NUMBER 13-15-00244-CR

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI – EDINBURG

MANUEL GONZALES HERNANDEZ, **Appellant,**

v.

THE STATE OF TEXAS, **Appellee.**

On appeal from the 24th District Court of Jackson County, Texas.

MEMORANDUM OPINION

Before Justices Rodriguez, Contreras, and Longoria
Memorandum Opinion by Justice Contreras

Appellant Manuel Gonzales Hernandez was convicted of delivering one gram or more but less than four grams of cocaine in a drug-free zone. *See* TEX. HEALTH & SAFETY CODE ANN. §§ 481.112(c), 481.134(c) (West, Westlaw through 2015 R.S.). The offense was enhanced to a first-degree felony and the trial court sentenced Hernandez to forty-five years' imprisonment. On appeal, he contends that the trial court erred by denying his

request for a jury charge instruction on the lesser-included offense of possession of cocaine. We affirm.

I. Background

Gary Smejkal, a Jackson County Sheriff's Office investigator, testified that on February 23, 2012, he received a phone call from Esther Rodriguez, a resident of Edna who had given him reliable information in the past. Rodriguez informed Smejkal that Casey Silva was selling cocaine from Silva's residence and that Hernandez, Silva's boyfriend, was also involved. Later, Rodriguez informed Smejkal that Silva and Hernandez had just returned from Victoria with a shipment of cocaine and were in the process of repackaging it.

The next day, Smejkal met Rodriguez and searched her to ensure she was not carrying any drugs. He then gave her $200, a cell phone battery containing a hidden microphone and transmitter, and a pen containing a hidden video camera, and he instructed her to purchase cocaine from Silva and Hernandez. Rodriguez went to a house on South East Street, which is about 400 feet away from a church with a day care center, and Smejkal followed Rodriguez. Rodriguez entered the house, purchased five small packets of cocaine, then left the house and brought the packets to Smejkal. Smejkal ran the license plate of the car parked in the driveway of the house, and discovered that the car was registered to Silva and Hernandez.

The video recording made by Rodriguez's hidden camera was entered into evidence. Smejkal stated that he has known Hernandez since 1986, and he identified Hernandez by sight and voice as one of the two people in the house that appeared on the video recording.

A transcript of the video recording, prepared by Smejkal and other police officers, was also entered into evidence. According to the transcript, Rodriguez asked for "40s" and Silva stated "Damn, we only have 5 f[***]ing 40's left." Hernandez stated "S[***], that's all we got left. After we got rid of that last time, you know, out of all other times . . . (inaudible) . . . we make good money out of it." At one point, Silva stated "I'll go get some more. This ain't going to be it. I'll go get some more" and Hernandez stated "[t]hat ain't going to be enough." Rodriguez purchased what they had. According to the transcript, Silva and Hernandez then warned Rodriguez as follows:

> [Silva]: Hey, one thing . . . please ya'll be careful, this s[***] is strong.
>
> [Hernandez]: It is.
>
> [Silva]: It is f[***]ing strong.
>
> [Rodriguez]: So it's like kinda like uncut then?
>
> [Silva]: Yeah.
>
> [Hernandez]: It's strong. It's like this morning me and my c[a]marada (friend) . . . we uh, we took . . . took a bump.
>
> [Silva]: Yeah like ohhhhhhh . . .
>
> [Hernandez]: Ohhhh. Strong.
>
> [Silva]: Strong, don't want ya'll to f[***]ing overdose.
>
> [Hernandez]: Only the reason I am telling you is because if I wouldn't . . .
>
> [Rodriguez]: . . . Yeah, I know . . .
>
> [Hernandez]: . . . Because they start giving you sickness and you have to go to this hospital over here they are going to ask you a lot of questions. It's better not be f[***]ing around.

(Ellipses in original.)[1]

[1] According to our review of the video recording, the transcript appears to be accurate.

A few months later, Smejkal made contact with Hernandez at the South East Street house and informed him that a grand jury was looking into his case. Hernandez gave written consent to search the home. Smejkal also interviewed Silva, who had been incarcerated for violating terms of her probation. In the interview, Silva first denied that Hernandez was involved in selling the cocaine and then later stated that he was involved. A recording of the interview was entered into evidence.

