NO. 12-10-00388-CR

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

WENDELL ERIC HARRIS, APPELLANT	***§***	***APPEAL FROM THE 3RD***
V.	***§***	***JUDICIAL DISTRICT COURT***
THE STATE OF TEXAS, APPELLEE	***§***	***HENDERSON COUNTY, TEXAS***

MEMORANDUM OPINION

Wendell Eric Harris appeals his conviction for possession of less than one gram of cocaine, for which he was sentenced to confinement for eighteen months. In two issues, Appellant argues that the evidence is factually insufficient to support his conviction and that the trial court erred in denying his motion for mistrial made during voir dire proceedings. We affirm.

BACKGROUND

Appellant was charged by indictment with possession of less than one gram of cocaine and pleaded "not guilty." The matter proceeded to a jury trial. Ultimately, the jury found Appellant "guilty" as charged. A bench trial on punishment was conducted, following which the trial court sentenced Appellant to confinement for eighteen months. This appeal followed.

FACTUAL SUFFICIENCY

In his first issue, Appellant argues that the evidence is factually insufficient to support his conviction.

In October 2010, the court of criminal appeals held that there is "no meaningful distinction" between the ***Jackson v. Virginia***[1] legal sufficiency standard and the ***Clewis v. State***[2] factual sufficiency standard and that "the ***Jackson v. Virginia*** standard is the only standard that a

[1] 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979).

[2] 922 S.W.2d 126, 134 (Tex. Crim. App. 1996).

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." *See* ***Brooks v. State***, 323 S.W.3d 893, 902, 912 (Tex. Crim. App. 2010). Consequently, the court of criminal appeals overruled the factual sufficiency standard of review as set forth in ***Clewis*** and its progeny. *See* ***id.***

Here, Appellant makes no argument that the evidence to support his conviction is insufficient under the ***Jackson v. Virginia*** standard, nor does he acknowledge the court's holding in ***Brooks***. Rather, Appellant argues that the verdict is against the great weight and preponderance of the evidence and that his conviction should be vacated and the cause remanded for a new trial. We cannot conduct an evidentiary sufficiency analysis under the standard requested by Appellant.[3] Nonetheless, we will review the evidence under the ***Jackson v. Virginia*** standard.[4]

Legal Sufficiency

Legal sufficiency is the constitutional minimum required by the Due Process Clause of the Fourteenth Amendment to sustain a criminal conviction. *See* ***Jackson***, 443 U.S. at 315-16, 99 S. Ct. at 2786–87; *see also* ***Escobedo v. State***, 6 S.W.3d 1, 6 (Tex. App.–San Antonio 1999, pet. ref'd). The standard for reviewing a legal sufficiency challenge is whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *See* ***Jackson***, 443 U.S. at 320, 99 S. Ct. at 2789; *see also* ***Johnson v. State***, 871 S.W.2d 183, 186 (Tex. Crim. App. 1993). The evidence is examined in the light most favorable to the verdict. *See* ***Jackson***, 443 U.S. at 320, 99 S. Ct. at 2789; ***Johnson***, 871 S.W.2d at 186. A conviction can be supported solely by circumstantial evidence, which is as probative as direct evidence. *See* ***Kuciemba v. State***, 310 S.W.3d 460, 462 (Tex. Crim. App. 2010). A successful legal sufficiency challenge will result in rendition of an acquittal by the reviewing court. *See* ***Tibbs v. Florida***, 457 U.S. 31, 41-42, 102 S. Ct. 2211, 2217–18, 72 L. Ed. 2d 652 (1982).

The sufficiency of the evidence is measured against the offense as defined by a hypothetically correct jury charge. *See* ***Malik v. State***, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997). Such a charge would include 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

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[3] *See* TEX. R. APP. P. 38.1(i).

[4] *See* ***Barron v. State***, No. 04-10-00043-CR, 2011 WL 1744110, at *3 (Tex. App.–San Antonio May 4, 2011, no pet.) (mem. op., not designated for publication) (construing the appellant's factual sufficiency challenge as legal sufficiency challenge); *see also* ***Whatley v. State***, 946 S.W.2d 73, 77 n.6 (Tex. Crim. App. 1997) (court of appeals may, in its discretion, address matters not briefed before it).

is tried." ***Id.***

In the case at hand, Appellant was charged with possession of less than one gram of cocaine. *See* TEX. HEALTH & SAFETY CODE ANN. §§ 481.102(3)(D), 481.115(a) (West 2010). At trial, Brownsboro Police Officer Lonnie McKinney testified that he arrested Appellant for criminal trespass. McKinney further testified that during a search of Appellant's person following his arrest, he discovered a substance in Appellant's coat pocket he believed to be crack cocaine. McKinney stated that he placed the substance in an evidence bag and placed the bag in his patrol car where the bag remained secure while Appellant was being booked into the jail. McKinney further stated that he documented the chain of custody and turned the evidence in to the evidence room before writing his report pertaining to Appellant's arrest. McKinney testified that Brownsboro Police Sergeant Danny Ford removed the substance from the evidence room and transported it in an envelope to the district attorney's office.[5] McKinney identified the contents of the envelope as the substance he discovered on Appellant that he placed inside the evidence bag. Thereafter, the substance was admitted into evidence.

