Opinion issued June 12, 2008

In The
Court of Appeals
For The
First District of Texas

NO. 01-07-00070-CR

ADEBAYO O. TIJANI, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 248th District Court
Harris County, Texas
Trial Court Cause No. 1072577

MEMORANDUM OPINION

Appellant, Adebayo O. Tijani, appeals from a judgment convicting him for possession of a controlled substance of more than 400 grams of cocaine with intent

to deliver. *See* TEX. HEALTH & SAFETY CODE ANN. § 481.112(a), (f) (Vernon 2003). Appellant pleaded not guilty. The jury found appellant guilty, and the court assessed punishment at confinement for 35 years and a $100 fine. In his sole issue, appellant challenges the factual sufficiency of the evidence, asserting that the manner of testing the cocaine was insufficient to establish the element of weight of at least 400 grams. We conclude the evidence is factually sufficient to support the verdict. We affirm.

Background

Appellant entered the United States on May 28, 2006 at Bush Intercontinental Airport in Houston, Texas. Upon arriving, appellant met Customs Officer Fisitalia and presented a passport from the United Kingdom. The officer asked him several routine questions, and appellant told her that he was a U.K.-born attorney visiting the United States to meet with a client. Because the officer thought appellant's accent, understanding of English, appearance, and general demeanor did not match with this story, the officer deemed appellant suspicious and passed him on to a secondary officer, Scarborough. After a few follow-up questions, Officer Scarborough admitted appellant into the country.

Appellant returned to Bush Intercontinental Airport on June 11, 2006. There, he presented a flight pass to a ticketing agent for British Airways, which indicated that he was to fly to London that day, and from London to Lagos, Nigeria, four days

later. Appellant presented two bags to the agent, who asked appellant whether he had packed the bags himself, whether the bags were his, and whether he knew the contents of the bags. Appellant responded in the affirmative to all three, and the agent accepted the bags. Appellant then proceeded to the terminal.

Because of prior narcotics smuggling activity through Bush Intercontinental Airport to Europe, Customs and Border Protection chose to examine appellant's two suitcases, along with those of several other passengers before loading them onto the plane. Once the bags were re-routed to the Customs and Border Patrol station, Agent Amadasu photographed the bag, opened it, and found three Quaker Oats containers and three Coffee-mate containers, all with evidence of apparent tampering and unusual weight. Agent Amadasu then opened a container of Quaker Oats, unsealed the bag within it, and probed the contents, recovering a white powdery substance. The substance field-tested positive for cocaine. At that time, officials opened the containers one by one, taking pictures of each container and its contents. Inside each Quaker Oats container was one vacuum-sealed bag of cocaine surrounded by actual oatmeal. The Coffee-mate containers had false bottoms, with two smaller vacuum-sealed bags of cocaine in the hidden compartment. Altogether, the search yielded nine separate bags of cocaine recovered from six containers.

At that point, officials with Custom and Border Protection notified Immigration

and Customs Enforcement ("ICE") officials that narcotics had been discovered in appellant's checked luggage. ICE officials then asked appellant, who was waiting to board the plane at that time, for his boarding pass and claim receipts. Upon inspecting his paperwork and confirming with appellant that the bags were his, the ICE officials arrested him. Subsequently, the officials took appellant and his bags to the security interrogation area and inspected his luggage.

Amanda Phillips, a criminalist for the Houston Police Department and the State's chemical expert, received and analyzed the confiscated substances. The final weight of the white, homogenous, powdery substance recovered from the appellant's bags was 3.96 kilograms, or 3,960 grams. As was routine procedure, Phillips took a sample from each individual bag and did a chemical test on it, finding each sample to be positive for cocaine. She then took another sample from each bag, combined the separate samples, and ran one instrumental test utilizing a gas chromatography mass spectrometer to confirm her analysis. Thus, because the substance in each package appeared to be homogenous, Phillips concluded that the sample was representative of the whole and that each package contained cocaine, including any adulterants and dilutants.

Factual Sufficiency

In his sole issue, appellant contends that the manner of testing the substance

by random sampling is factually insufficient to establish the weight element of the crime. Specifically, appellant asserts that, because the chemist did not analyze all 3.96 kilograms of the substance, nor did she determine the type or amount of adulterants and dilutants present in the bags, the evidence is factually insufficient to prove that the substance in appellant's bag was cocaine weighing at least 400 grams. Additionally, appellant asserts that evidence is factually insufficient because the chemist incorrectly defined the term "adulterants and dilutants" during her testimony at trial.