Rodriguez testified that she had made many cocaine purchases for her boyfriend from Silva and Hernandez in the past. On occasion, she bought from Hernandez personally. On a couple of other occasions, she went with Silva to purchase cocaine from their supplier in Victoria. Rodriguez had seen Hernandez cut and repackage the cocaine that they received. A few days after the purchase, Rodriguez went back to the South East Street house to look for Silva. While there, she had a conversation with Hernandez, who said he was going to Mexico and that Silva had been arrested. On cross-examination, Rodriguez conceded that, during the controlled buy, she handed the money to Silva, told Silva how much she wanted, and received the cocaine from Silva.

At the charge conference, defense counsel asked for an instruction on the lesser-included offense of simple possession. Counsel argued that "the evidence shows that while my client had knowledge of drugs in the house, delivery was done by [Silva] and that the testimony by the cooperating witnesses is not reliable enough to establish that he was a party to the delivery." The trial court denied the instruction, and the jury convicted Hernandez of delivery of cocaine. This appeal followed.[2]

[2] The State has not filed a brief to assist us in the resolution of this appeal.

II. DISCUSSION

A. Applicable Law

We use a two-pronged test to determine whether a defendant is entitled to a jury charge instruction on a lesser-included offense. *Rice v. State*, 333 S.W.3d 140, 144 (Tex. Crim. App. 2011); *Hall v. State*, 225 S.W.3d 524, 528 (Tex. Crim. App. 2007). The first step of the analysis asks whether the lesser-included offense is included within the proof necessary to establish the offense charged. *Rice*, 333 S.W.3d at 144; *see* TEX. CODE CRIM. PROC. ANN. art. 37.09 (West, Westlaw through 2015 R.S.). The second step is to determine whether "there is some evidence in the record which would permit a jury to rationally find that, if the defendant is guilty, he is guilty only of the lesser-included offense." *Wortham v. State*, 412 S.W.3d 552, 555 (Tex. Crim. App. 2013); *Hall*, 225 S.W.3d at 536. The evidence must establish the lesser-included offense as "a valid, rational alternative to the charged offense." *Cavazos v. State*, 382 S.W.3d 377, 385 (Tex. Crim. App. 2012); *Rice*, 333 S.W.3d at 144; *Hall*, 225 S.W.3d at 536. Anything more than a scintilla of evidence will be sufficient to entitle a defendant to a charge on the lesser offense. *Hall*, 225 S.W.3d at 536. However, "it is not enough that the jury may disbelieve crucial evidence pertaining to the greater offense, but rather, there must be some evidence directly germane to the lesser-included offense for the finder of fact to consider before an instruction on a lesser-included offense is warranted." *Hampton v. State*, 109 S.W.3d 437, 441 (Tex. Crim. App. 2003). "Meeting this threshold requires more than mere speculation—it requires affirmative evidence that both raises the lesser-included offense and rebuts or negates an element of the greater offense." *Cavazos*, 382 S.W.3d at 385; *see Wortham*, 412 S.W.3d at 558.

B. Analysis

Hernandez argues that the trial court erred by denying the simple possession instruction because there was evidence "showing [he] possessed the cocaine by repackaging it and having had some in his coat pocket" and because "[m]ost, if not all, evidence of delivery was attributed against [Silva]."

We disagree. We note first that, with respect to Hernandez's claim that there was evidence he possessed cocaine "in his coat pocket," he appears to be referring to testimony Smejkal gave at the punishment phase that officers found two baggies of cocaine in a coat belonging to Hernandez when they searched the house pursuant to his written consent. That evidence was not adduced at the guilt-innocence phase.