Sharla McCloskey testified that she is a forensic scientist at the Department of Public Safety crime lab in Tyler, Texas. McCloskey testified that she performed tests on the substance discovered on Appellant's person and that that substance contained cocaine and weighed 0.70 grams.

We have reviewed the record in the light most favorable to the verdict. Having done so, we hold that the evidence is legally sufficient to support that Appellant possessed less than one gram of cocaine.

Appellant's first issue is overruled.

DENIAL OF MOTION FOR MISTRIAL

In his second issue, Appellant argues that the trial court erred in denying his motion for mistrial made during voir dire proceedings. Appellant's motion for mistrial was made in response to the following statement made by the prosecuting attorney:

> [PROSECUTING ATTORNEY]: Something else that is not on that board that the State doesn't have to prove, it's not a part of the offense, is that the Defendant was actually using drugs or under the influence of drugs at the time. Now, is there anyone here who would have a problem convicting someone of possession, unless there's evidence that they were using the drugs or under the influence of the drugs?
>
> (No response)

[5] McKinney testified that at the time of trial, he was no longer a law enforcement officer and, thus, could not transport a controlled substance. Ford later testified concerning his transporting the evidence from the Brownsboro Police Department to the district attorney's office as well as other chain of custody matters.

Now, something that I know a lot of people are very curious about, is some sort of history. Jurors will ask if this is the first time. The Code of Criminal Procedure, 37.07, breaks trials up into two parts. The general verdict, and a separate hearing for punishment, okay. We call that bifurcating the trial. So it's basically two miniature trials. The Judge has already told you that the Court's going to be assessing punishment. So the only issue for the jury will be guilt or innocence.

Section 3[] says that prior criminal record only comes in during the second part of the trial, or during that separate hearing on punishment. Okay. So is there anyone here who could need to hear about a Defendant's criminal history, or that they have done this before, in order to come back with a guilty verdict?

[APPELLANT'S COUNSEL]: I'm [going] to object, Your Honor, may we approach?

THE COURT: Yes. I'm sustaining the objection. I don't even know why we're getting into this.

[PROSECUTING ATTORNEY]: Well, Your Honor, criminal history is not an element of possession, and if a juror is going to require the State to prove - -

THE COURT: I understand that, but the problem I have, is the implication that there's - -

[APPELLANT'S COUNSEL]: It's implicating that he's got a prior criminal history. At this point[,] I'm going to ask for a motion for mistrial.

THE COURT: That's denied.

[APPELLANT'S COUNSEL]: I'll ask it again. I'd ask the Court to have the jury disregard - -

[PROSECUTING ATTORNEY]: If there's a juror out there that is going to require the State to prove a history of drug abuse or possession, I'm entitled to know that.

THE COURT: Okay. I respectfully disagree. Move on to the next question.

[PROSECUTING ATTORNEY]: Absolutely.

Standard and Scope of Appellate Review

We review the trial court's denial of a motion for mistrial for abuse of discretion. *See* ***Hawkins v. State***, 135 S.W.3d 72, 77 (Tex. Crim. App. 2004); ***Trevino v. State***, 991 S.W.2d 849, 851 (Tex. Crim. App. 1999). A trial court does not abuse its discretion when its decision is at least within the zone of reasonable disagreement. *See* ***Montgomery v. State***, 810 S.W.2d 372, 391 (Tex. Crim. App. 1990).

A defendant's complaint to the trial court when evidence is admitted or statements are made before the jury may take three forms: (1) a timely, specific objection, (2) a request for an instruction to disregard, and (3) a motion for a mistrial. *See* ***Young v. State***, 137 S.W.3d 65, 69 (Tex. Crim. App. 2004). Each of these methods furthers the policies of preventing and correcting errors and conserving judicial resources, but in different ways and to varying degrees. ***Id.*** An objection serves as a preemptive measure. ***Id.*** Because it informs the judge and opposing counsel of the potential for error, an objection conserves judicial resources by prompting the prevention of foreseeable, harmful events. ***Id.***

