Opinion filed May 18, 2017

In The

Eleventh Court of Appeals

No. 11-15-00115-CR

JIMMY LOYD BROWN, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 29th District Court
Palo Pinto County, Texas
Trial Court Cause No. 15327

M E M O R A N D U M O P I N I O N

Jimmy Loyd Brown appeals his jury conviction for the offense of delivery of a controlled substance to a minor. *See* TEX. HEALTH & SAFETY CODE ANN. § 481.122(a)(1) (West 2010). The trial court assessed Appellant's punishment at confinement for a term of sixty-five years in the Institutional Division of the Texas

Department of Criminal Justice. Appellant challenges his conviction in three issues. We affirm.

Background Facts

Wes Corzine is the principal of Graford Elementary School. He testified that Graford Elementary School and Graford High School share some of the same facilities, including restrooms. On April 4, 2014, he saw a plastic baggie lying in the hallway outside of the boys' restroom. Corzine picked up the baggie and observed that it contained clear "rocks" with some powdery residue. Corzine was suspicious of the contents of the baggie. He transported the baggie and its contents to his office, and he contacted Constable Marc Moon to investigate the matter further. While waiting on Constable Moon to arrive at the school, Corzine reviewed surveillance video from the hallway. Corzine was able to determine from the video that the baggie fell out of the pocket of J.P., a high school student.

Constable Moon suspected that the baggie contained methamphetamine. He contacted Investigator Job Espinoza of the City/County Narcotics Unit to bring a presumptive drug test kit to the school to test the contents of the baggie for methamphetamine. Constable Moon also confirmed from the surveillance video that J.P. was the person that dropped the baggie. After interviewing J.P. at the school, Constable Moon transported him to a magistrate so that a formal statement could be taken from J.P. Based upon the information obtained from J.P., Constable Moon obtained an arrest warrant for Appellant.

Investigator Espinoza is the senior narcotics officer for the City/County Narcotics Unit. He testified that the presumptive test that he performed on the contents of the baggie was positive for the presence of methamphetamine. Subsequent testing of the contents of the baggie at the DPS Crime Laboratory in Abilene revealed that the substance weighed 0.45 grams and that it contained methamphetamine.

J.P. was sixteen on April 4, 2014, and he was a freshman at Graford High School at the time. J.P. testified that he saw Appellant on the previous day. When asked what had caused J.P. to see Appellant that day, J.P. replied, "[I] [t]exted him and told him I had money and to come pick me [up] to get some drugs. And he came and picked me up and left me at a gas station." Specifically, J.P. testified that he had eighty dollars and that he wanted Appellant to get him methamphetamine. The prosecutor asked J.P., "Now, how did you know to call [Appellant]?" J.P. replied, "Because I dealt with him several times before."

J.P. testified that Appellant picked him up at his house and transported him to a closed business in Palo Pinto County. Appellant returned fifteen minutes later with a gram of methamphetamine that he delivered to J.P. J.P. testified that he gave a "bump" of the methamphetamine to Appellant for Appellant's use. Appellant then transported J.P. back home. J.P. took the remaining methamphetamine to school the next day. J.P. and some of his friends snorted a portion of the methamphetamine at school prior to J.P. dropping the methamphetamine in the hallway.

Analysis

Appellant was indicted for delivering methamphetamine to J.P. in an amount of less than one gram. The indictment alleged that the delivery occurred "on or about April 4, 2014." In his third issue, Appellant contends that the trial court erred in denying his motion for directed verdict because a reasonable doubt existed as to Appellant's guilt for the crime with which he was charged. At the close of the State's case-in-chief, Appellant moved for directed verdict on two grounds: (1) that the State had not offered sufficient evidence of Appellant's guilt and (2) that J.P. was an accomplice witness and the State had not offered sufficient evidence to corroborate his testimony. The trial court denied Appellant's motion for directed verdict.