Even if such evidence were adduced at the guilt-innocence phase, it would not support a lesser-included offense instruction because there was nothing indicating that the cocaine found in Hernandez's coat pocket was in any way related to the cocaine that he was accused of selling to Rodriguez. In *Campbell v. State*, the Texas Court of Criminal Appeals considered a similar issue. 149 S.W.3d 149, 153–56 (Tex. Crim. App. 2004). There, the appellant was charged with possession of methamphetamine with intent to deliver and argued he was entitled to a lesser-included offense instruction on simple possession. *Id*. at 150–51. Police found methamphetamine in a car in which appellant was a passenger; appellant told police at the scene that the drugs were his but denied ownership at trial. *Id*. at 151. But appellant admitted at trial to having possessed methamphetamine in a different vehicle. *Id*. The Court found that appellant was not entitled to a possession instruction because the drugs which the appellant admitted to possessing "were at a different location than those for which the State offered proof" and the possession offense was therefore "unrelated to the crime for which [appellant] was

charged." *Id.* at 155. Similarly, here, Hernandez was not entitled to a lesser-included offense instruction regarding possession of the cocaine found in his coat pocket because that cocaine was unrelated to the cocaine involved in the charged offense. *See id*.; *see also Alanis v. State*, No. 01-15-00272-CR, 2016 WL 636262, at *4 (Tex. App.—Houston [1st Dist.] Feb. 11, 2016, no pet.) (concluding that appellant was not entitled to possession instruction because there was no evidence indicating that the cocaine possessed was related to the delivery offense as charged). That is, possession of the coat-pocket cocaine is not included within the proof necessary to establish the charged offense, delivery of cocaine to Rodriguez.[3] *See Rice*, 333 S.W.3d at 144.

Hernandez also points to evidence that he "repackaged" the cocaine sold to Rodriguez as grounds for a simple possession instruction. We disagree. Rodriguez testified about Hernandez "repackaging" the cocaine only in the context of his and Silva's delivering the cocaine to her. *See Moore v. State*, 969 S.W.2d 4, 8 (Tex. Crim. App. 1998) ("The evidence must be evaluated in the context of the entire record."); *see also Rodriguez v. State*, No. 10-13-00239-CR, 2014 WL 4385011, at *3 (Tex. App.—Waco Aug. 28, 2014, no pet.) (mem. op., not designated for publication) (holding that no possession instruction was warranted where "the only context in which the [informant] testified about [appellant] possessing methamphetamine . . . was in the context of [appellant] delivering the methamphetamine to him").

[3] At the charge conference, the prosecutor expressed uncertainty as to whether Hernandez was entitled to a possession instruction based on his statement, in the hidden video recording, that he "took a bump" that morning. Hernandez does not mention that evidence on appeal. In any event, the reasoning set forth in *Campbell* also applies to this evidence. *See Campbell v. State*, 149 S.W.3d 149, 153–56 (Tex. Crim. App. 2004). The cocaine which Hernandez admitted to consuming on the morning of the controlled buy is unrelated to the cocaine which he was alleged to have sold to Rodriguez. Accordingly, possession of that cocaine is not a lesser-included offense. *See id.*

Finally, we disagree with Hernandez's assertion that "[m]ost, if not all" of the evidence supporting delivery of the cocaine implicated Silva. The transcript of the hidden video recording, the accuracy of which Hernandez does not dispute, establishes that both Silva and Hernandez were directly involved in selling the cocaine to Rodriguez.[4] Hernandez implored Rodriguez not to overdose out of fear that hospital personnel would ask "a lot of questions," thereby showing his knowledge that the cocaine was being delivered to Rodriguez. In any event, there was no evidence indicating that, if Hernandez is guilty, he is guilty only of possession. *See Wortham*, 412 S.W.3d at 555; *Hall*, 225 S.W.3d at 536.

Having reviewed the record, we can locate not even a scintilla of evidence that both raises the offense of possession and rebuts or negates any element of delivery. *See Wortham*, 412 S.W.3d at 558; *Cavazos*, 382 S.W.3d at 385. The evidence did not establish that possession of cocaine was a "valid, rational alternative" to delivery of cocaine in this case. See *Cavazos*, 382 S.W.3d at 385; *Rice*, 333 S.W.3d at 144; *Hall*, 225 S.W.3d at 536. Accordingly, the trial court did not err in denying Hernandez's request for a jury instruction on simple possession. We overrule Hernandez's issue on appeal.

III. CONCLUSION

The trial court's judgment is affirmed.

DORI CONTRERAS
Justice

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

Delivered and filed the
23rd day of March, 2017.

[4] The charge allowed the jury to convict Hernandez as either a principal or party to the offense. *See* TEX. PENAL CODE ANN. § 7.02(a) (West, Westlaw through 2015 R.S.).