COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

SHOLOMO DAVID,		§	No. 08-18-00059-CR
	Appellant,	§	Appeal from the
v.		§	41st District Court
THE STATE OF TEXAS,		§	of El Paso County, Texas
	Appellee.	§	(TC# 20160D05398)

O P I N I O N

A jury found Appellant Shomolo David guilty of tampering with physical evidence. *See* TEX.PENAL CODE ANN. § 37.09. After David pleaded true to two enhancement paragraphs, the jury assessed punishment at thirty years' in prison. David presents four issues on appeal: (1) there was insufficient evidence to support his conviction; (2) the application paragraph in the jury charge omitted an element of the offense which caused egregious harm; (3) the trial court abused its discretion by denying a motion for new trial based on jury charge error; and (4) ineffective assistance of trial counsel. We agree that the evidence is insufficient and reverse the judgment and render an acquittal.

FACTUAL BACKGROUND

In 2016, Gabriel Nava was working as a special agent in the gang unit of the Criminal Investigations Division ("CID") of the Texas Department of Public Safety. CID received

information that drugs were being sold from a hotel located in a high-crime area in Northeast El Paso. On June 8, 2016, Nava and other CID agents arranged for an undercover buy of crack cocaine at the hotel. Using the information Nava received from that buy, he obtained two "no-knock" warrants to search Hotel Rooms 12 and 15. The next day, on June 9, 2016, with warrants in hand, but before executing them, Nava and a team of law enforcement officers began to surveil Rooms 12 and 15.

During the surveillance, the officers noticed that the suspected drug activity that had been occurring in Rooms 12 and 15 the evening before, had shifted to Room 18. Specifically, they noticed a series of quick transaction exchanges being performed by a female exiting from Room 18, visitors were arriving and quickly departing, and heavy foot traffic coming in and out of the hotel entrance, all of which Nava testified is consistent with narcotic transactions. The officers also witnessed a male arrive and depart Room 18 within two-three minutes, walk across the street and smoke a white rock-like substance with a glass pipe. Faced with this change in circumstance, the team of officers re-grouped and the decision was made to execute the warrants at Rooms 12 and 15 and then attempt a "knock and talk" at Room 18 in which the officers would ask the occupants to come out and talk to the officers.

As the officers drove up to the doors of Rooms 12 and 15, which faced the parking lot, Nava noticed a woman, who was in the process of entering Room 18, look directly at the officers as they approached in their vehicles. The officers were dressed in law enforcement uniforms and gear and were travelling in at least one marked vehicle. As Nava exited his police vehicle from the passenger side, he saw the woman turn toward the interior of Room 18 while the door was still ajar and appeared to yell something to the room's occupants. Nava believed the woman warned

the occupants that police were coming. While the door to Room 18 was still open, Nava announced his presence by yelling "Police, come out. Come this way." After Nava made his announcement of police presence, the door was quickly slammed shut.

As Nava walked past Room 18 on his way to Room 15, he heard movement suggesting there were multiple occupants inside Room 18. He also smelled a strong odor of marijuana coming from inside Room 18. Based on this information, he instructed agents behind him to keep attempting to make contact with the occupants of Room 18. Nava and his team then proceeded to execute the "no-knock" search warrant at Room 15, which was obviously being lived in, but, at the moment, was unoccupied. Nava and his team "cleared" Room 15, but did not search it at that time.

Nava then returned to Room 18, where agents were still trying to make contact with the occupants. Nava believed circumstances justified breaching the room. These circumstances included, but were not limited to, the activity witnessed by the officers earlier that day, the strong odor of marijuana coming from that room, sounds of movement, and his concern for officer safety and that evidence would be destroyed. After forcing themselves inside Room 18, the officers found two women in the living area, Shykeytra Jones and Cierra McFadden, as well as drug paraphernalia in plain view, and the Room had "a very, very strong odor of marijuana." They also heard a third person in the restroom behind a locked door. The officers gave multiple commands to the individual to exit the restroom and could hear movement from inside. After the individual failed to comply, the officers forced the restroom door open and found David fully clothed standing by the toilet.

