COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-16-00172-CR

KENNY LYNN EDGEMON — APPELLANT

V.

THE STATE OF TEXAS — STATE

FROM COUNTY COURT AT LAW NO. 1 OF WICHITA COUNTY
TRIAL COURT NO. 61801-E

MEMORANDUM OPINION[1]

A jury convicted Appellant Kenny Lynn Edgemon of possessing less than two ounces of marihuana, and upon his plea of true to the enhancement paragraph, the trial court found the enhancement allegation true and sentenced Appellant to 180 days' confinement in jail. *See* Tex. Health & Safety Code Ann. § 481.121(a), (b)(1) (West 2017); Tex. Penal Code Ann. § 12.43(b)(2) (West

[1]*See* Tex. R. App. P. 47.4.

2011). In one point, Appellant contends that the trial court reversibly erred by "instructing, over Appellant's objections, the jury specifically on extraneous offense evidence it had previously ruled inadmissible, thereby making an impermissible comment on the weight of the evidence." Because we hold that error, if any, was harmless, we affirm the trial court's judgment.

I. Procedural and Factual Background

A. The Traffic Stop and Evidence Supporting the Offense

On October 4, 2013, while working the day shift, Officers Carl Stewart and Dylan Dilbeck of the Wichita Falls Police Department stopped a gold Monte Carlo after the driver "cut from the right side of the street all the way across traffic and parked facing northbound on the southbound side without signaling." The driver parked the car crookedly, not parallel with the curb. Officer Dilbeck approached the driver, Appellant, and asked him for his driver's license and proof of insurance. Appellant replied that he did not have either with him, so Officer Dilbeck asked for other identifying information. Then, as Officer Dilbeck was "standing there, [he smelled] the odor of [m]ari[h]uana emitting from the vehicle." Officer Dilbeck told Officer Stewart that he smelled marihuana. When Officer Stewart replied that he could smell it too, Officer Dilbeck "pulled [Appellant] out [of the car] and detained him in handcuffs." Officer Dilbeck told Appellant that he smelled marihuana; Appellant responded that he had just smoked. Officer Dilbeck then asked "if . . . anything [was] left inside the vehicle, and [Appellant] said, yes, in the Skittles bag." Officer Dilbeck testified that he could see the

Skittles bag from where he was standing and that it was lying "under the compartment under the stereo." He reached inside the car, grabbed the Skittles bag, and opened it, finding a green leafy substance that appeared to be and that he later confirmed was marihuana. Officer Dilbeck also determined that the marihuana weighed .088 ounces and testified that it was "a usable quantity." *See* Tex. Health & Safety Code Ann. § 481.121(a) (requiring that the amount of marihuana possessed be a "usable quantity").

Officer Dilbeck testified that Appellant told him repeatedly that anything in the car was his. Similarly, Office Stewart, who focused on the passenger in the car, testified that Appellant told the officers that

- "[E]verything was his";
- He would take responsibility for everything in the car; and
- "That's mine."

The jury saw and heard a redacted version of the dash camera video (video) from the police car. On the video, after Officer Dilbeck had retrieved the marihuana and placed Appellant in the police car, he also retrieved a white package from the driver's side of the interior of the vehicle. Officer Dilbeck unrolled the white, flexible packaging material to reveal a pipe. Appellant stated, "That's mine," and told Officer Stewart, who was still questioning the passenger, that she did not have anything to do with the contraband. Appellant further stated that if the officers found anything else in the car, he took "responsibility for it."

B. The Video Published to the Jury

Before trial and again during trial but before the video from the police car was played for the jury, the trial court ordered some redactions concerning extraneous matters that appeared on the video, including one of the police officer's referring to the pipe as a "meth pipe." However, according to Appellant and the trial court, on the video admitted as State's Exhibit One and played for the jury, the police officer could still be heard referring to the pipe as a "meth pipe." Appellant objected to the playing of the video but after conferring with counsel, declined to move for a mistrial. The trial court then asked whether Appellant would request a limiting instruction to be given to the jury at that time, in the jury charge, or not at all. Appellant did not request an immediate instruction. The trial court gave him "some time to think and craft a limiting instruction that would be effective in this case" and indicated that delaying the discussion of the limiting instruction to the charge conference would be "fine."

C. The Limiting Instruction

At the charge conference, Appellant and the State both requested a limiting instruction. Appellant's requested limiting instruction was:

> During the trial, you heard evidence that the defendant may have committed wrongful act[s] not charged in the information. You are not to consider that evidence at all. You may not consider this evidence to prove the person is a bad person and for this reason was likely to commit the charged offense. To consider this evidence for any other purpose would be improper.

