Opinion issued October 19, 2017

In The

Court of Appeals

For The

First District of Texas

NO. 01-16-00375-CR

JERMAINE NOLON BRADLEY, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 268th District Court
Fort Bend County, Texas
Trial Court Case No. 15-DCR-069358A

MEMORANDUM OPINION

The State indicted Jermaine Nolon Bradley for possession with the intent to deliver cocaine, a controlled substance, in an amount not less than 4 grams but not more than 200 grams. The case proceeded to trial before a jury. At the close of evidence, the trial court instructed the jury to find Bradley not guilty of the charge

of possession with intent to deliver and submitted the case to the jury on the lesser-included offense of simple possession. The jury found Bradley guilty of the lesser-included offense. After finding true the enhancement paragraphs alleging that Bradley had a prior felony conviction and that the offense occurred in a drug-free zone, it assessed a sentence of 10 years' incarceration.

On appeal, Bradley contends that (1) the evidence was insufficient to prove that he knowingly possessed cocaine, (2) the trial court erred in granting the State's challenge for cause to one prospective juror and in denying Bradley's challenges for cause to two others, and (3) the trial court erred in denying his request for a mistrial. We affirm.

BACKGROUND

Bradley's arrest followed a car accident that occurred in Richmond, Texas in May 2015. One morning, Bradley was walking in his neighborhood, which was known for a lot of drug activity and narcotics sales.

Bradley saw an acquaintance, Nicky, with two other people, standing outside a home in the neighborhood. Bradley approached Nicky, and the four got into Nicky's rental car, with Bradley in the driver's seat, Nicky in the front passenger seat, and the others in the back.

Before driving out of the neighborhood, Bradley swerved and hit another vehicle head-on. The individuals in that vehicle, who were friends with Bradley's

wife, were very upset. As an angry crowd of neighbors began to gather around Bradley and the rental car, Nicky and her friends fled the scene, leaving the passenger door open.

By the time Officer V. Golovine of the Richmond Police Department arrived at the scene, the crowd had grown so large and agitated that Officer Golovine had to park about 50 or 60 feet away. He could not reach the cars or the people involved in the accident. He called for backup and Sergeant Horton arrived a few moments later. Bradley told Sergeant Horton that he was the driver of the rental car and that he was alone in the car when the accident happened. Other witnesses, however, told the officers that Bradley had passengers who left the scene after the accident. Sergeant Horton confirmed that the car was a rental and that it was not rented in Bradley's name.

Noticing the odor of burnt marijuana wafting through the open passenger door, Sergeant Horton initiated a search of the car's interior. She found the butt of a marijuana cigarette on the driver's side floorboard. In a grocery sack on the front passenger seat, she found a measuring cup, baking soda, and a digital scale. She also found a clear plastic bag containing crack cocaine in plain view on the front passenger-side floorboard, and another bag with two cocaine "cookies" in a compartment in the passenger-side front door. After discovering the contraband, Sergeant Horton arrested Bradley.

Bradley testified that he did not attempt to run away after the initial accident had occurred (and before the police arrived). Other witnesses, however, told Sergeant Horton that Bradley may have tried to run away, but was stopped by the crowd that gathered there.

The driver of the other vehicle involved in the accident told Sergeant Horton that Bradley did not want the police to become involved. She also told Sergeant Horton that Bradley pulled a large handful of cash out of his pocket and offered it to her in an attempt to try to settle things without police involvement. When Sergeant Horton interviewed Bradley, Bradley denied making the offer and was not carrying any money. Bradley also claimed that he did not try to run away after the accident, and the crowd did not restrain him from leaving.

Bradley testified that he did not see the cocaine or the paraphernalia when he was getting into or out of the rental car. He claimed that he did not know that there was cocaine and paraphernalia in the vehicle. He further denied knowing that Nicky and her friends were in possession of the cocaine and paraphernalia and claims that he did not see Nicky holding onto anything after they got in the car or at any time before the accident.

DISCUSSION

I. The evidence supports the finding that Bradley knowingly possessed cocaine.

We first address Bradley's complaint that the evidence adduced at trial was insufficient to prove beyond a reasonable doubt that he both possessed the cocaine and knew what it was.