Inside the toilet, officers found a green leafy substance that Nava testified looked and

smelled like marijuana. Also located in the toilet were small glass pipes used to smoke narcotics. It appeared to officers that someone had tried to flush the items down the toilet. Photographs of the toilet and its contents were taken and introduced into evidence at David's trial. David was arrested and taken into custody, along with the two other occupants of Room 18. All three were charged with tampering with evidence. The hotel had video recording equipment that captured in real time the events described above occurring outside hotel Room 18 and the parking lot. The video footage was introduced into evidence at David's trial.

In addition to the events described above, at David's trial the State introduced evidence regarding the seizure of drugs found in a truck from which David is seen exiting before he entered Room 18. The video footage obtained from the hotel's recording equipment begins with a gray truck parked in front of Room 12. A few minutes before police arrive, David is seen exiting from the driver's side of the truck and walking up toward Room 12, while an individual, later identified as Quentin Jones, remains seated in the front passenger seat. Although David walked out of the field of vision captured by the camera, Nava testified that he believed David tried to make contact with someone in Room 12.

The video then depicts David standing in front of his vehicle with a phone to his ear. A female, later identified as Cierra McFadden, David's niece, exits Room 18 and joins David. David then walks to the passenger side of the truck and opens the door. Jones hands something to David, who hands it to McFadden. Jones remains in the truck while both David and McFadden walk into Room 18. The door to Room 18 is left open. The police officers then arrive and events unfold as described above. The end of video footage depicts Jones exiting the truck from the driver's side. Jones was also later arrested. The duration of the video footage from the moment David exits the

truck through Jones' exit from the truck is approximately four minutes. The entire video footage was introduced into evidence.

In addition, over defense counsel's relevance objection, the State also introduced evidence that a subsequent search of the truck from which David was seen exiting resulted in discovery of crack, crystal meth, and marijuana. Crystal meth and crack were found in a plastic baggie between the center console and the driver's seat. Crystal meth was also found in the cupholder in the center console. Photographs of the drugs confiscated from the truck were admitted into evidence over David's relevance objections.

David did not testify, nor did he present any witnesses or evidence during his case-in-chief. On cross-examination, defense counsel elicited testimony from Nava establishing that because fecal matter was mixed with the contents of the toilet, neither the green leafy substance nor the pipes themselves were retrieved from the toilet or tested. Nava did not deny that the leafy substance was capable of being tested for marijuana if it had been retrieved. Nava also testified that all three occupants at some point could have flushed something down the toilet. Defense counsel established that none of the officers heard the toilet flush prior to entering the restroom, nor did the officers see anyone flushing anything down the toilet.

DISCUSSION

David presents four issues for our review: (1) the evidence is legally insufficient to support the Appellant's conviction under TEX.PENAL CODE ANN. § 37.09; (2) the trial court erred in the jury charge's application paragraph by omitting an element of the offense; (3) the trial court erred in denying the motion for new trial based on jury charge error; and (4) the trial court erred in denying the motion for new trial based on ineffective assistance of counsel. We turn to Appellant's

first point of error.

I. Sufficiency of the Evidence

David argues the evidence is legally insufficient to show he altered, destroyed, or concealed the marijuana; or to show he knew an investigation was pending or in progress; or that he was the individual who placed the marijuana in the toilet.

A. Standard of Review and Applicable Law

When reviewing sufficiency of the evidence, we consider the evidence in the light most favorable to the verdict to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Griffin v. State*, 491 S.W.3d 771,774 (Tex.Crim.App. 2016); *see Brooks v. State,* 323 S.W.3d 893, 895 (Tex.Crim.App. 2010)(plurality op.)(citing *Jackson v. Virginia,* 443 U.S. 307, 319 (1979)). We resolve any evidentiary inconsistencies in favor of the judgment, keeping in mind that the jury is the exclusive judge of the facts, the credibility of the witnesses, and the weight to give their testimony. *Brooks,* 323 S.W.3d at 899; *see* TEX.CODE CRIM.PROC.ANN. art. 38.04 ("The jury, in all cases, is the exclusive judge of the facts proved, and of the weight to be given to the testimony . . . ."). We determine, based upon the cumulative force of all the evidence, whether the necessary inferences made by the jury are reasonable. *Griffin,* 491 S.W.3d at 774.