The trial court rejected Appellant's proposed instruction. The State proposed the following limiting instruction, which the trial court accepted and incorporated into the jury charge:

> You are further instructed that any testimony or other evidence before you in this case regarding the defendant having committed an offense other than the offense alleged in the information in this case, specifically any mention in the dash camera video of drug paraphernalia found on or about the defendant's person[2] is not to be used as evidence of guilt in this case or for any other purpose. You may not mention, allude to, consider or rely upon any such evidence of extraneous offense in your deliberations.

Appellant objected, pointing out that he had timely objected to the mention of "meth pipe" both pretrial and in trial when the video was offered and played, but the jury had still heard it, and opining that

- he "ha[d] been harmed by having the presentation of that evidence over objection"; and
- "to again note that there's drug paraphernalia in the charge itself would again harm him."

The trial court overruled his objections.

II. Discussion

In his sole point, Appellant contends that the trial court reversibly commented on the weight of the evidence by instructing the jury on specific facts of an inadmissible extraneous offense.

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[2]The Texas Court of Criminal Appeals has long recognized that "on or about" a person includes the interior of the vehicle occupied by the person. *See Christian v. State*, 686 S.W.2d 930, 933 (Tex. Crim. App. 1985); *Courtney v. State*, 424 S.W.2d 440, 441 (Tex. Crim. App. 1968).

A. Standard of Review

"[A]ll alleged jury-charge error must be considered on appellate review regardless of preservation in the trial court." *Kirsch v. State*, 357 S.W.3d 645, 649 (Tex. Crim. App. 2012). In our review of a jury charge, we first determine whether error occurred; if error did not occur, our analysis ends. *Id.* If error occurred, whether it was preserved determines the degree of harm required for reversal. *Id.*

Error in the charge, if timely objected to in the trial court, requires reversal if the error was "calculated to injure the rights of [the] defendant," which means no more than that there must be *some* harm to the accused from the error. Tex. Code Crim. Proc. Ann. art. 36.19 (West 2006); *Abdnor v. State*, 871 S.W.2d 726, 732 (Tex. Crim. App. 1994); *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985) (op. on reh'g); *see also Reeves v. State*, 420 S.W.3d 812, 816 (Tex. Crim. App. 2013). In other words, a properly preserved error will require reversal as long as the error is not harmless. *Almanza*, 686 S.W.2d at 171. This analysis requires a reviewing court to consider (1) the jury charge as a whole, (2) the arguments of counsel, (3) the entirety of the evidence, and (4) other relevant factors present in the record. *Reeves*, 420 S.W.3d at 816; *see also Almanza*, 686 S.W.2d at 171 ("[T]he actual degree of harm must be assayed in light of the entire jury charge, the state of the evidence, including the contested issues and weight of probative evidence, the argument of counsel and any other relevant information revealed by the record of the trial as a whole.").

B. Substantive Law

Generally in the jury charge, the "trial court . . . should not express any opinion as to the weight of the evidence . . . [or] discuss the facts." *Bartlett v. State*, 270 S.W.3d 147, 150 (Tex. Crim. App. 2008); *see* Tex. Code Crim. Proc. Ann. art. 36.14 (West 2007). "[A] trial court should avoid any allusion in the jury charge to a particular fact in evidence." *Bartlett*, 270 S.W.3d at 150. However, one of the occasions on which a trial court may properly "single out a particular item of evidence in the jury instruction without signaling to the jury an impermissible view of the weight (or lack thereof) of that evidence" occurs when the law directs that the jury accord only "a certain degree of weight" or only "particular or limited significance" to a specific piece of evidence. *Id.* at 151 (omitting citations and internal quotation marks). Thus, a proper limiting instruction is not a comment on the weight of the evidence. *See id.*

To be timely, a limiting instruction must be requested when the challenged evidence is admitted. *Hammock v. State*, 46 S.W.3d 889, 894–95 (Tex. Crim. App. 2001). When there is no timely request for a limiting instruction, the evidence is admitted for all purposes. *Delgado v. State*, 235 S.W.3d 244, 251 (Tex. Crim. App. 2007) (explaining that to hold otherwise would allow a jury to "sit through most of a trial under the mistaken belief" that challenged "evidence is admissible for all purposes when, in fact, it is not"). A trial court does not err by failing or refusing to give a limiting instruction on extraneous offense evidence in the jury charge during the guilt-innocence phase if the defendant did not request

