In The
Court of Appeals
Sixth Appellate District of Texas at Texarkana

No. 06-20-00014-CR

RODERICK DEANDRE SPARKS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 7th District Court
Smith County, Texas
Trial Court No. 007-0934-19

Before Morriss, C.J., Burgess and Stevens, JJ.
Memorandum Opinion by Justice Stevens

MEMORANDUM OPINION

A Smith County[1] jury found that Roderick Deandre Sparks intentionally or knowingly destroyed or concealed cocaine by chewing a baggie of cocaine during a traffic stop with intent to impair the availability of evidence in an investigation or official proceeding. As a result, the jury convicted Sparks of tampering with physical evidence. *See* TEX. PENAL CODE ANN. § 37.09. After the jury found that Sparks was twice previously convicted of felony offenses, it assessed an enhanced sentence of forty years' imprisonment.

On appeal, Sparks argues that the evidence was legally insufficient to support the jury's verdict of guilt because he surrendered the baggie of cocaine when the arresting officer discovered Sparks chewing it and requested him to spit it out. Sparks also argues that the decision to enhance his sentence was fueled by prosecutorial vindictiveness. Because we find that (1) legally sufficient evidence supports the jury's verdict and (2) Sparks has failed to meet his burden to show actual prosecutorial vindictiveness, we affirm the trial court's judgment.

I. Legally Sufficient Evidence Supports the Jury's Verdict

A. Factual Background

Jonathan Holland, a Tyler Police Department (TPD) officer, arrived at the scene of a traffic stop of a vehicle driven by Sparks, who initially failed to yield to other TPD officers. Holland approached Sparks and noticed that he was trying to "hide that he was chewing on something or hiding something under his tongue." Holland described Sparks's action as "swallow chewing"

[1]Originally appealed to the Twelfth Court of Appeals, this case was transferred to this Court by the Texas Supreme Court pursuant to its docket equalization efforts. *See* TEX. GOV'T CODE ANN. § 73.001. We follow the precedent of the Twelfth Court of Appeals in deciding this case. *See* TEX. R. APP. P. 41.3.

and said that, when asked what was in his mouth, Sparks "attempted to start trying to swallow whatever was in his mouth." As Holland opened the door, Sparks "reached into his mouth, pulled out the bag, and then held it out the driver's window."

Adam Riggle, a TPD officer, testified that he took the bag from Sparks. According to Riggle, the bag was wet and had a "[r]eal small" amount of a white substance. Holland noticed that Sparks had white reside on the walls of his mouth and tongue. On the dash cam recording, an officer can be heard telling told Sparks to stick out his tongue and, after viewing Sparks's mouth, saying, "You got that white stuff all over your mouth, man." Holland and Riggle both testified that the bag, which contained a plastic straw, field tested positive for cocaine. Micaela Steward, a forensic scientist with the Texas Department of Public Safety, testified that the bag contained a trace amount, or less than 0.01 grams, of cocaine. Steward added that there was no visible powder in the bag, only a "kind of a wet residue."

Based on his experience as a police officer, Holland testified that suspects who eat bags filled with controlled substances are "trying to destroy, hide, or essentially get rid of the evidence of narcotics." Holland explained that, even where a bag is retrieved from the mouth, evidence is impaired if some of the drug is consumed because the weight of the drug can alter the degree of a possession of a controlled substance offense. Riggle testified that Sparks tried to conceal evidence in his mouth and, when asked if he destroyed some of the evidence, said, "Yes, sir. The bag was pretty messed up." The recording of the incident showed that the bag was chewed up. Holland testified that, because of Sparks's actions, he did not know the weight of the cocaine that was in the bag before it went into Sparks's mouth.

B. Standard of Review

"In assessing the legal sufficiency of the evidence, the reviewing court considers all of the evidence in the light most favorable to the verdict to determine whether a rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt." *Dean v. State*, 449 S.W.3d 267, 268 (Tex. App.—Tyler 2014, no pet.); *see Williamson v. State*, 589 S.W.3d 292, 297 (Tex. App.—Texarkana 2019, pet. ref'd) (plurality op.) (citing *Brooks v. State*, 323 S.W.3d 893, 912 (Tex. Crim. App. 2010) (plurality op.); *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). "Our rigorous [legal sufficiency] review focuses on the quality of the evidence presented." *Williamson*, 589 S.W.3d at 297 (citing *Brooks*, 323 S.W.3d at 917–18 (Cochran, J., concurring)). "We examine legal sufficiency under the direction of the *Brooks* opinion, while giving deference to the responsibility of the jury 'to fairly resolve conflicts in testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.'" *Id.* (quoting *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007); citing *Jackson*, 443 U.S. at 318–19; *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007)).