When conducting a factual-sufficiency review, we view all of the evidence in a neutral light. *Ladd v. State*, 3 S.W.3d 547, 557 (Tex. Crim. App. 1999). We will set the verdict aside only if (1) the evidence is so weak that the verdict is clearly wrong and manifestly unjust or (2) the verdict is against the great weight and preponderance of the evidence. *Johnson v. State*, 23 S.W.3d 1, 11 (Tex. Crim. App. 2000). Under the first prong of *Johnson*, we cannot conclude that a conviction is "clearly wrong" or "manifestly unjust" simply because, on the quantum of evidence admitted, we would have voted to acquit had we been on the jury. *Watson v. State*, 204 S.W.3d 404, 417 (Tex. Crim. App. 2006). Under the second prong of *Johnson*, we cannot declare that a conflict in the evidence justifies a new trial simply because we disagree with the jury's resolution of that conflict. *Id.* Before finding that

evidence is factually insufficient to support a verdict under the second prong of *Johnson*, we must be able to say, with some objective basis in the record, that the great weight and preponderance of the evidence contradicts the jury's verdict. *Id.* The jury is in the best position to evaluate the credibility of witnesses, and we are required to afford "due deference" to the jury's determinations. *Marshall v. State*, 210 S.W.3d 618, 625 (Tex. Crim. App. 2006). In conducting a factual-sufficiency review, we must also discuss the evidence that, according to appellant, most undermines the jury's verdict. *See Sims v. State*, 99 S.W.3d 600, 603 (Tex. Crim. App. 2003).

The State produced Phillips's testimony regarding the procedure she used to establish that the substances confiscated from appellant's bags were cocaine. She took a sample of the powdered substance from each of the nine individual bags found in the Quaker Oats and Coffee-mate canisters and determined that they all contained cocaine. Additionally, Phillips testified that she visually inspected each bag and determined that each contained a homogenous white powder. According to Phillips, there was nothing in the bags that would indicate the presence of an alternate substance, such as odd colored specks or chunks.

The State must show that the cocaine possessed by appellant weighed at least four hundred grams in the aggregate; it is not required to separate the cocaine from

adulterants and dilutants. TEX. HEALTH & SAFETY CODE ANN. § 481.002(5) (Vernon Supp. 2007), § 481.112(f) (Vernon 2003); *see Beller v. State*, 154 S.W.3d 836, 868 (Tex. App.—Houston [14th Dist.] 2005, pet. ref'd). A sampling of each distinct parcel of a substance alleged to be narcotics is enough to satisfy this burden. *Zone v. State*, 118 S.W.3d 776, 777 (Tex. Crim. App. 2003); *see also Melton v. State*, 120 S.W.3d 339, 343–44 (Tex. Crim. App. 2003) (holding that State could randomly sample some rocks to determine whether they contained cocaine where rocks were all found in same bag and were visually examined to establish that they all had same color and texture). Thus, the State's evidence is factually sufficient to establish that all of the powder found in the canisters, totaling 3,960 grams, was cocaine. *See Zone*, 118 S.W.3d at 777.

Additionally, appellant contends that the evidence was factually insufficient because Phillips did not identify the type or percentage of adulterants and dilutants present in the sample. However, "the State is no longer required to determine the amount of controlled substance and the amount of adulterant and dilutant that constitute the mixture." *Melton*, 120 S.W.3d at 344. The State only needs to demonstrate that part of the substance is a controlled substance and that the aggregate weight exceeds the minimum statutory amount. *Id.*

Appellant also asserts that the evidence is factually insufficient because

Phillips incorrectly defined "adulterants and dilutants." In her testimony, Phillips stated that adulterants are substances "added to not only enhance the bulk, but to maybe enhance the effect of the drugs." She defined dilutants as substances added "only to enhance the bulk." The Texas Health and Safety Code defines an adulterant or a dilutant as "any material that increases the bulk or quantity of a controlled substance, regardless of its effect on the chemical activity of the controlled substance." TEX. HEALTH & SAFETY CODE ANN. § 481.002(49) (Vernon Supp. 2007). Phillips's testimony, although arguably narrower, fits within the legal definition.

Appellant did not present any conflicting evidence or attempt to test the substances himself in order to establish that the substance in the canisters was not cocaine. *See Gabriel v. State*, 900 S.W.2d 721, 722 (Tex. Crim. App. 1995) (holding that evidence was sufficient where State tested only five of 54 bags containing cocaine and noting that "appellant could have conducted independent chemical tests on all fifty-four [bags] to show they did not contain the same substance") (citing TEX. CODE CRIM. PROC. ANN. art. 39.14 (Vernon 1993)). Viewing all of the evidence in a neutral way, we conclude that the jury's verdict is not against the great weight and preponderance of the evidence, nor is it clearly wrong and manifestly unjust. *Watson*, 204 S.W.3d at 414–15.

We overrule appellant's sole issue.

Conclusion

We affirm the judgment of the trial court.

Elsa Alcala
Justice

Panel consists of Justices Nuchia, Alcala, and Hanks.

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