A challenge to the trial court's denial of a motion for an instructed verdict or a motion for a directed verdict is treated as a challenge to the sufficiency of the

evidence. *Williams v. State*, 937 S.W.2d 479, 482 (Tex. Crim. App. 1996). We review a challenge to the sufficiency of the evidence, regardless of whether it is denominated as a legal or factual sufficiency challenge, under the standard of review set forth in *Jackson v. Virginia*, 443 U.S. 307 (1979). *Brooks v. State*, 323 S.W.3d 893, 912 (Tex. Crim. App. 2010); *Polk v. State*, 337 S.W.3d 286, 288–89 (Tex. App.—Eastland 2010, pet. ref'd). Under the *Jackson* standard, we review all of the evidence in the light most favorable to the verdict and determine whether any rational trier of fact could have found the elements of the offense beyond a reasonable doubt. *Jackson*, 443 U.S. at 319; *Isassi v. State*, 330 S.W.3d 633, 638 (Tex. Crim. App. 2010). When conducting a sufficiency review, we consider all the evidence admitted at trial, including pieces of evidence that may have been improperly admitted. *Winfrey v. State*, 393 S.W.3d 763, 767 (Tex. Crim. App. 2013); *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007). We defer to the factfinder's role as the sole judge of the witnesses' credibility and the weight their testimony is to be afforded. *Brooks*, 323 S.W.3d at 899. This standard accounts for the factfinder's duty to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. *Jackson*, 443 U.S. at 319; *Clayton*, 235 S.W.3d at 778. When the record supports conflicting inferences, we presume that the factfinder resolved the conflicts in favor of the verdict, and we defer to that determination. *Jackson*, 443 U.S. at 326; *Clayton*, 235 S.W.3d at 778.

Appellant focuses his third issue on his challenge to the sufficiency of the evidence that he asserted in his motion for directed verdict. Appellant essentially contends that J.P.'s testimony identifying Appellant as the source of the methamphetamine was too weak to support Appellant's conviction. He argues that J.P. had a "troubled life," used drugs, and was a poor student at school. He also asserts that there was no other evidence other than J.P.'s testimony identifying

Appellant as the source of the methamphetamine that J.P. dropped in the school hallway.

As noted previously, Appellant also asserted a contention in support of his motion for directed verdict that J.P. was an accomplice and that his testimony was not sufficiently corroborated. This appeared to be a reference to the corroboration requirement of TEX. CODE CRIM. PROC. ANN. art. 38.14 (West 2005). As correctly noted by the trial court, J.P. was not an accomplice because the "recipient" in a drug delivery offense is not an accomplice as a matter of law under *Rodriguez v. State*, 104 S.W.3d 87, 91–92 (Tex. Crim. App. 2003), a case that also involved the offense of delivery of a controlled substance to a minor. While Appellant asserts on appeal that "[t]here was no corroboration of [J.P.'s] identification from any other source," he has not presented a claim on appeal under Article 38.14.

J.P. testified that Appellant delivered the methamphetamine to him that he dropped in the school hallway. J.P. detailed the specifics of the transaction that occurred on the previous day, including how he contacted Appellant, the amount that he paid for the methamphetamine, the amount of the drug that he purchased, and the location where the delivery occurred. This transaction was not an isolated incident because J.P. testified that he had dealt with Appellant several times before. J.P.'s testimony concerning the source of the methamphetamine was inherently a matter of credibility that the jury was required to resolve. Under the applicable standard of review, the jury was the sole judge of J.P.'s credibility, and we defer to that determination. *See Brooks*, 323 S.W.3d at 899; *Clayton*, 235 S.W.3d at 778. Viewing the evidence in the light most favorable to the jury's verdict, we conclude that a rational trier of fact could have found the elements of the alleged offense beyond a reasonable doubt. We overrule Appellant's third issue.

Appellant's first and second issues concern a question that the prosecutor asked J.P. After J.P. testified that he had dealt with Appellant several times before,

the prosecutor asked him: "And had he given you meth several times before?" Appellant's trial counsel objected to the question on relevancy grounds. The prosecutor responded to the objection by saying that the evidence that he sought was admissible under *Rodriguez*. After reviewing the opinion in *Rodriguez*, the trial court overruled Appellant's objection. However, J.P. did not subsequently answer the question that the prosecutor had asked him, nor did the prosecutor immediately re-ask the question. On redirect examination, the prosecutor asked J.P., "When you wanted to buy meth, who did you buy it from?" J.P. responded by identifying Appellant as his source of methamphetamine.