"Legal sufficiency of the evidence is measured by the elements of the offense as defined by a hypothetically correct jury charge." *Id.* at 298 (quoting *Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997)). "The 'hypothetically correct' jury charge is 'one that accurately sets out the law, is authorized by the indictment, does not unnecessarily increase the State's burden of proof or unnecessarily restrict the State's theories of liability, and adequately describes the particular offense for which the defendant was tried.'" *Id*. (quoting *Malik*, 953 S.W.2d at 240).

A person commits the offense of tampering with 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 ANN. § 37.09(a)(1). Here, the State alleged that Sparks "did then and there, knowing that an offense had been committed, namely possession of a controlled substance, intentionally and knowingly destroy and conceal a baggie containing cocaine, with intent to impair its availability as evidence in any subsequent investigation or official proceeding related to the offense."

C. Analysis

Sparks argues that the evidence is legally insufficient to support the finding of guilt because there was no evidence that he swallowed the cocaine. In support, Sparks cites *Hollingsworth v. State*, 15 S.W.3d 586, 595 (Tex. App.—Austin 2000, no pet.). In that case, the Austin Court of Appeals concluded that evidence showing a defendant spit out crack cocaine after running from officers was insufficient to prove that the defendant was concealing crack cocaine in his mouth with the intent to impair its availability as evidence. Instead, the Austin court found that the defendant was already carrying the cocaine in his mouth. *Id.* The court wrote,

> Under these facts, we see no difference between appellant's carrying the contraband in his mouth or in his pocket. There is no evidence that appellant saw the police officers and then put the evidence into his mouth in order to hide it from them. Appellant spit out the cocaine, thus exposing it to view.

Id. Here, the record reveals precisely the type of evidence that the Austin court opined would constitute sufficient evidence of concealment. Even though Sparks had been stopped by the police, he secreted contraband by placing the bag of cocaine inside of his mouth. Moreover, when Holland

questioned Sparks about what he had in his mouth, "[Sparks] changed the subject quickly or avoided the question, and then attempted to start trying to swallow whatever was in his mouth."

The fact that Sparks eventually relinquished the bag to Riggle does not mean that the offense was incomplete. We have previously held that where there is evidence that the defendant "put the cocaine in his mouth and swallowed it, the State [has] proved that he hid it or kept it from observation." *Lewis v. State*, 56 S.W.3d 617, 625 (Tex. App.—Texarkana 2001, no pet.) (finding that "[t]he statute does not require that the evidence be made useless to the investigation or proceeding by its concealment; rather, it requires that the defendant have acted with the intent to impair its usefulness in the investigation or the proceeding"). Here, there was ample evidence for the jury to find that Sparks concealed and even destroyed evidence by swallowing some of the cocaine. Officers testified that the bag was "pretty messed up" and contained only saliva-drenched trace amounts of cocaine and that they saw a white substance on the walls of Sparks's mouth and tongue. The jury was able to view the bag on the recording as it was delivered by Sparks to the officers and saw police tell Sparks that he had white reside all over his mouth. Viewing this evidence in the light most favorable to the verdict, we find that a rational jury could have found beyond a reasonable doubt that Sparks had swallowed cocaine. As a result of Sparks's swallowing of the cocaine, "the State was unable to determine the actual weight of the cocaine he possessed, hence reducing the evidentiary value of the cocaine" and impairing its availability as evidence in the investigation or official proceeding. *Dooley v. State*, 133 S.W.3d 374, 379 (Tex. App.—Austin 2004, pet. ref'd).

Because we find the evidence legally sufficient to support the jury's finding of guilt, we overrule Sparks's first point of error.

II. Sparks Failed to Meet His Burden to Show Actual Prosecutorial Vindictiveness

In his second point of error, Sparks argues that he showed prosecutorial vindictiveness. We disagree.

"[C]ourts must presume that a criminal prosecution is undertaken in good faith and in nondiscriminatory fashion to fulfill the State's duty to bring violators to justice." *Rhymes v. State*, 536 S.W.3d 85, 99 (Tex. App.—Texarkana 2017, pet. ref'd) (quoting *Neal v. State*, 150 S.W.3d 169, 173 (Tex. Crim. App. 2004)). "In certain limited circumstances, however, this presumption of good-faith prosecution may 'give[] way to either a rebuttable presumption of prosecutorial vindictiveness or proof of actual vindictiveness.'" *Id*. (quoting *Neal*, 150 S.W.3d at 173).

"A constitutional claim of prosecutorial vindictiveness may be established in either of two distinct ways." *Neal v. State*, 150 S.W.3d 169, 173 (Tex. Crim. App. 2004). In the first, the defense can introduce "proof of circumstances that pose a 'realistic likelihood' of such misconduct sufficient to raise a 'presumption of prosecutorial vindictiveness,' which the State must rebut or face dismissal of the charges." *Id.* (quoting *United States v. Johnson*, 171 F.3d 139, 140–41 (2d Cir. 1999) (per curiam)). In the second, there must be "proof of 'actual vindictiveness'—that is, direct evidence that the prosecutor's charging decision is an unjustifiable penalty resulting solely from the defendant's exercise of a protected legal right." *Id.* (quoting *United States v. Goodwin*, 457 U.S. 368, 380–81 (1982)).

