COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

JULISSA GAMEZ OCHOA,	§	No. 08-16-00045-CR
Appellant,	§	Appeal from
v.	§	Criminal District Court No. 1
THE STATE OF TEXAS,	§	of El Paso County, Texas
Appellee.	§	(TC # 20150D02050)

O P I N I O N

A jury convicted Julissa Gamez Ochoa of possession with intent to deliver more than six pounds of methamphetamine. Appellant's sole complaint on appeal is that the evidence is insufficient to show her intent to deliver the drug, as distinct from personal use. We disagree and affirm the conviction.

FACTUAL SUMMARY

The State indicted Appellant for possession with intent to deliver a Penalty Group One drug, methamphetamine, having an aggregate weight, including adulterants or diluents, of 400 grams or more. The indictment arose out of the interdiction efforts of the El Paso Police Department at the Amtrak train station in El Paso.

On March 7, 2015, Officers Martin Moncada and Kenny Jones, both assigned to a narcotics unit, were working the train station in El Paso. They chose the train station because it is one of

the known conduits for narcotics being transported from one coast to the other. The officers boarded an eastbound Amtrak train from San Diego when it stopped at the station. The officers then engaged in consensual encounters with several passengers. One of those passengers was Appellant.

Officer Jones talked with Appellant, and obtained consent to search her duffel bag. Underneath some clothing, the officers found several vacuum-sealed bags with large shards of what the officers recognized as crystal methamphetamine. They then arrested Appellant and collected several additional exhibits from her, including a California identification card, a restaurant receipt from Tijuana, Mexico, dated two days before she boarded the train, and her train ticket showing a final destination of Houston. The officers found nothing else on her person, and her duffel bag contained only enough clothing for a short trip (one change of pants, two shirts, and two changes of underwear). Appellant was cooperative, soft spoken, and very calm at all times.

One of the officers further explained that San Diego is "source" city for drugs, and Houston is considered a "demand" city. Methamphetamine is produced in Tijuana, Mexico, and then shipped north. One officer was impressed with the apparent high quality and size of the shards in Appellant's possession. The forensic chemistry report confirmed one of the shards as methamphetamine; the total weight of all the shards was 2,853.10 grams, which converts to 6.29 pounds.

The jury found Appellant guilty of possession with intent to deliver. By agreement, the trial court sentenced Appellant to the minimum applicable term of fifteen years, but assessed no fine. Appellant's sole issue revolves around whether she intended to "deliver" the drug to anyone else.

STANDARD OF REVIEW

Evidence is legally sufficient when, viewed in the light most favorable to the verdict, *any* rational jury could have found the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19, 99 S.Ct. 2781, 2788-89, 61 L.Ed.2d 560 (1979); *Brooks v. State*, 323 S.W.3d 893, 912 (Tex.Crim.App. 2010)(establishing legal insufficiency under *Jackson v. Virginia* as the only standard for review of the evidence).

The jury is the sole judge of credibility and the weight attached to the testimony of each witness. *Dobbs v. State*, 434 S.W.3d 166, 170 (Tex.Crim.App. 2014). It is the fact finder's duty "to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *See Clayton v. State*, 235 S.W.3d 772, 778 (Tex.Crim.App. 2007), *quoting Jackson*, 443 U.S. at 319, 99 S.Ct. 2781. The jury also may choose to believe or disbelieve that testimony. *Lancon v. State*, 253 S.W.3d 699, 707 (Tex.Crim.App. 2008); *Belton v. State*, 900 S.W.2d 886, 897 (Tex.App.--El Paso 1995, pet. ref'd). When the record supports conflicting inferences, we presume that the jury resolved the conflicts in favor of the verdict, and we defer to that determination. *Dobbs*, 434 S.W.3d at 170; *see also Jackson*, 443 U.S. at 319, 99 S.Ct. at 2789.

Circumstantial evidence is as probative as direct evidence in establishing guilt, and circumstantial evidence alone may be sufficient to establish guilt. *Dobbs*, 434 S.W.3d at 170; *Carrizales v. State*, 414 S.W.3d 737, 742 n.20 (Tex.Crim.App. 2013), *citing Hooper v. State*, 214 S.W.3d 9, 13 (Tex.Crim.App. 2007). Each fact need not point directly and independently to the guilt of the appellant, as long as the cumulative force of all the incriminating circumstances is sufficient to support the conviction. *Dobbs*, 434 S.W.3d at 170; *Hooper*, 214 S.W.3d at 13.

We remain mindful that "[t]here is no higher burden of proof in any trial, criminal or civil, and there is no higher standard of appellate review than the standard mandated by *Jackson.*"

Brooks, 323 S.W.3d at 917 (Cochran, J., concurring). Nonetheless, if a rational fact finder could have found the defendant guilty, we will not disturb the verdict on appeal. *Fernandez v. State*, 479 S.W.3d 835, 838 (Tex.Crim.App. 2016).