The other two methods of complaint are corrective measures. ***Id.*** An instruction to

disregard attempts to cure any harm or prejudice resulting from events that have already occurred. ***Id.*** Where the prejudice is curable, an instruction eliminates the need for a mistrial, thereby conserving the resources associated with beginning the trial process anew. ***Id.*** Like an instruction to disregard, a mistrial serves a corrective function. ***Id.*** However, the class of events that require a mistrial is smaller than that for which a sustained objection or an instruction to disregard will suffice to prevent or correct the harm. ***Id.*** A grant of a motion for mistrial should be reserved for those cases in which an objection could not have prevented, and an instruction to disregard could not cure, the prejudice stemming from an event at trial, i.e., where an instruction would not leave the jury in an acceptable state to continue the trial. ***Id.*** Therefore, a mistrial conserves the resources that would be expended in completing the trial as well as those required for an appeal should a conviction occur. ***Id.***

Because the objection, the request for an instruction to the jury, and the motion for mistrial seek judicial remedies of decreasing desirability for events of decreasing frequency, the traditional and preferred procedure for a party to voice its complaint has been to seek them in sequence—that is, (1) to object when it is possible, (2) to request an instruction to disregard if the prejudicial event has occurred, and (3) to move for a mistrial if a party thinks an instruction to disregard was not sufficient. ***Id.*** However, this sequence is not essential to preserve complaints for appellate review. ***Id.*** The essential requirement is a timely, specific request that the trial court refuses. ***Id.***

The request for an instruction that the jury disregard an objectionable occurrence is essential only when the instruction could have had the desired effect, which is to enable the continuation of the trial by an impartial jury. ***Id.*** at 70. The party who fails to request an instruction to disregard will have forfeited appellate review of that class of events that could have been "cured" by such an instruction. ***Id.*** But if an instruction could not have had such an effect, the only suitable remedy is a mistrial, and a motion for a mistrial is the only essential prerequisite to presenting the complaint on appeal. ***Id.*** Faced with incurable harm, a defendant is entitled to a mistrial and if denied one, will prevail on appeal. ***Id.***

Accordingly, as in the case at hand, when a party's first action is to move for mistrial, the scope of appellate review is limited to the question whether the trial court erred in not taking the most serious action of ending the trial. ***Id.*** In other words, an event that could have been cured by instruction to the jury will not lead an appellate court to reverse a judgment on an appeal by the party who did not request these lesser remedies in the trial court.[6] *See* ***id.***

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[6] Because Appellant failed to secure a ruling on his motion to instruct the jury to disregard, which he made after the trial court denied his motion for mistrial, *see* TEX. R. APP. P. 33.1(a)(2), we will focus on the trial court's denial of Appellant's motion for mistrial.

Reference to Extraneous Offenses During Voir Dire

Mistrial is an extreme remedy and is appropriate only when the objectionable event is so emotionally inflammatory that a curative instruction is not likely to prevent the jury from being unfairly prejudiced against the defendant. *See* ***Bauder v. State***, 921 S.W.2d 696, 698 (Tex. Crim. App. 1996); ***Lusk v. State***, 82 S.W.3d 57, 60 (Tex. App.–Amarillo 2002, pet. ref'd). References to extraneous offenses can be rendered harmless by an instruction to disregard unless they are so clearly calculated to inflame the minds of the jury and are of such a nature as to suggest the impossibility of withdrawing the impression produced. *See* ***Lusk***, 82 S.W.3d at 61 (citing ***Kemp v. State***, 846 S.W.2d 289, 308 (Tex. Crim. App. 1992); ***Huffman v. State***, 746 S.W.2d 212, 218 (Tex. Crim. App. 1988)).

In the case at hand, the prosecuting attorney asked if there was anyone on the venire panel who would need to hear about a defendant's criminal history or evidence that a defendant previously had engaged in the charged conduct in order to find that defendant guilty. In sustaining Appellant's objection to this question, the trial court agreed that there was an implication in the question that Appellant had been previously convicted of a similar offense. However, there is no indication from the record that the prosecuting attorney's statement was clearly calculated to inflame the minds of the venire members. To the contrary, the prosecuting attorney explained that he believed he was entitled to know if a prospective juror was going to require the State to prove more than it was required to prove by law to convict Appellant. Furthermore, based on our review of the statement in light of the record as a whole, we cannot conclude that the nature of the statement made it impossible to withdraw the impression produced by a curative instruction. Accordingly, we conclude that the implication that Appellant may have committed extraneous offenses created by the prosecuting attorney's question could have been rendered harmless by an instruction to disregard. Since the error was curable, we hold that the trial court did not err in denying Appellant's motion for mistrial. Appellant's second issue is overruled.

DISPOSITION

Having overruled Appellant's first and second issues, we ***affirm*** the trial court's judgment.

JAMES T. WORTHEN
Chief Justice

Opinion delivered November 23, 2011.
Panel consisted of Worthen, C.J., Griffith, J., and Hoyle, J.

(DO NOT PUBLISH)