Appellant asserts in his first issue that the trial court erred in ruling that evidence that J.P. "dealt with [Appellant] several times before" was admissible under *Rodriguez*. Appellant asserts in his second issue that this evidence constituted improper character conformity evidence under TEX. R. EVID. 404(b) and that the State failed to give him adequate notice under Rule 404(b)(2) of its intent to use this evidence.

We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *Henley v. State*, 493 S.W.3d 77, 82–83 (Tex. Crim. App. 2016). A trial court's decision is an abuse of discretion only when it falls outside the zone of reasonable disagreement. *Id.* at 83. Before a reviewing court may reverse the trial court's decision, "it must find the trial court's ruling was so clearly wrong as to lie outside the zone within which reasonable people might disagree." *Id.* (quoting *Taylor v. State*, 268 S.W.3d 571, 579 (Tex. Crim. App. 2008)).

We first note that Appellant did not object to J.P.'s response that he had dealt with Appellant several times before. Thus, Appellant has not preserved his complaint about this particular response for appellate review. *See* TEX. R. APP. P. 33.1. Appellant objected to the prosecutor's follow-up question asking J.P. if Appellant had given him methamphetamine several times before. Accordingly,

we focus our analysis on the trial court's ruling permitting evidence that Appellant provided methamphetamine to J.P. on other occasions.

As noted previously, *Rodriguez* also involved the offense of delivery of a controlled substance to a child. 104 S.W.3d at 88. The minor in *Rodriguez* testified that the defendant had delivered the same controlled substance to her "maybe 20 or 30 times" during the nine-month period preceding the "on or about" date alleged in the indictment. *Id.* Relying upon *Sledge v. State* and *Rankin v. State*, the Court of Criminal Appeals concluded that evidence that the defendant committed the charged offense on multiple occasions is not extraneous offense evidence but, rather, is evidence of the repeated commission of the charged offense and is therefore admissible. *Id.* at 90–91 (citing *Sledge v. State*, 953 S.W.2d 253 (Tex. Crim. App. 1997); *Rankin v. State*, 953 S.W.2d 740 (Tex. Crim. App. 1996)).

Appellant contends that the trial court erred in concluding that evidence of Appellant's prior deliveries of methamphetamine to J.P. was not extrinsic offense evidence. Appellant is essentially asserting that *Rodriguez* is distinguishable from the facts in this case and that the trial court erred in finding that it was applicable. We disagree. Appellant contends that *Rodriguez* is distinguishable because the minor in that case testified about prior deliveries during only a nine-month period preceding the indictment. *Id.* at 88. Accordingly, the other occasions in *Rodriguez* fell within the applicable limitations period. *Id.* There was no specific inquiry in this case regarding the dates that Appellant delivered methamphetamine to J.P. However, J.P. testified that he had been using drugs for a couple of months prior to dropping the methamphetamine in the school hallway. This testimony indicates that the other deliveries fell within the applicable limitations period.

We conclude that the trial court did not abuse its discretion in determining that the other instances of Appellant delivering methamphetamine to J.P. did not constitute impermissible extrinsic offense evidence. *See id.* at 90–91. Accordingly,

we overrule Appellant's first issue. Our disposition of Appellant's first issue is dispositive of Appellant's second issue because the second issue is premised on the contention that the evidence of other deliveries of methamphetamine to J.P. constituted extraneous offense evidence.[1] We overrule Appellant's second issue.

This Court's Ruling

We affirm the judgment of the trial court.

JOHN M. BAILEY
JUSTICE

May 18, 2017

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

Panel consists of: Wright, C.J.,
Willson, J., and Bailey, J.

[1]One of the complaints raised by Appellant in his second issue is the contention that the State did not give him adequate notice under Rule 404(b)(2). However, Appellant did not raise this complaint in the trial court. Accordingly, Appellant has not preserved this specific complaint for appellant review. *See* TEX. R. APP. P. 33.1.