In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-15-00162-CR

AMIR MUSTAFA KARIEM, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

On Appeal from the 108th District Court
Potter County, Texas
Trial Court No. 68,959-E; Honorable Douglas R. Woodburn, Presiding

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September 29, 2016

MEMORANDUM OPINION

Before CAMPBELL and HANCOCK and PIRTLE, JJ.

Following a plea of not guilty, Appellant, Amir Mustafa Kariem, was convicted by a jury of possession of cocaine in an amount of one gram or more but less than four grams, a third degree felony,[1] enhanced by two prior felonies.[2] Punishment was

[1] TEX. HEALTH AND SAFETY CODE ANN. § 481.115(c) (West 2010).

[2] TEX. PENAL CODE ANN. § 12.42(d) (West Supp. 2016). A double-enhanced third degree felony is punishable by confinement for life, or for any term of not more than 99 years or less than 25 years.

assessed by the trial court at twenty-five years confinement. By two issues, Appellant maintains (1) the trial court abused its discretion in denying his *Amended Motion for New Trial* because the verdict was contrary to the law and the evidence and (2) the evidence is insufficient to support his conviction. We affirm.

BACKGROUND

An officer was on patrol in the early morning hours of May 6, 2014, looking for a runaway near an apartment complex. When he pulled up to the complex, he observed a Cadillac with the interior light on and observed two males inside.[3] Upon realizing that an officer had arrived, the occupants began to move about causing the officer to become suspicious. When the officer exited his patrol car to approach the Cadillac, two males exited the vehicle and ran in the same direction through the apartment complex.

The officer testified he observed the passenger, later identified as Appellant, throw a plastic bag on the ground as he exited the Cadillac. The officer also heard the sound of metal hit the ground and testified that from his military experience, he recognized that distinct sound as being that of a gun hitting the ground.[4] In response to this sound, the officer drew his weapon and pursued the suspects. He was eventually able to apprehend the driver while dispatching a description of the passenger so that other officers could assist him.

During a coordinated search, other officers quickly located Appellant hiding behind a nearby apartment complex. Appellant was handcuffed and transported by

[3] Appellant testified there were three males inside the car and the officer could not have seen inside because the windows were tinted.

[4] The sound he heard was an air gun hitting the ground. Appellant testified he had his son's BB gun in his pocket and that it fell out.

patrol car to the scene where he was identified by the first officer. He was then taken into custody.

After the first officer apprehended the driver and returned to the location of the Cadillac, he observed the plastic bag that had been thrown to the ground. The plastic bag contained eight smaller baggies containing a green, leafy substance which he believed to be marihuana and two smaller baggies containing a white, powdery substance which he believed was cocaine.[5]

A male tenant of the first apartment complex testified he knew Appellant and the driver of the Cadillac and had witnessed the incident from the top of a stairway. He testified an officer chased both the driver and Appellant but was only able to apprehend the driver. The officer then ordered the witness to go inside his apartment. Before retreating into his apartment, the witness observed a third "dude . . . in the back passenger side" of the Cadillac exit and flee. However, during cross-examination the witness admitted that from his location he could not see the occupants exit the Cadillac or whether Appellant had thrown anything on the ground.

A female tenant at the same apartment complex testified she did not see Appellant exit the Cadillac; however, she did observe a third occupant exit the vehicle. She also testified she saw this third occupant "throw his dope." The witness later admitted, however, that she did not actually see the third occupant throw anything on

[5] Lab testing subsequently established that the plastic bag contained 1.23 grams of cocaine.

the ground when he exited the Cadillac and that she only heard claims that he had done so later. An objection to this statement was sustained.

Appellant testified in his own defense. He maintained that he and two other occupants of the Cadillac had been smoking marihuana,[6] and when he realized the officer was approaching, he exited and walked towards the trunk of the car, where the BB gun fell to the ground. At this point, his walking turned to running. Appellant denied possessing any drugs or throwing the plastic bag on the ground. He did, however, admit to being familiar with cocaine. He also admitted running approximately four blocks before hiding behind another apartment complex. During cross-examination, Appellant admitted his two prior possession convictions, as well as a conviction for assault on a public servant.

Appellant's defense at trial was that a third occupant was sitting in the back passenger's side of the Cadillac, that it was he who possessed the plastic bag, and that it was he who threw the plastic bag on the ground when he exited the vehicle. By his *Amended Motion for New Trial*,[7] which was filed by new counsel, Appellant asserted that he was deprived of direct exculpatory evidence in the form of his mother's testimony because she was unavailable. At the hearing on the motion, Appellant's former trial counsel and mother both testified.

