young did not recall anyone else bringing any bottles of soda that day. Chambers testified that no other drinks were brought for the spread, and Bordelon testified that he saw no other two-liter bottles that day.

Bordelon testified that liter drinks were not allowed inside the unit, that officers were instructed not to bring large bottles, and there were no exceptions for the spread. Reeves believed the bottles of soda were permitted for the spread. Bordelon explained

that the warden could have permitted officers to bring bottles and that Reeves could have believed bottles were permitted for the spread. Lieutenant Monica Goodman testified that two-liter bottles are permitted as long as they go through the scanner. Reeves testified that he visually inspected Charles's bag when she entered the unit, but he did not testify that the bottles went through the scanner.

Chambers saw Charles set one soda on the table and leave with two other sodas. He testified that Charles did not appear to be trying to hide anything. Sergeant Marilyn Harmon testified that Charles set three sodas on a cart in the turn-out room. Goodman testified that she saw no other drinks in the turn-out room. Charles testified that she took two sodas with her when she left the turn-out room. Bordelon testified that he saw Charles carrying a bag of sodas and other items. According to Bordelon, Charles stated that she was going to share a soda with other officers, but had left a bottle of soda for Bordelon in the turn-out room. Charles, however, denied telling Bordelon that she had any soda for him. Charles testified that she always brought snacks and was carrying the sodas to her building.

Initially, Bordelon testified that two sodas were on the table in the turn-out room, but after reviewing his statement, he testified that only one soda was on the table. Bordelon picked up the bottle of Dr Pepper and bounced it on his knee. Chambers testified that Bordelon left the room, but returned with the bottle broken into two pieces. He testified that Bordelon was gone for a few seconds, but his prior statement said

Bordelon was gone for about four minutes. Bordelon testified that when the bottle separated, he smelled alcohol and saw a false compartment behind the label and two cellular telephones inside the compartment. He thought Charles had accidently left the wrong soda on the table in the turn-out room.

Bordelon took the bottle to his supervisors. Goodman described Bordelon as "kind of stunned." Charles testified that Goodman called her on the telephone and told her to bring her belongings to Building 1. Goodman testified that she asked Charles what she brought for the spread and Charles told Goodman that she brought three two-liter bottles of soda, left one bottle in the turn-out room, and took two bottles to another building. Bordelon testified that during this telephone conversation, Charles stated that the bottle of Dr Pepper belonged to her.

Goodman told Charles to bring the soda bottles to visitation. Goodman testified that she sent Harmon to ensure that Charles brought all the bottles with her. Bordelon testified that he and Harmon went to find Charles. Bordelon saw Charles carrying her personal belongings and one soda bottle. Harmon testified that Charles claimed one soda had been consumed. Bordelon told Harmon to find the other bottle. Harmon testified that she found a bottle of cherry Dr Pepper sitting on a desk in Charles's building. Charles, however, testified that Harmon came to Charles's building, Charles picked up one bottle, Harmon picked up the other bottle, and the two women walked together to Building 1. Goodman expected Charles to return to visitation with two soda bottles, but

she testified that Charles arrived with one bottle of diet Dr Pepper and that Harmon retrieved the other bottle.

Harmon testified that Charles was loud, upset, angry, and argumentative when speaking with her supervisor. Harmon heard Charles say, "I did not do anything." Harmon testified that, at some point, Charles stood up, opened and unbuttoned her shirt, removed her pants, and stated, "I don't have an MF thing." Bordelon testified that Charles was startled, confused, scared, nervous, uncooperative, aggressive, and belligerent. Goodman testified that Charles was irate and belligerent, used profanity, yelled, and beat on the sally port door. Charles admitted becoming upset and using profanity. She testified that her supervisors claimed the broken Dr Pepper bottle was hers, but that she denied ownership of the bottle. She explained that she became frustrated with being falsely accused. Goodman testified that Charles was eventually escorted off the unit. When Charles returned home, Walton testified that Charles was upset, crying, and using profanity. Charles told Walton that she was being falsely accused of bringing something into the unit.

Investigator Charles Jeffery Coulter testified that inmates' families sometimes give a non-activated cellular telephone to a correctional officer, the officer sneaks the telephone in to the inmate, and the inmate activates the telephone from inside the facility. He testified that he was unable to identify the cellular telephones found in the Dr Pepper bottle because the telephones had not been activated. Charles testified that cellular

telephones in a maximum security prison are a "[v]ery bad" idea and she was aware of other officers having been accused of bringing cellular telephones into the Stiles Unit. She denied ownership of the Dr Pepper bottle, denied buying any cellular telephones, and denied having anything to do with the Dr Pepper bottle. She admitted telling Coulter that she knew who was "dirty[,]" but denied offering to share information with him in exchange for a lighter sentence. She later admitted mentioning that she would tell Coulter what she knew if she could get a lighter sentence, but testified that she was being sarcastic and was not trying to cut a deal.

Legal Sufficiency

In issue one, Charles contends that the evidence is legally insufficient to support her conviction. She argues that the State failed to show that she possessed the cellular telephones or intended to provide the telephones to an inmate.