A. Standard of review and applicable law

Appellate courts apply a legal-sufficiency standard in evaluating whether the evidence is sufficient to support each element of the criminal offense that the State is required to prove beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 318–19, 99 S. Ct. 2781, 2788–89 (1979); *Temple v. State*, 390 S.W.3d 341, 360 (Tex. Crim. App. 2013). Under this standard, we "consider all of the evidence in the light most favorable to the verdict and determine whether, based on that evidence and reasonable inferences therefrom, a rational fact finder could have found the essential elements of the crime beyond a reasonable doubt." *Gear v. State*, 340 S.W.3d 743, 746 (Tex. Crim. App. 2011) (citing *Jackson*, 443 U.S. at 318–19, 99 S. Ct. at 2788–89). We may not substitute our judgment for that of the jury by reevaluating the weight or credibility of the evidence; we defer to its resolution of conflicts in the evidence, weighing of the testimony, and drawing of reasonable inferences from basic facts to ultimate facts. *Isassi v. State*, 330 S.W.3d 633, 638 (Tex. Crim. App. 2010). This standard applies equally to direct and circumstantial

evidence. *Id.*; *see also Carrizales v. State*, 414 S.W.3d 737, 742 (Tex. Crim. App. 2013) (explaining that circumstantial evidence "is as probative as direct evidence in establishing the guilt of the actor, and circumstantial evidence alone may be sufficient to establish guilt").

To prove unlawful possession of a controlled substance, the State must prove beyond a reasonable doubt that the accused exercised control, management, or care over the substance, and that the accused knew the substance was contraband. *Evans v. State*, 202 S.W.3d 158, 161 (Tex. Crim. App. 2006); *see Poindexter v. State*, 153 S.W.3d 402, 405 (Tex. Crim. App. 2005); *see also* TEX. HEALTH & SAFETY CODE § 481.115(a) ("[A] person commits an offense if the person knowingly or intentionally possesses a controlled substance listed in Penalty Group 1 . . . .").

Possession need not be exclusive. *McGoldrick v. State*, 682 S.W.2d 573, 578 (Tex. Crim. App. 1985); *Woodard v. State*, 355 S.W.3d 102, 110 (Tex. App.—Houston [1st Dist.] 2011, pet. ref'd). When the evidence establishes that an accused did not have exclusive possession of the place where the controlled substance was found, however, the trier of fact cannot conclude that the accused knowingly possessed the controlled substance unless additional, independent facts and circumstances affirmatively link the accused to the controlled substance. *Blackman v. State*, 350 S.W.3d 588, 594–95 (Tex. Crim. App. 2011) (citing *Poindexter*, 153 S.W.3d at 406); *Kibble v. State*, 340 S.W.3d 14, 18 (Tex. App.—Houston [1st Dist.]

2010, pet. ref'd). The evidence "must establish, to the requisite level of confidence, that the accused's connection with the [contraband] was more than just fortuitous." *Brown v. State*, 911 S.W.2d 744, 747 (Tex. Crim. App. 1995). Evidence that affirmatively links an accused to the substance is proof that he possessed it knowingly. *Id.* These "affirmative links" include evidence showing:

(1) the defendant's presence when a search is conducted;

(2) whether the contraband was in plain view;

(3) the defendant's proximity to and the accessibility of the narcotics;

(4) whether the defendant was under the influence of narcotics when arrested;

(5) whether the defendant possessed other contraband or narcotics when arrested;

(6) whether the defendant made incriminating statements when arrested;

(7) whether the defendant attempted to flee;

(8) whether the defendant made furtive gestures;

(9) whether there was an odor of contraband;

(10) whether other contraband or drug paraphernalia were present;

(11) whether the defendant owned or had the right to possess the place where the drugs were found;

(12) whether the place where the drugs were found was enclosed;

(13) whether the defendant was found with a large amount of cash; and

(14) whether the conduct of the defendant indicated a consciousness of guilt.

