Opinion issued December 1, 2011.

In The

Court of Appeals

For The

First District of Texas

NOS. 01-10-01047-CR

01-10-01048-CR

TERANCE DESHAY CANNADY, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 185th District Court
Harris County, Texas
Trial Court Case No. 1270556, 1270557

MEMORANDUM OPINION

Terrance Deshay Cannady appeals convictions for the state jail felonies of possession of less than one gram of cocaine and delivery of less than one gram of

cocaine.[1] TEX. HEALTH & SAFETY CODE ANN. §§ 481.112(a), (b) (delivery), 481.115(a), (b) (possession) (West 2010). Cannady was charged by indictment with the two offenses and pleaded not guilty. After finding him guilty, the jury assessed punishment at two years' confinement for the possession charge and four years' confinement for the delivery charge. On appeal, Cannady contends that the evidence is insufficient to show that the substance confirmed to be cocaine by the Houston Police Department, and admitted into evidence at trial, is the same substance gathered by officers during the undercover investigation and arrest that led to these charges. Finding some evidence from which a rational jury could determine that the evidence tested and admitted at trial was the evidence taken from Cannady on the day of his arrest, we affirm.

Background

Officer Craig with the Houston Police Department Narcotics Division was conducting an undercover buy as part of an investigation. Craig approached Michael Spitzer and informed Spitzer that he was looking for a "40-pack," which is slang for $40 worth of crack cocaine. After Spitzer made a phone call, Craig handed him two $20 bills. Spitzer walked into a nearby parking lot, out of Craig's sight.

[1] The possession charge is appellate cause number 01-10-01047-CR and trial court cause number 1270557. The delivery charge is appellate cause number 01-10-01048-CR and trial court cause number 1270556.

Officer Briggs, a surveillance officer who was part of Craig's team that night, observed Spitzer take the money from Craig. Spitzer made a phone call and a car drove up to him. Spitzer handed money to Cannady, the car's sole occupant, who handed something back to Spitzer. Spitzer returned to Craig and handed him a rock. Craig's field-testing later indicated the rock was cocaine. Craig put the rock in a bag and labeled it "Item No. 1."

Two uniformed officers, Aldrete and Hernandez, stopped Cannady's car shortly thereafter. The officers arrested Cannady and searched him incident to that arrest. Aldrete found what appeared to be four rocks of crack cocaine in Cannady's sock. Hernandez found two $20 bills in Cannady's pocket, and the serial numbers on them matched the serial numbers of the two bills that Craig had used for the buy. One of the officers placed the suspected cocaine taken from Cannady's sock on the trunk of Cannady's car. Briggs approached as Hernandez and Aldrete were searching Cannady and took possession of the suspected cocaine. He placed it in a bag, which Hernandez initialed.

Briggs later turned the bag over to Sergeant Gracia, who in turn gave the suspected cocaine to Craig for field testing. The field test indicated that the substance was cocaine. Craig bagged this evidence and labeled it "Item No. 2." Later that night, Craig logged both pieces of evidence into the Narcotics Division.

At trial, Craig identified State's Exhibit 3 as the item Spitzer gave him and State's Exhibit 6 as the items Sergeant Gracia gave him. Craig further testified that, on the day of the trial, he picked the items up from the Narcotics Division to transport to court for use in the trial.

Ahtavea Barker, a chemist from the HPD Crime Laboratory, testified that she tested State's Exhibits 3 and 6. State's Exhibit 3 consisted of 0.4 grams of cocaine. State's Exhibit 6 consisted of 0.8 grams of cocaine.

Sufficiency of the Evidence

In his sole issue, Cannady contends that the evidence is insufficient to show an unbroken chain of custody demonstrating that the substance confirmed by the Crime Laboratory to be cocaine and admitted in evidence as State's Exhibits 3 and 6 are the same substances taken from Cannady on the day of his arrest. Specifically, Cannady contends that Craig did not testify at trial that he initialed or marked with an HPD incident number the suspected cocaine before logging it into the Narcotics Division for safekeeping. Cannady also points out that Barker did not testify that the items she received and tested were marked with an incident number or officer's initials. According to Cannady, without express testimony from these witnesses confirming that such identifying marks were placed on and remained on the items at all times, there is insufficient evidence that the items

tested by Barker and introduced as State's Exhibits 3 and 6 were the items recovered during the undercover buy and Cannady's arrest.