Sparks relies on the first method and urges this Court to apply a presumption of vindictiveness. However, "[t]o be entitled to a rebuttable presumption of prosecutorial vindictiveness, the 'defendant must prove that he was convicted, he appealed and obtained a new trial, and that the State thereafter filed a greater charge or additional enhancements.'" *Rhymes*, 536 S.W.3d at 99 (quoting *Neal*, 150 S.W.3d at 173–74) (finding that the first prong applies "if the State pursues increased charges or an enhanced sentence after a defendant is convicted, exercises his legal right to appeal, and obtains a new trial").[2] Since "there has been no previous appeal that resulted in a new trial," and this is "the first appeal of [Sparks's] original conviction, . . . [he] is not entitled to a presumption of prosecutorial vindictiveness." *Id.* at 100 (citing *Neal*, 150 S.W.3d at 174). As a result, Sparks "must show actual vindictiveness." *Id.* (citing *Neal*, 150 S.W.3d at 174 (citing *Texas v. McCullough*, 475 U.S. 134, 138 (1986))).[3]

[2]"The State can then overcome the presumption by presenting 'an explanation for the charging increase that is unrelated to the defendant's exercise of his legal right to appeal.'" *Rhymes*, 536 S.W.3d at 99 (quoting *Neal*, 150 S.W.3d at 174 (citing *United States v. Krezdorn*, 693 F.2d 1221, 1229 (5th Cir. 1982))).

[3]In the following excerpt from *Goodwin*, the United States Supreme Court explained the reason why a presumption applies in the first category, but not the second:

> There is good reason to be cautious before adopting an inflexible presumption of prosecutorial vindictiveness in a pretrial setting. In the course of preparing a case for trial, the prosecutor may uncover additional information that suggests a basis for further prosecution or he simply may come to realize that information possessed by the State has a broader significance. At this stage of the proceedings, the prosecutor's assessment of the proper extent of prosecution may not have crystallized. In contrast, once a trial begins—and certainly by the time a conviction has been obtained—it is much more likely that the State has discovered and assessed all of the information against an accused and has made a determination, on the basis of that information, of the extent to which he should be prosecuted. Thus, a change in the charging decision made after an initial trial is completed is much more likely to be improperly motivated than is a pretrial decision.

United States v. Goodwin, 457 U.S. 368, 381 (1982).

"To show actual vindictiveness, 'the defendant shoulders the burden of both production and persuasion, unaided by any legal presumption.'" *Id*. (citing *Neal*, 150 S.W.3d at 174; *United States v. Moulder*, 141 F.3d 568, 572 (5th Cir. 1998)). "[T]he trial judge decides the ultimate factual issue based upon the evidence and credibility determinations." *Neal*, 150 S.W.3d at 174–75. "If the defendant is unable to prove actual vindictiveness . . . , a trial court need not reach the issue of government justification." *Id.* at 175 (quoting *United States v. Contreras*, 108 F.3d 1255, 1262–63 (10th Cir. 1997)).

Before the trial court, Sparks argued that prosecutorial vindictiveness was shown because the State's notice to enhance punishment came after Sparks rejected plea offers and the trial court granted the defendant's motion to grant additional discovery. First, we have previously held that "[a]rgument of counsel is not evidence," and, as a result, a defendant offers "no objective evidence to show actual prosecutorial vindictiveness" when he relies only on counsel's argument. *Rhymes*, 536 S.W.3d at 100 (citing *Cary v. State*, 507 S.W.3d 750, 755 (Tex. Crim. App. 2016)). Second, "[n]one of these facts, whether separately or taken together, show actual prosecutorial vindictiveness." *Rhymes*, 536 S.W.3d at 100. The addition of an enhancement following rejection of a plea offer does not prove actual prosecutorial vindictiveness. *Platter v. State*, 600 S.W.2d 803, 806 (Tex. Crim. App. [Panel Op.] 1980) (citing *Bordenkircher v. Hayes*, 434 U.S. 357, 363–64 (1978)). Also, because "[t]he invocation of procedural rights is an integral part of the adversary process in which our criminal justice system operates," "[i]t is unrealistic to assume that a prosecutor's probable response" to motions seeking to "obtain access to government files . . . is to seek to penalize and to deter." *Goodwin*, 457 U.S. at 381.

In sum, we find that Sparks has failed to meet his burden to show actual prosecutorial vindictiveness. We overrule his last point of error.

III. Conclusion

We affirm the trial court's judgment.

Scott E. Stevens
Justice

Date Submitted: July 6, 2020
Date Decided: July 9, 2020

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