Evans, 202 S.W.3d at 162 n.12; *see Burrell v. State*, 445 S.W.3d 761, 765 (Tex. App.—Houston [1st Dist.] 2014, pet. ref'd). The State is not required to prove all

of these links, and the "number of affirmative links [proven] is not as important as the logical force that they collectively create." *Hubert v. State*, 312 S.W.3d 687, 691 (Tex. App.—Houston [1st Dist.] 2009, pet. ref'd). We consider only the links that are present; the absence of a particular link does not constitute evidence of innocence to be weighed against the existing links. *James v. State*, 264 S.W.3d 215, 219 (Tex. App.—Houston [1st Dist.] 2005, pet. ref'd) (citing *Hernandez v. State*, 538 S.W.2d 127, 131 (Tex. Crim. App. 1976)); *see Evans*, 202 S.W.3d at 162.

B. Analysis

Bradley was driving the rental car when the accident occurred. Sergeant Horton discovered the contraband in plain view. The cocaine was in plastic bags on the passenger-side floorboard and door compartment; it was within Bradley's reach. *See Robinson v. State*, 174 S.W.3d 320, 326 (Tex. App.—Houston [1st Dist.] 2005, pet. ref'd) (explaining that link to accused may result from accused's "convenient access" to contraband found in vehicle and may support inference that accused had knowledge of contraband and exercised control over it). Sergeant Horton also found paraphernalia that could be used to process, weigh, and package illegal drugs inside the car.

The odor of marijuana emanated from the open car door, which led Sergeant Horton to initiate the search. While contested, other evidence favorable to the verdict shows that Bradley told the other driver not to call the police, attempted to

bribe the other driver, and attempted to flee before the crowd stopped him. Also, Bradley later contradicted his initial statement to Sergeant Horton that he was the car's only occupant when the accident occurred, later conceding that he had three passengers. These inconsistent statements, coupled with Bradley's admission that he lied to the police, support a reasonable inference of consciousness of guilt.

Viewing the evidence in the light most favorable to the jury's verdict, we conclude that the evidence is sufficient for a rational trier of fact to have found the elements of possession of cocaine beyond a reasonable doubt. *See* TEX. HEALTH & SAFETY CODE § 481.112(a).

II. Voir dire challenges

We next consider Bradley's contentions that the trial court erred in granting the State's challenge for cause to prospective juror 20 and erred in denying his challenges for cause to prospective jurors 32 and 35.

A. Any error in granting the State's request to strike prospective juror 20 did not harm Bradley.

Bradley challenges the trial court's granting of the State's challenge for cause with respect to prospective juror 20. During voir dire, prospective juror 20 expressed his view that marijuana should be legalized, subject to regulation by the state. He also stated that a few of his friends used cocaine, which he felt was "not a big deal." He agreed with the rest of the panel that cocaine should be illegal.

The State challenged prospective juror 20 for cause based on his statements, and the trial court granted this challenge without requiring further support. Specifically, the prospective juror was not asked whether he could not follow the law as instructed. Bradley objected to this ruling based on the lack of any statement that prospective juror 20 could not follow the relevant law.

Even if the trial court erred in granting the State's challenge to prospective juror 20, however, we must disregard the error unless it affected Bradley's substantial rights. *See* TEX. R. APP. P. 44.2(b). A defendant does not have the right to have a particular individual sit on the jury; rather, a defendant's "only substantial right is that the jurors who do serve be qualified." *Jones v. State*, 982 S.W.2d 386, 393 (Tex. Crim. App. 1998). Thus, error in excusing a prospective juror requires reversal "only if the record shows that the error deprived the defendant of a lawfully constituted jury." *Id.* at 394; *see also Gray v. State*, 233 S.W.3d 295, 301 (Tex. Crim. App. 2007) (holding that trial court's erroneous exclusion of potential juror did not merit reversal because defendant did not show he had not "received a trial by an impartial jury comprised of qualified individuals"). If the jurors who serve are qualified, then the jury is lawfully constituted, the defendant's substantial rights are not affected, and reversal of the defendant's conviction based on the erroneous granting of a challenge for cause is unnecessary. *See Jones*, 982 S.W.2d at 392; *Moore v. State*, 54 S.W.3d 529, 538 (Tex. App.—Fort Worth 2001, pet. ref'd).