"[T]he *Jackson v. Virginia* legal-sufficiency standard is the only standard that a reviewing court should apply in determining whether the evidence is sufficient to support each element of a criminal offense that the State is required to prove beyond a reasonable doubt." *Brooks v. State*, 323 S.W.3d 893, 895 (Tex. Crim. App. 2010). We assess all the evidence in the light most favorable to the prosecution to determine whether any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007). We give deference to the jury's

responsibility to fairly resolve conflicting testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. *Hooper*, 214 S.W.3d at 13.

A person commits the offense of possession of a prohibited item in a correctional facility by providing or possessing with the intent to provide a cellular telephone to a person in the custody of a correctional facility. Tex. Penal Code Ann. § 38.11(a)(3) (West 2011). To establish possession, the State must show that the accused exercised care, custody, control, or management over the contraband and knew the matter possessed was contraband. *Id.* § 1.07(a)(39); *Poindexter v. State*, 153 S.W.3d 402, 405 (Tex. Crim. App. 2005).[1] "Possession is a voluntary act if the possessor knowingly obtains or receives the thing possessed or is aware of his control of the thing for a sufficient time to permit him to terminate his control." Tex. Penal Code Ann. § 6.01(b) (West 2011). Possession may be established by either direct or circumstantial evidence, but the evidence must show that the accused's connection with the contraband was more than fortuitous. *Poindexter*, 153 S.W.3d at 405-06. An accused's presence or proximity to the contraband, when combined with other direct or circumstantial evidence, may be sufficient to establish possession beyond a reasonable doubt. *Evans v. State*, 202 S.W.3d 158, 162 (Tex. Crim. App. 2006). Likewise, intent may be inferred from circumstantial evidence, such as the accused's acts, words, and conduct. *Guevara v. State*, 152 S.W.3d 45, 50 (Tex. Crim. App. 2004); *Hart v. State*, 89 S.W.3d 61, 64 (Tex. Crim. App. 2002).

[1] Because the amendment to section 1.07 is not material to this case, we cite to the current version of the statute.

The jury heard evidence that Charles carried three bottles of soda, including a bottle of Dr Pepper, into the prison unit and that no one else was seen with similar bottles on the day of the offense. The record contains evidence that Charles placed a bottle of Dr Pepper on the table in the turn-out room, that this bottle was the only bottle on the table, that Bordelon picked up the only bottle of Dr Pepper on the table, and that the bottle of Dr Pepper contained a secret compartment that held cellular telephones. Charles's subsequent behavior consisted of becoming irate and uncooperative, and suggesting her willingness to share information with Coulter in exchange for a lighter sentence. Finally, the jury heard evidence from Coulter that correctional officers sometimes sneak cellular telephones into a correctional facility on behalf of an inmate's family.

As the sole judge of the weight of the evidence and the credibility of the witnesses, the jury bore the burden of resolving any conflicts in the evidence and drawing reasonable inferences from the basic facts to ultimate facts. *See Hooper*, 214 S.W.3d at 13. In doing so, the jury could reasonably conclude that Charles had voluntary possession of the Dr Pepper bottle that contained the two cellular telephones, that she knew the bottle contained contraband, and that she possessed the telephones with intent to provide them to a person in the custody of the Stiles Unit. *See* Tex. Penal Code Ann. §§ 1.07(a)(39), 6.01(b), 38.11(a)(3); *see also Poindexter*, 153 S.W.3d at 405; *Hart*, 89 S.W.3d at 64. Viewing the evidence in the light most favorable to the State, the jury could conclude beyond a reasonable doubt that Charles committed possession of a

prohibited item in a correctional facility. *See Jackson*, 443 U.S. at 319; *Hooper*, 214 S.W.3d at 13; *see also* Tex. Penal Code Ann. § 38.11(a)(3). Because the evidence is sufficient to support Charles's conviction, we overrule issue one.

Admission of Evidence

In issue two, Charles contends that the trial court abused its discretion by admitting into evidence a recorded interview between Charles and Coulter. Charles objected to the recording on the grounds that it had been improperly published and not properly offered, but the trial court overruled the objection. On appeal, Charles argues that admission of the recording violated Rule of Evidence 901 and Article 38.22 of the Code of Criminal Procedure.

The record does not indicate that Charles objected to the recording pursuant to article 38.22. *See* Tex. R. App. P. 33.1(a); *see also Banargent v. State*, 228 S.W.3d 393, 401-02 (Tex. App.—Houston [14th Dist.] 2007, pet. ref'd). Moreover, Charles's objection failed to inform the trial court of the manner in which the predicate was deficient and is insufficient to preserve a Rule 901 complaint for appeal. *See Young v. State*, 183 S.W.3d 699, 704-05 (Tex. App.—Tyler 2005, pet. ref'd); *see also Mutz v. State*, 862 S.W.2d 24, 30 (Tex. App.—Beaumont 1993, pet. ref'd). Because Charles's complaint is not preserved for appellate review, we overrule issue two and affirm the trial court's judgment.

AFFIRMED.

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STEVE McKEITHEN
Chief Justice

Submitted on November 4, 2011
Opinion Delivered November 16, 2011
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Before McKeithen, C.J., Gaultney and Kreger, JJ.