a limiting instruction when the evidence was admitted. *See id.*; *Gunter v. State*, 327 S.W.3d 797, 802 (Tex. App.—Fort Worth 2010, no pet.) (applying *Delgado* to hold that Gunter forfeited his complaint on appeal). Because such evidence is admitted for all purposes, a limiting instruction is not "'within the law applicable to the case.'" *Hammock*, 46 S.W.3d at 895 (quoting Tex. Code Crim. Proc. Ann. art. 36.14). Nevertheless, *Hammock* and cases following it do not prohibit the trial court from including a limiting instruction in the jury charge even when the defendant did not timely request one and the evidence was therefore admitted for all purposes. *See, e.g.*, *Ryder v. State*, 514 S.W.3d 391, 403 & n.10 (Tex. App.—Amarillo 2017, pet. ref'd) (citing cases).

We usually presume that a jury will follow the trial court's understandable instructions absent evidence to the contrary. *Elizondo v. State*, 487 S.W.3d 185, 208 (Tex. Crim. App. 2016); *Gamboa v. State*, 296 S.W.3d 574, 580 (Tex. Crim. App. 2009).

C. Application of the Law to the Facts

1. Because the Evidence Was Admitted for all Purposes, the Trial Court Did Not Err by Rejecting Appellant's Proposed Limiting Instruction.

Appellant did not request a limiting instruction contemporaneously with the admission and publication of State's Exhibit One. The video was therefore admitted for all purposes, and the trial court had no obligation to include any proposed jury instruction in the jury charge. *See Delgado*, 235 S.W.3d at 251. We therefore hold that the trial court did not err by refusing to give to the jury

Appellant's proposed instruction.

2. Any Error in Including the State's Proposed Instruction in the Jury Charge Was Harmless.

We recognize that the trial court's instruction could have been more qualified regarding Appellant's possible commission of another offense. *See Easter v. State*, 867 S.W.2d 929, 941 (Tex. App.—Waco 1993, pet. ref'd) (holding that because the instruction included phrases "if any were committed" and "if any," it was not a comment on the weight of the evidence); *accord Hareter v. State*, 435 S.W.3d 356, 360 (Tex. App.—Amarillo 2014, no pet.). But even if the trial court erred by adopting the State's proposed instruction and including it in the charge—a decision we need not reach—such error, if any, was harmless under the specific facts of this case.

First, the jury determined only whether Appellant was guilty; the trial court determined Appellant's punishment. Second, the evidence of guilt was overwhelming. The police officers testified and the jury saw for themselves that Appellant:

- admitted to the police that he had just smoked marihuana;
- pointed out the Skittles bag containing marihuana to the police; and
- stated that the marihuana belonged to him and that his passenger had nothing to do with it.

Additionally, Officer Dilbeck testified that the amount of marihuana in the Skittles bag was a usable amount.

Third, *methamphetamine* was mentioned in voir dire only generally and

very briefly by both parties and not tied in any way to Appellant; *pipe* was not mentioned at all. Fourth, the prosecutor mentioned *pipe* only once in questioning Officer Dilbeck, and that was before the jury saw the video and only in the context of marihuana:

> Q Can you hold that up again? Do you think you could take that amount of Mari[h]uana and roll it into a Mari[h]uana cigarette or put it in a pipe and smoke it?
>
> A Yes, I do.

Fifth, neither party mentioned *methamphetamine* or *pipe* in argument. Sixth, the defensive theory—that Appellant claimed the marihuana was his to protect the passenger—was not affected by the instruction. Seventh, the instruction is easy to understand, and we presume the jury followed it. *See Elizondo*, 487 S.W.3d at 208; *Gamboa*, 296 S.W.3d at 580. Finally, the jury charge also included the following instruction:

> You are instructed that you are not to allow yourselves to be influenced in any degree whatsoever by what you may think or surmise the opinion of the Court to be. The Court has no right by any word or act to indicate any opinion respecting any matter of fact in this case, and if you have observed anything which you have or may interpret as the Court's opinion upon any matter of fact in this case, you must wholly disregard it.

Because we conclude that Appellant suffered no harm from an instruction intended to exclude from the jury's consideration evidence that he had earlier sought to exclude, *see Hareter*, 435 S.W.3d at 360, we overrule his sole point.

III. Conclusion

Having overruled Appellant's sole point, we affirm the trial court's judgment.

/s/ Mark T. Pittman
MARK T. PITTMAN
JUSTICE

PANEL: LIVINGSTON, C.J.; WALKER AND PITTMAN, JJ.

DO NOT PUBLISH
Tex. R. App. P. 47.2(b)

DELIVERED: September 7, 2017