Sufficiency of the evidence is measured by the elements of the offense as defined by a hypothetically correct jury charge. *Villarreal v. State*, 286 S.W.3d 321, 327 (Tex.Crim.App. 2009); *Malik v. State*, 953 S.W.2d 234, 240 (Tex.Crim.App. 1997). "'Such a 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.'" *Villarreal*, 286 S.W.3d at 327; *Malik*, 953 S.W.2d at 240.

Here, a hypothetically correct charge authorized by the indictment would instruct the jury to find David guilty of tampering with physical evidence if (1) knowing that an investigation or official proceeding was pending or in progress, and (2) he altered, destroyed, or concealed drugs, and (3) with intent to impair its verity or availability as evidence in the investigation or official proceeding. Alternatively, a jury could find David guilty of tampering with physical evidence if (1) knowing that an offense was committed, and (2) he altered, destroyed, or concealed drugs, and (3) with intent to impair its verity, legibility, or availability as evidence in any subsequent investigation of or official proceeding related to the offense. *See* TEX.PENAL CODE ANN. § 37.09(a)(1); *State v. Zuniga*, 512 S.W.3d 902, 907 (Tex.Crim.App. 2017).

"Alter" is not defined by statute but may be commonly understood to mean "to change; make different; modify." *Williams v. State*, 270 S.W.3d 140, 146 (Tex.Crim.App. 2008)(citing WEBSTER'S UNABRIDGED DICTIONARY, at 52 (2nd ed. 1983)). Recently, in *Stahmann v State*, the Court of Criminal Appeals stated "when a defendant is alleged to have altered a physical thing" then "alter" means "the defendant changed or modified the thing itself[.]" 602 S.W.3d 573, 579 (Tex.Crim.App. 2020). Destroy is defined as "ruined and rendered useless[.]" *Williams*, 270 S.W.3d at 146.

B. Arguments

David challenges the sufficiency of the evidence in that the State failed to prove: (1) he was the individual who placed the marijuana in the toilet; (2) knowing an investigation or official proceeding was in progress or pending; and (3) the marijuana had been altered, destroyed, or

concealed.

David's indictment alleged:

> On or about the 9th day of June, 2016 . . . [David] did then and there knowing that an investigation or official proceeding is pending or in progress alter, destroy or conceal a thing, to wit: drugs, with intent to impair its verity, legibility, or availability as evidence in the investigation or official proceeding.

First, David claims there was insufficient evidence establishing that *he* took any action to "'. . . alter, destroy(s), or conceal . . .' drugs as alleged in the indictment." He asserts that his mere presence in the restroom is insufficient to prove *he* put the marijuana in the toilet.

The State in closing argued:

> [The marijuana's] in the toilet, ladies and gentlemen, because [David] probably wanted to flush it. And it's in the toilet, making it unavailable to test anymore. . . .
>
> DPS said -- the agent said, 'You know, it looked like there was maybe some fecal matter in the toilet.' That would certainly *alter* a substance, don't you think? Urine would *alter* it. Just a nasty toilet would *alter* it, putting it in the toilet to *destroy* its availability in a subsequent case.
>
> And the cops were investigating that [marijuana] smoke and investigating the fact that there's other drug activity going on, and then the door slams in their face and there's all this commotion. Something was getting *destroyed*. That was that weed in the toilet.
>
> . . .
>
> Just because you didn't catch the defendant red-handed . . . doesn't mean that there's no evidence that he was altering, destroying or concealing that marijuana—those drugs. . . . He *destroyed* those drugs for future use. [Emphasis added].

In rebuttal, the prosecutor continued:

> You see it right here in State's 17, that the—the evidence, the marijuana evidence, the drug paraphernalia, that's already been tampered---that's been tampered with, right? It's been *altered*, all right? Altered, destroyed, concealed where its verity or its availability is no longer.
>
> . . .