A. Standard of Review

Evidence is insufficient to support a conviction if considering all record evidence in the light most favorable to the verdict, a factfinder could not have rationally found that each essential element of the charged offense was proven beyond a reasonable doubt. *Gonzalez v. State*, 337 S.W.3d 473, 478 (Tex. App.—Houston [1st Dist.] 2011, pet. ref'd); *see Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979); *In re Winship*, 397 U.S. 358, 361, 90 S. Ct. 1068, 1071 (1970); *Brooks*, 323 S.W.3d at 899 (plurality op.); *Laster v. State*, 275 S.W.3d 512, 517 (Tex. Crim. App. 2009); *Williams v. State*, 235 S.W.3d 742, 750 (Tex. Crim. App. 2007). Evidence is insufficient under this standard in four circumstances: (1) the record contains no evidence probative of an element of the offense; (2) the record contains a mere "modicum" of evidence probative of an element of the offense; (3) the evidence conclusively establishes a reasonable doubt; and (4) the acts alleged do not constitute the criminal offense charged. *Gonzalez*, 337 S.W.3d at 479; *see Jackson*, 443 U.S. at 314, 318 n.11, 320, 99 S. Ct. at 2786, 2789 & n.11; *Laster*, 275 S.W.3d at 518; *Williams*, 235 S.W.3d at 750. If an appellate court finds the evidence insufficient under this standard, it must

reverse the judgment and enter an order of acquittal. *Gonzalez*, 337 S.W.3d at 479; *see Tibbs v. Florida*, 457 U.S. 31, 41, 102 S. Ct. 2211, 2218 (1982).

An appellate court determines whether the necessary inferences are reasonable based upon the combined and cumulative force of all the evidence viewed in the light most favorable to the verdict. *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007) (quoting *Hooper v. State*, 214 S.W.3d 9, 16–17 (Tex. Crim. App. 2007)). When the record supports conflicting inferences, an appellate court presumes that the factfinder resolved the conflicts in favor of the verdict and defers to that resolution. *Jackson*, 443 U.S. at 326, 99 S. Ct. at 2793; *Clayton*, 235 S.W.3d at 778. An appellate court likewise defers to the factfinder's evaluation of the credibility of the evidence and the weight to give the evidence. *Williams*, 235 S.W.3d at 750.

B. Application

Cannady argues that the State failed to present evidence of an unbroken chain of custody demonstrating that the cocaine tested by Barker and admitted in evidence as State's Exhibits 3 and 6 was the same substance recovered during the undercover buy and his arrest. "Absent evidence of tampering, issues regarding the chain of custody bear on the weight, rather than on the admissibility, of evidence." *Davis v. State*, 313 S.W.3d 317, 348 (Tex. Crim. App. 2010), *cert. denied*, No. 10-9078, 2011 WL 4530488 (U.S. Oct. 3, 2011). To support the

admission of evidence, the State must prove the beginning and the end of the chain of custody; the State need not "provide a moment-by-moment account of the whereabouts of evidence from the instant it is seized until it is introduced at trial." *Reed v. State*, 158 S.W.3d 44, 52 (Tex. App.—Houston [14th Dist.] 2005, no pet.). A chain of custody is conclusively established if an officer testifies that he seized an item of physical evidence, put an identification mark on it, placed it in the property room, and retrieved the item being offered into evidence at trial. *Stoker v. State*, 788 S.W.2d 1, 10 (Tex. Crim. App. 1989), *cert. denied,* 498 U.S. 951, 111 S. Ct. 371 (1990). Because Cannady does not contend that tampering occurred in this case or that evidence regarding the cocaine should not have been admitted, we review the evidence in the light most favorable to the jury's verdict to determine whether a jury rationally could have found beyond a reasonable doubt that State's Exhibits 3 and 6 were the substances that Cannady delivered and possessed, respectively, on the day of his arrest. *See Davis*, 313 S.W.3d at 348 (stating that, absent evidence of tampering, issues regarding the chain of custody go to weight and not admissibility of evidence).

Concerning State's Exhibit 3, the substance delivered to Craig through Spitzer, Craig testified he gave $40 to Spitzer for crack cocaine. Briggs witnessed Spitzer engage in a hand-to-hand transaction with Cannady. Spitzer walked back to Craig and handed him a rock of what appeared to Craig to be crack cocaine.