ANALYSIS

The jury charge here presented two possible crimes. Appellant might have been found guilty of possession *with intent to deliver* of 400 grams of more of methamphetamine. The jury could have also found her guilty of the lesser-included offense of possession of the same amount of drugs. The minimum sentence for the former offense is fifteen years' incarceration, while the latter is ten years. *Cf.* TEX. HEALTH & SAFETY CODE ANN. § 481.115(f) *with* § 481.112(f)(West 2017)(difference in penalty between possession and possession with intent to deliver 400 grams or more is the minimum jail sentence, and maximum fine). Under either charge, she could have been sentenced to as much as life imprisonment. *Id.* The jury charge defined "deliver" to mean, "transfer, actually or constructively, to another a controlled substance . . . regardless of whether there is an agency relationship." *See* TEX.HEALTH & SAFETY CODE ANN. § 481.002(8)(similarly defining the term delivery).

Appellant's sole claim is that the State presented insufficient evidence to show that she intended to deliver the methamphetamine found in her possession. The gist of her argument is that at most the State proved a large quantity of the drug, and a large quantity alone is not enough. Case law has developed a number of indicators demonstrating an intent to deliver, including: (1) the nature of the location at which the accused was arrested; (2) the quantity of drugs in the accused's possession; (3) the manner of packaging of the drugs; (4) the presence or absence of drug paraphernalia for either use or sale; (5) the accused's possession of large amounts of cash; and (6) the accused's status as a drug user. *See Utomi v. State*, 243 S.W.3d 75, 82 (Tex.App.--Houston [1st Dist.] 2007, pet. ref'd); *Jordan v. State*, 139 S.W.3d 723, 726 (Tex.App.--Fort Worth

2004, no pet.). Expert testimony by experienced law enforcement officers may establish an accused's intent to deliver. *See Utomi*, 243 S.W.3d at 82. However, circumstantial evidence will also suffice to prove an intent to deliver. *Id.*

Appellant focuses on the lack of some of these indicators, and contends that the State ultimately relies only on the quantity of drugs alone. The State responds in part that the large quantity of the drugs here would be sufficient evidence to support the conviction. It cites a number of cases in support of that proposition. *E.g*. *United States v. DeLeon*, 641 F.2d 330, 335 (5th Cir. 1981); *United States v. Goldstein*, 635 F.2d 356, 362 (5th Cir. 1981), and *United States v. Grayson*, 625 F.2d 66 (5th Cir. 1980). We need not apply such a bright line rule, only because the conviction here rests on much more than just the sheer quantity of the drug.

Appellant was traveling from what one detective testified was a supply city (San Diego) to a demand city (Houston). She was traveling on a known conduit for the commerce in drugs (an East-West train). She had been in Tijuana, Mexico, just days before she left San Diego. Tijuana is a known manufacturing site for methamphetamine. The jury could infer from these facts that the drug was destined for commerce with others. *See Utomi*, 243 S.W.3d at 82 (nature of location where accused arrested as a relevant factor). Appellant had only a few changes of clothes with her, suggesting that she did not intend to stay long in Houston. But she had no implements in her possession to consume any of the drug. It would seem unlikely that a person on a several day trip would carry such a large quantity of a drug for personal use, without any of the paraphernalia to actually use the drug. *See Mack v. State*, 859 S.W.2d 526, 529 (Tex.App.--Houston [1st Dist.] 1993, no pet.)(lack of drug paraphernalia as negating inference drugs were for personal use). The State could have certainly done more to explain the significance of this quantity of the drug (i.e. calculate the street value, or provide the usual dosage for personal use). Nonetheless, the jury

could have used its own common sense to understand that an offense based on grams of a substance takes on added significance when those grams add up to many pounds.

Appellant relies on the discussion in *Branch v. State*, 833 S.W.2d 242 (Tex.App.--Dallas 1992, pet. ref'd), a case where the court held the evidence sufficient to prove intent to deliver. In reaching that conclusion, the *Branch* court distinguished its earlier decision in *Turner v. State*, 681 S.W.2d 849 (Tex.App.--Dallas 1984, pet. ref'd), a case where the court held the evidence insufficient to prove intent to deliver. *Turner*, however, was decided at a time when courts used the "reasonable-alternative-hypothesis construct" for analyzing legal insufficiency claims; that construct has since been rejected. *See Geesa v. State*, 820 S.W.2d 154, 160 (Tex.Crim.App. 1991), *overruled on other grounds by Paulson v. State*, 28 S.W.3d 570, 571-72 (Tex.Crim.App. 2000). Accordingly, we find the discussion in *Turner* unhelpful.

The accumulation of several factors--finding the drugs in a known conduit for the drug trade between a "supply" and "demand" city, the apparent short duration of the trip without any paraphernalia for any personal use of the drug, and the sheer quantity of the drug--all collectively support the jury's finding of intent to deliver. We overrule Appellant's single point and affirm the conviction.

December 20, 2017

ANN CRAWFORD McCLURE, Chief Justice

Before McClure, C.J., Rodriguez, and Palafox, JJ.

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