[6] An inventory of the Cadillac called into question whether the occupants had been smoking marihuana.

[7] Appellant filed an untimely *Second Amended Motion for New Trial* to which the State objected. Although the trial court announced it would consider the merits of the untimely motion, on appeal, Appellant limits his arguments to those presented in his *Amended Motion for New Trial.*

Appellant's former trial counsel testified he had subpoenaed the third occupant in the Cadillac to testify that the drugs were his; however, when called as a witness, he did not appear. Appellant's mother testified she had heard the third occupant of the Cadillac claim the drugs belonged to him and she confronted him about taking responsibility for possessing those drugs. She also testified she was present in the courthouse during trial but was never called to testify. Trial counsel explained that his failure to call Appellant's mother as a witness was due to a misunderstanding because he believed she had been ejected from the courthouse after communicating with Appellant in violation of the "Rule of Witnesses." *See* TEX. R. EVID. 614; TEX. CODE CRIM. PROC. ANN. arts. 36.03, 36.06 (West 2007). Former trial counsel did concede, however, that the mother's testimony probably would have been determined to be inadmissible hearsay. At the conclusion of the hearing, the trial court denied the *Amended Motion for New Trial.* Appellant timely perfected this appeal.

ISSUES ONE AND TWO

By his first issue, Appellant maintains the trial court abused its discretion in denying his *Amended Motion for New Trial*. By his second issue, Appellant challenges the sufficiency of the evidence to support his conviction. The only argument raised on appeal relevant to the first issue is that the verdict is contrary to the law and evidence. Because Appellant presents his issues simultaneously, as they both relate to sufficiency of the evidence, we will address them in the same fashion, logically commencing with his second issue challenging the sufficiency of the evidence.

Both Appellant and the State agree that the only standard that a reviewing court should apply in determining whether the evidence is sufficient to support each element

of a criminal offense the State is required to prove beyond a reasonable doubt is the standard set forth in *Jackson v. Virginia*, 443 U.S. 307, 33 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). *Brooks v. State,* 323 S.W.3d 893, 912 (Tex. Crim. App. 2010). In determining whether the evidence is legally sufficient to support a conviction, this court considers all the evidence in the light most favorable to the verdict and determines whether, based on that evidence and reasonable inferences to be drawn therefrom, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Lucio v. State*, 351 S.W.3d 878, 894 (Tex. Crim. App. 2011). We measure the legal sufficiency of the evidence by the elements of the offense as defined by a hypothetically correct jury charge. *Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997). In our review, we must evaluate all of the evidence in the record, both direct and circumstantial, whether admissible or inadmissible. *Dewberry v. State*, 4 S.W.3d 735, 740 (Tex. Crim. App. 1999), *cert. denied*, 529 U.S. 1131, 120 S. Ct. 2008, 146 L. Ed. 2d 958 (2000).

Furthermore, in applying this standard, we must keep in mind that the trier of fact is the exclusive judge of the credibility of witnesses and of the weight to be given to their testimony. TEX. CODE CRIM. PROC. ANN. art. 38.04 (West 1979); *Lancon v. State*, 253 S.W.3d 699, 707 (Tex. Crim. App. 2008). Any inconsistencies in the testimony are resolved in favor of the verdict. *Curry v. State*, 30 S.W.3d 394, 406 (Tex. Crim. App. 2000).

In a prosecution for possession of a controlled substance, the State must prove (1) the accused exercised control, management, or care over the substance and (2) the accused knew the matter possessed was contraband. *Evans v. State*, 202 S.W.3d 158,

161 (Tex. Crim. App. 2006). Regardless of whether the evidence is direct or circumstantial, it must establish that the defendant's connection with the drug was more than fortuitous. *Id.*

The question as to whether there was a third occupant in the Cadillac is not the issue. The issue is whether Appellant or someone else was in possession of the plastic bag containing cocaine when it was thrown to the ground. The first officer on the scene who approached the Cadillac unequivocally testified that he saw Appellant holding a plastic bag that he threw to the ground before fleeing the scene. After subsequently retrieving that bag and submitting it to the crime lab for testing, expert testimony established that it contained 1.23 grams of cocaine.