> The evidence says, yes, he was tampering. He may not have had a chance to flush it. We may have gotten there too soon; but again, already been tampered with. [Emphasis added].

Taken together, these arguments suggest that the State believed it had proved at the very least that David had *altered* the marijuana by mixing it with feces and urine and attempting to flush it down the toilet to destroy it. The State on appeal asserts, Appellant altered or destroyed the marijuana by mixing it with the urine and fecal matter but does not assert Appellant concealed the marijuana.

C. Analysis

(i) Is the evidence sufficient Appellant altered or destroyed the marijuana?

The thrust of the State's sufficiency argument is Appellant did not open the bathroom door, officers heard movement and shuffling; the door was locked and had to be forced open; Appellant was fully clothed standing between the shower and the toilet. Officer Carrasco testified when he gained entry to the bathroom, he looked in the toilet and observed what appeared to be marijuana in the toilet. Officers declined to collect the marijuana because they asserted it was contaminated with urine and/or fecal matter. However, because it was not collected the marijuana was not tested nor was the toilet water. Appellant, in addition to the two other individuals in the motel room were charged with tampering with evidence.

The State relies on *Diaz* for the proposition that coming from a bathroom in which cocaine was found around the rim of the toilet with flecks of cocaine in the toilet water alone is enough to support a conviction for tampering with evidence. *Diaz v. State,* Nos. 13-13-00067-CR & 13-13-00068-CR, 2014 WL 1266350, at *2 (Tex.App.—Corpus Christi Jan. 23, 2014, no pet.)(mem. op., not designated for publication). However, in that case there were no other occupants of the house and the Appellant told officers he was using the bathroom as they made entry pursuant to a search

warrant. *Id.* at *2-3.

Here we have three individuals who were present, all with access to the bathroom, each had opportunity and access to the toilet and were charged with the offense. Lieutenant Nava conceded under cross-examination that the sound of flushing was not heard, he did not know who of the three arrestees placed the marijuana in the toilet and any of the three could have attempted to flush the toilet. Officer Carrasco stated he did not know why Appellant was in the bathroom or how long the marijuana had been in the toilet before the officers found it.

Again, juxtaposed against the facts at hand, no officer directly observed Appellant place the marijuana in the toilet. Given the premises were rented by two other individuals, who were also charged with tampering with evidence, no evidence was presented as to how long the marijuana had been in the toilet. Further, the fact David had entered the room minutes prior to the police making entry, supports our conclusion the evidence is insufficient that David was the individual who placed the marijuana in the toilet. For the jury to conclude from the evidence David placed the marijuana in the toilet by his mere presence would therefore be an unreasonable inference, amounting to no more than mere speculation. *See Gross v. State*, 380 S.W.3d 181, 188 (Tex.Crim.App. 2012)("Juries are permitted to draw reasonable inferences from the evidence, but they are not permitted to draw conclusions based on speculation.").

(ii) Is the evidence sufficient that the marijuana was "altered" or "destroyed"?

Next, the State points to *Gordwin* for support that cocaine flushed down a toilet is altered or destroyed. *Gordwin v. State,* Nos. 01-14-00343-CR & 01-14-00344-CR, 2015 WL 1967623, at *3 (Tex.App.—Houston [1st Dist.] Apr. 30, 2015, pet ref'd)(mem.op., not designated for publication). In *Gordwin*, officers came upon Appellant as he repeatedly flushed the toilet refusing

their commands to stop, resisting as officers pulled him away from the flushing toilet with his hands in the toilet bowl. *Id.* at *1. Here, other than Appellant's presence in the bathroom with a toilet, there is no evidence of any overt act by Appellant to indicate he had placed the marijuana in the toilet. The State also points to *Turner,* which found that an Appellant who was observed swallowing a baggie with a "white or beige rock-like substance" had destroyed evidence. *Turner v. State,* No. 13-12-00335-CR, 2013 WL 1092194, at *1-2 (Tex.App.—Corpus Christi Mar. 14, 2013, no pet.)(mem.op., not designated for publication). Officers directly observed the baggie with the unknown substance in Appellant's mouth when he swallowed it. *Id.*