Bradley does not show that he was deprived of a lawfully constituted jury. Accordingly, we hold that any error in the trial court's granting of the State's request to strike prospective juror 20 would be harmless. *See Gray*, 233 S.W.3d at 301; *Jones*, 982 S.W.2d at 392; *Moore*, 54 S.W.3d at 538.

B. The trial court acted within its discretion in denying Bradley's challenges to prospective jurors 32 and 35.

Bradley next argues that the trial court improperly denied his challenges for cause to prospective jurors 32 and 35 because their statements showed bias and prejudice.

1. Applicable law and standard of review

A bias or prejudice that substantially impairs a prospective juror's ability to carry out his oath and court instructions in accordance with the law disqualifies him from jury service. *Gardner v. State*, 306 S.W.3d 274, 295 (Tex. Crim. App. 2009). If the potential juror makes a statement indicating a bias but agrees he or she will apply the law as instructed, then the trial court has discretion to deny the challenge for cause, and we will not reverse the trial court's ruling absent a clear abuse of that discretion. *See Feldman v. State*, 71 S.W.3d 738, 744 (Tex. Crim. App. 2002); *Maloney v. State*, 294 S.W.3d 613, 623 (Tex. App.—Houston [1st Dist.] 2009, pet. ref'd) (citing *Blue v. State*, 125 S.W.3d 491, 497 (Tex. Crim. App. 2003)).

A considerable amount of deference is appropriate because the trial judge is in the courtroom and in the best position to observe the jury panel member's

demeanor and tone. *See Gardner*, 306 S.W.3d at 295–97; *Feldman*, 71 S.W.3d at 744. The burden of proof is on the party seeking to exclude a juror to demonstrate a reason for the challenge for cause. *Thomas v. State*, 470 S.W.3d 577, 594 (Tex. App.—Houston [1st Dist.] 2015, pet. ref'd.). The proponent does not meet his burden until he has shown that the prospective juror understood the requirement of the law and could not overcome his prejudice well enough to follow it. *Feldman*, 71 S.W.3d at 747. We review the entire voir dire record to determine if there is sufficient evidence to find bias as a matter of law by any of the challenged prospective jurors. *See id.* at 744.

2. Analysis

Prospective juror 32's granddaughter had a drug problem and was killed earlier in the year. When asked if that would prevent her from being a fair and impartial juror in this case, prospective juror 32 stated, "I don't know what kind [of drugs her granddaughter had been on], so it'll affect me." Similarly, prospective juror 35 revealed that he had a close relative who was addicted to cocaine and that the addiction was very destructive to his family. When asked if that experience would affect his ability to be a fair and impartial juror in this case, prospective juror 35 responded "Yes, it will."

But Bradley did not have either of the prospective jurors address whether they could follow the law on the presumption of innocence despite their expressed

prejudices. *See Feldman*, 71 S.W.3d at 747. Because Bradley did not meet his burden to show that these prospective jurors understood the requirement of the law and could not overcome their prejudices well enough to follow it, the trial court did not abuse its discretion in denying his challenges for cause.

III. The trial court's refusal to grant a mistrial did not cause harmful error.

Finally, Bradley contends that the trial court erred in refusing to grant a mistrial after the State argued in its closing statement that Bradley no longer enjoyed a presumption of innocence. During voir dire, the State told the jury, "So being legally not guilty does not mean that he is, in fact, innocent; it means that we haven't proved our burden of proof yet . . . ." Bradley objected, contending that this was a misstatement of the law. The trial court responded by informing the jury panel that "[t]he Court will instruct as to the law." The State then told the jury that "the presumption of innocence, depending on what your—what you believe beyond a reasonable doubt is starts falling away as you hear evidence in this case." Bradley objected, "That is a misstatement of law. The defendant carries a presumption of innocence throughout the entire trial." The trial court sustained that objection. During closing, the State told the jury that:

> When the defense attorney says that presumption of innocence is throughout the entire trial; that is incorrect. The presumption of innocence is what the defendant starts with; however, you are allowed to use your reason and common sense to determine and allow that innocence to fall away as you hear evidence throughout the trial . . . . That innocence falls away. He doesn't carry that innocence the entire

> time throughout and now you determine whether he's guilty or not. That innocence falls away like a flower petal as you hear the evidence.