Appellant argues that the physical evidence and the defense witnesses "plainly refuted" the officer's testimony. We disagree. Appellant points to State's Exhibit 7 which is a photograph that depicts a plastic bag on the ground closer to the rear passenger door than to the front passenger door. He opines that this photograph supports his version of the facts that it was the occupant in the back seat of the Cadillac who possessed the plastic bag. Where the plastic bag was ultimately found does not conclusively establish who possessed it before it was thrown to the ground. The State was only required to prove that Appellant possessed the plastic bag; where it landed after being thrown was not relevant to proving possession.

Additionally, the male witness standing in the nearby stairway admitted he was not in a position to see any of the occupants exit the Cadillac. The female witness testified that while she did not see Appellant exit the Cadillac, she did see the third

occupant exit the vehicle and drop the plastic bag. Based on the State's objection, however, she was forced to retract her testimony that she had seen the third occupant drop the plastic bag on the ground. The only credible testimony remaining was that of the responding officer who testified that he saw Appellant in possession of the plastic bag and observed him throw it to the ground. This testimony alone is sufficient to establish that Appellant exercised control, management, or care over the plastic bag, which later evidence established contained 1.23 grams of cocaine. As the exclusive judge of the credibility of witnesses and of the weight to be given to their testimony, the jury was free to believe the officer and disbelieve Appellant and any other witness. Accordingly, we conclude the evidence is sufficient to support Appellant's conviction. Issue two is overruled.

As to Appellant's first issue, we review a trial court's ruling on a motion for new trial for abuse of discretion. *Coyler v. State*, 428 S.W.3d 117, 122 (Tex. Crim. App. 2014). We do not substitute our judgment for that of the trial court; rather, we decide whether the ruling was arbitrary or unreasonable. *Id.* A trial court abuses its discretion in denying a motion for new trial when no reasonable view of the record supports that ruling. *Id.* Furthermore, the evidence must be viewed in the light most favorable to the trial court's ruling and it is presumed that all reasonable factual findings that could have been made against the losing party were made against that party. *Id.*

A trial court may grant a motion for new trial on any basis listed in Rule 21.3 of the Texas Rules of Appellate Procedure. A trial court may also grant a motion for new trial on a basis not listed in Rule 21.3, but it may do so only when the movant shows that he is entitled to one under law. *State v. Thomas*, 428 S.W.3d 99, 104 (Tex. Crim.

App. 2014). In *State v. Herndon,* the Texas Court of Criminal Appeals held that a trial court may grant a new trial "in the interest of justice" if the error is sufficiently serious to affect the defendant's substantial rights. *State v. Herndon,* 215 S.W.3d 901, 910 (Tex. Crim. App. 2007). A trial court's discretion to grant a motion for new trial "in the interest of justice" is not, however, "unbounded or unfettered." *Thomas,* 428 S.W.3d at 104-05. Generally, a trial court does not abuse its discretion in granting a motion for new trial if the movant (1) articulates a valid legal claim, (2) produces evidence to substantiate that claim, and (3) shows harm under the standards articulated in Rule 44.2 of the Texas Rules of Appellate Procedure. *Id.* at 105.

At a hearing on a motion for new trial, the trial court alone determines the credibility of the witnesses. *Salazar v. State*, 38 S.W.3d 141, 148 (Tex. Crim. App. 2001). Even if the testimony is not controverted or subject to cross-examination, the trial court has discretion to disbelieve that testimony. *Id.*

Here, Appellant contends he has articulated a valid legal claim supporting his entitlement to a new trial because he was deprived of his mother's exculpatory testimony. He reasons that, even though he was aware of her testimony and failed to call her at the time of trial, she was rendered "unavailable" as a result of being excluded from the courthouse due to the violation of the Rule of Witnesses. Assuming *arguendo* that Appellant has raised a valid legal claim supporting a new trial, the record does not support a showing that Appellant's substantial rights were disregarded. Nothing shows that the evidence presented at the hearing on the motion for new trial was not available to Appellant at the time of trial. Furthermore, his mother's testimony would only have tracked testimony already available to the jury that a third occupant of the Cadillac was

in possession of the plastic bag containing cocaine and that he threw it on the ground. Again, viewing the evidence in the light most favorable to the trial court's ruling, we conclude the trial court did not abuse its discretion in denying the motion for new trial. Issue one is overruled.

CONCLUSION

The trial court's judgment is affirmed.

Patrick A. Pirtle
Justice

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