The State maintains the marijuana had been altered once it had been "wetted-with-toilet-water" mixed with fecal matter that the agents were "unwilling and/or unable to collect." However, given that whether the marijuana was "altered" is a critical, crucial element to whether David tampered with potential evidence, the State failed to present any evidence from any witness or expert demonstrating the toilet water had indeed altered or destroyed the marijuana. We have not uncovered any case that has found marijuana mixed with water, albeit toilet water, has modified the marijuana or rendered it useless. Common sense tells us that water does not necessarily alter everything it touches. While case law demonstrates cocaine is altered by water, it does not automatically follow an unrefined organic material, in its original state, is altered or destroyed by toilet water. The mere assertion that it does cannot support a conviction for tampering with evidence without more. Whether the marijuana can be dried and used is an unanswered question. We cannot simply assume that it is unusable simply because it is repugnant that one would even attempt to do so. Without any evidence the marijuana was altered by immersion in the toilet water, David's conviction cannot stand.

Applying the *Stahmann* definition, the State was required to prove the marijuana was changed or modified. 602 S.W.3d at 579-80. In *Stahmann*, a pill bottle was alleged to have been altered by the act of throwing it over a fence. *Id.* The Court concluded the act of changing its geographic location did not meet the definition of altering the pill bottle itself. *Id.* Here, hypothetically, throwing the pill bottle in a toilet would not "alter" it, likewise, we cannot assume the placement of marijuana in the toilet water "alters" it. The necessary evidence to prove the alteration or destruction of the marijuana was not presented nor proved. The chemical impact of the toilet water upon the marijuana cannot be left to a lay person to infer or assume. It is not uncommon for cell phones to fall into a toilet, yet are successfully retrieved, dried and continue to be used. If one threw dried leaves or twigs in the toilet, have they been "altered" or "destroyed"? Are they altered or destroyed after five minutes in the water, as the case here? It cannot be reasonably inferred or concluded the immersion of the marijuana in toilet water has "altered" or "destroyed" it.

For the foregoing reasons, we conclude the evidence adduced at trial was legally insufficient to support a finding, first, David was the individual that destroyed or altered the marijuana and second, the marijuana was in fact, altered or destroyed.[1] Having sustained David's first issue, accordingly, we do not reach whether he knew an investigation or official proceeding was in progress or pending nor his second, third, or fourth issue.

[1] Under *Thornton v. State*, 425 S.W.3d 289, 295 (Tex.Crim.App. 2014), we are instructed that a reformation of the judgment must be considered regardless whether a party has requested it; it was contested or a lesser-included offense instruction was included in the jury charge instructions. *Thornton* outlined a reformation must be rendered if (1) every element of the lesser-included offense was found by the jury, and (2) the evidence at trial is sufficient to support a conviction of the lesser-included offense. *Id.* at 299-300. Here, even if the evidence supported a finding David intended to alter or destroy the marijuana, but failed, the evidence is legally insufficient to support David was the individual who placed the marijuana in the toilet putting the identity of the offender at issue so an analysis pursuant to *Thornton,* and *Rabb* would be inapplicable. *Id.; Rabb v, State,* 483 S.W.3d 16 (Tex.Crim.App. 2016).

The Court ORDERS Appellant's attorney, pursuant to Rule 48.4, to send Appellant a copy of this opinion and this Court's judgment, to notify Appellant of his right to file a *pro se* petition for discretionary review, and to inform Appellant of the applicable deadlines. *See* TEX.R.APP.P. 48.4, 68. The Court further ORDERS Appellant's attorney to comply with all the requirements of Rule 48.4.

CONCLUSION

We reverse the judgment finding David guilty of tampering with evidence and render a judgment of acquittal.

April 12, 2021

YVONNE T. RODRIGUEZ, Chief Justice

Before Rodriguez, C.J., Palafox, and Alley, JJ.
Alley, J., Dissents

(Publish)