AFFIRM; and Opinion Filed June 30, 2016.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-15-00555-CR

KENDRICK EUGENE MORROW, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the County Court At Law No. 1
Kaufman County, Texas
Trial Court Cause No. 14-30443-CC-M

MEMORANDUM OPINION

Before Justices Lang, Brown, and Richter[1]
Opinion by Justice Richter

A jury convicted Kendrick Eugene Morrow of possession of marijuana under two ounces and assessed punishment at 180 days' confinement in jail. In two issues, appellant contends the trial court erred by refusing a "mere presence" jury instruction and by arresting appellant for an extraneous offense in the jury's presence. We affirm the trial court's judgment.

BACKGROUND

Kaufman police captain Edward Black testified that on October 29, 2014, a resident of the City of Kaufman went to the Kaufman Police Department to report drug activity in his neighborhood. The neighborhood about which the report was made is called "the Hill" and is known as a high crime area. The resident reported three black men were dealing drugs at 1101

[1] The Hon. Martin Richter, Justice, Court of Appeals, Fifth District of Texas at Dallas, Retired, sitting by assignment.

East Hickory Street. The resident asked the police to go to the address right away. Black and several other officers responded to the complaint.

Black was the first officer to arrive at 1101 East Hickory Street, which was appellant's address. Black pulled up in front of the house, and he saw three black males standing by a car. Black knew two of the men, Bronyon Qualls and Calvin Wren, by sight, and he later identified appellant as the third man. Wren stood by the driver's side door, appellant stood at the back of the car on the driver's side, and Qualls sat on the hood on the driver's side. Black smelled marijuana as soon as he got out of his squad car. Black saw Wren throw a baggie into the car. The baggie contained marijuana. Black detained Wren and told the other officers that Wren had thrown the baggie of marijuana.

Black looked back at appellant and saw him throw a blue baggie into the air. That baggie landed in a grassy area nearby. Black later determined the blue baggie had several smaller "dime" bags of marijuana inside it. Black testified "dime" bags are small bags of marijuana that sell for ten or fifteen dollars. He determined the baggies contained marijuana by the odor and green leafy look of the substance. All three men were detained.

During a search, the officers found drugs and folded up five-dollar bills in Wren's car and in the area surrounding the car. Black testified that he commonly found fives, tens, and twenties when dime bags of marijuana are being sold.

Kaufman police sergeant Michael Dykes testified that he is a patrol sergeant, and has experience in narcotics investigations. Dykes has received training on how to identify illegal narcotics. Dykes was the third officer to arrive at the scene. When Dykes exited his vehicle, he smelled marijuana. Black told Dykes that appellant had thrown a blue baggie of marijuana in the air; Dykes did not personally witness appellant throw the marijuana. Black instructed Dykes to arrest appellant for possession of marijuana. Dykes testified that he took photographs at the

scene and instructed another officer to gather and tag the marijuana evidence. Dykes also saw the folded five-dollar bills.

Kaufman police officer Jordan Martin testified that he was called to the scene regarding warrant service on Qualls and possible drug activity. Martin had experience in working narcotics calls, and he smelled marijuana when he got out of his car. Black directed Martin to collect evidence and to take photographs. The suspects were detained at that time. Martin collected evidence at the scene from underneath the car in the driveway and from a grassy area next to the house. He photographed the drugs collected and placed the evidence inside his patrol vehicle. Martin testified that he weighed the baggies at the police department. The gross amount of the marijuana collected at the scene weighed was 1.350 ounces. The weight of the drugs in the blue baggie from appellant was .40 ounces.

Black was recalled to testify. He testified that he recognized the baggies of marijuana presented to him at trial that were collected at the scene, and the blue baggie was the same one he had seen appellant toss. The baggies of marijuana were admitted into evidence.

"MERE PRESENCE" JURY INSTRUCTION

In appellant's first issue, he asserts the trial judge erred by refusing a "mere presence" jury instruction. Appellant argues he was merely present at his residence and that one of the other suspects at the scene was the person in possession of the marijuana. The State responds that the trial court did not abuse its discretion in refusing the requested jury charge instruction because it would merely negate an element of the offense and was not required.

When addressing a claim of jury charge error, we first decide whether error exists. *Ngo v. State*, 175 S.W.3d 738, 743 (Tex. Crim. App. 2005). If we find error, we then analyze that error for harm. *Id*. Preservation of charge error does not become an issue until we assess harm. *Id*. Under *Almanza*, jury charge error requires reversal when the defendant has properly objected to

the charge and we find "some harm" to his rights. *Id.; Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985) (op. on reh'g). When the defendant fails to object or states that he has no objection to the charge, we will not reverse for charge error unless the record shows "egregious harm" to the defendant. *Ngo*, 175 S.W.3d at 743. We first turn to whether error exists.

The trial court is required to give a written charge to the jury distinctly setting forth the law applicable to the case. *See* TEX. CODE CRIM. PROC. ANN. art. 36.14 (West 2007). "The law requires the trial judge to instruct the jury on statutory defenses, affirmative defenses, and justifications whenever they are raised by the evidence." *Walters v. State*, 247 S.W.3d 204, 208–09 (Tex. Crim. App. 2007). However, "[i]f the defensive theory is not explicitly listed in the penal code—if it merely negates an element in the State's case, rather than independently justifying or excusing the conduct—the trial judge should not instruct the jury on it." *Id*.

Here, the trial court instructed the jury that "a person commits an offense if he intentionally or knowingly possesses a usable quantity of marijuana in an amount of two ounces or less." The trial court further instructed the jury it had to find beyond a reasonable doubt that appellant voluntarily possessed the marijuana. Appellant's requested "mere presence" instruction is a defensive theory and is not listed in the penal code, and would have merely negated the intentionally or knowingly element of possession of marijuana. *See Walters*, 247 S.W.3d at 209. Therefore, appellant was not entitled to the jury instruction. We conclude the trial court did not err in refusing the appellant's jury instruction request. We overrule appellant's first issue.

ARREST OF APPELLANT IN THE PRESENCE OF THE JURY

In his second issue, appellant contends the trial court violated his fundamental right to a trial by a fair and impartial jury when it admonished and then arrested him for an extraneous offense in the jury's presence. The State responds the jury was not present when the trial court ordered appellant in custody.

We have reviewed the corrected record.[2] It shows the jury was not present when the complained action took place. Thus, the record does not support the appellant's argument. We overrule appellant's second issue.

CONCLUSION

Having overruled appellant's issues, we affirm the trial court's judgment.

/Martin Richter/
MARTIN E. RICHTER
JUSTICE, ASSIGNED

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[2] This Court abated this appeal to the trial court to hold a hearing and make findings regarding the accuracy of the reporter's record. We adopted the trial court's findings that the corrected record filed on December 1, 2015 accurately reflected the proceedings.

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

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Appellant

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Opinion delivered by Justice Richter.
Justices Lang and Brown participating.

Based on the Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

Judgment entered this 30th day of June, 2016.