Craig testified that he placed this evidence into a bag, marked it "Item No. 1", and turned it over to the Narcotics Division later that night. Craig also testified that, on the day he testified at trial, he picked up this piece of evidence from Narcotics Division and brought it with him to court, where it was admitted as State's Exhbit 3. He expressly testified that State's Exhibit 3 was the rock Spitzer had given him. For her part, Barker testified that she tested State's Exhibit 3 and that it was 0.4 grams of cocaine.

Concerning State's Exhibit 6, the State presented evidence that Aldrete and Hernandez found these rocks of crack cocaine in Cannady's sock when they stopped and arrested him within a few minutes after his transaction with Spitzer. The State presented evidence that Hernandez placed these on the trunk lid of Cannady's car and that Briggs "immediately" took possession of the rocks and placed them in a bag, which Hernandez initialed. Briggs gave the bag to Gracia, who gave it to Craig, who, in turn, bagged the evidence and marked it as "Item No. 2" before logging the evidence into the Narcotics Division later that night. Craig testified that State's Exhibit 6 was the contents of that bag and that he had personally picked State's Exhibit 6 up from the Narcotics Division and brought it to court on the day of trial. Barker, the chemist, testified that she tested State's Exhibit 6 and that it was 0.8 grams of cocaine. On cross-examination regarding the chain of custody for State's Exhibit 6, Officer Briggs said that it is not unusual

for evidence to pass through the hands of various officers while the search of a suspect was being conducted.

Cannady's specific complaint is that the witnesses did not each give express testimony about which markings were on the bags at various points in time. For example, he points out that Craig said he labeled the bags containing the suspected cocaine "Item No. 1" and "Item No. 2" but that Barker did not testify that the items she tested were marked in this way. He also points out that Hernandez testified that he initialed the bag containing State's Exhibit 6, but that the other witnesses did not confirm that they had seen Hernandez's initials on that bag. Although the State did not elicit testimony from every witness about the presence or absence of markings on the bags, the State presented sufficient chain-of-custody evidence: Craig's testimony that he tagged the evidence as Items 1 and 2 and logged in and picked up the evidence from the Narcotics Division; Barker's testimony that she added incident numbers, tested the evidence, and resealed the bags; and the bags themselves that the State offered into evidence as Exhibits 3 and 6, which the jury could examine to determine whether the markings matched the witnesses' testimony. We conclude that a rational jury could find that the items tested by Barker and admitted as State's Exhibits 3 and 6 were the items recovered during the undercover buy and Cannady's arrest. *See Stoker*, 788 S.W.2d at 10 (chain of custody conclusively established if an officer testifies that he seized an item of

physical evidence, put an identification mark on it, placed it in the property room, and retrieved the item being offered into evidence at trial); *Coleman v. State*, 113 S.W.3d 496, 503 (Tex. App.—Houston [1st Dist.] 2003), *aff'd*, 145 S.W.3d 649 (Tex. Crim. App. 2004) (chain-of-custody evidence sufficient to support conviction for possession with intent to deliver PCP where officer testified he seized bottles, tagged them, and put them in narcotics lock box, picked the bottles up to bring to trial and that he recognized the bottles that the State offered as evidence at trial and chemist testified he tested the bottles and they contained PCP); *see also Gullatt v. State*, No. 10-09-00244-CR, 2011 WL 3759221, at *3 (Tex. App.—Waco Aug. 24, 2011, no pet.) (holding chain-of-custody evidence sufficient to show possession with intent to deliver where officer who seized methamphetamine transported it to lock box, sergeant took it from lock box to laboratory; evidence sufficient although "testimony regarding the various envelopes in which the drugs were contained is at times confusing"); *Ramos v. State*, No. 03-97-00485-CR, 1998 WL 830512, at *4 (Tex. App.—Austin Dec. 3, 1998, pet. ref'd) (holding evidence sufficient to show possession of controlled substance where officer testified that after he seized methamphetamine from defendant, he locked it in his trunk and later turned it over to another officer; second officer locked drugs in evidence room; a detective took drugs from evidence room to laboratory).

We overrule Cannady's sole issue.

Conclusion

We affirm the judgment of the trial court.

Rebeca Huddle
Justice

Panel consists of Chief Justice Radack and Justices Bland and Huddle.

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