Bradley objected to this argument on the grounds that it misstated the law and deprived him of his constitutional right to the presumption of innocence. The trial court sustained the objections and instructed the jury to disregard the prosecutor's statement. Bradley moved for a mistrial, and the trial court denied the motion.

Bradley argues that the State's arguments misstated the law and thereby deprived him of his Fifth and Fourteenth Amendment right to the presumption of innocence. In denying his request for a mistrial, Bradley contends, the trial court committed reversible error.

A mistrial is an appropriate remedy in extreme circumstances for a narrow class of highly prejudicial and incurable errors. *See Hawkins v. State*, 135 S.W.3d 72, 77 (Tex. Crim. App. 2004); *Juarez v. State*, 409 S.W.3d 156, 166 (Tex. App.—Houston [1st Dist.] 2013, pet. ref'd). The particular facts of the case determine whether an error requires a mistrial. *See Bokemeyer v. State*, 355 S.W.3d 199, 202 (Tex. App.—Houston [1st Dist.] 2011, no pet.). Because a mistrial is an extreme remedy, a trial court should grant it "only when residual prejudice remains" after less drastic alternatives are explored. *See Barnett v. State*, 161 S.W.3d 128, 134 (Tex. App.—Fort Worth 2005), *aff'd*, 189 S.W.3d 272 (Tex. Crim. App. 2006). Jury instructions are sufficient to cure most improprieties that occur during a trial. *See Gamboa v. State*, 296 S.W.3d 574, 580 (Tex. Crim. App. 2009).

We review a trial court's denial of a motion for mistrial for an abuse of discretion and will uphold the ruling if it falls within the zone of reasonable disagreement. *Archie v. State*, 221 S.W.3d 695, 699 (Tex. Crim. App. 2007). In determining whether a trial court abused its discretion in denying a mistrial, we balance (1) the severity of the misconduct, (2) the effectiveness of the measures adopted to cure the misconduct, and (3) the strength of the evidence supporting the conviction. *Juarez v. State*, 409 S.W.3d 156, 166 (Tex. App.—Houston [1st Dist.] 2013, pet. ref'd) (citing *Ramon v. State*, 159 S.W.3d 927, 929 (Tex. Crim. App. 2004)). We consider only those arguments before the trial court when it made the ruling. *Wead v. State*, 129 S.W.3d 126, 129 (Tex. Crim. App. 2004).

In this case, Bradley's counsel timely interposed an objection both times the prosecutor made the misstatement. Both misstatements were brief and occurred in close succession. The sustained objections prevented any serious harm that might have occurred had the prosecutor gone on to apply the misstated legal principle to the evidence. The trial court promptly instructed the jury to disregard the prosecutor's misstatement of law. Further, its charge instructed the jury that:

> All persons are presumed to be innocent and no person may be convicted of an offense unless each element of the offense is proved beyond a reasonable doubt. The fact that a person has been arrested, confined or indicted for, or otherwise charged with the offense gives rise to no inference of guilt at his trial. The law does not require a defendant to prove his innocence or produce any evidence at all. The presumption of innocence alone is sufficient to acquit the defendant, unless the jurors are satisfied beyond a reasonable doubt of the

> defendant's guilt after careful and impartial consideration of all the evidence in the case. The prosecution has the burden of proving the defendant guilty and it must do so by proving each and every element of the offense charged beyond a reasonable doubt and if it fails to do so, you must acquit the defendant.

This instruction properly informed the jury about the presumption of innocence and the State's burden of proof. *See Miles v. State*, 204 S.W.3d 822, 824–27 (Tex. Crim. App. 2006). The jury is presumed to have followed the instructions contained in the trial court's charge. *See Gamboa*, 296 S.W.3d at 580; *Miles*, 204 S.W.3d at 827–28. And lastly, sufficient evidence supports the jury's finding of guilt. We therefore hold that the trial court did not abuse its discretion in denying Bradley's motion for mistrial.

CONCLUSION

We affirm the judgment of the trial court.

Jane Bland
Justice

Panel consists of Justices Jennings, Bland, and Brown.

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