Opinion issued July 24, 2018

In The

Court of Appeals

For The

First District of Texas

NO. 01-17-00417-CR

ROBERT EUGENE BROWN, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 178th District Court
Harris County, Texas
Trial Court Case No. 1444509

MEMORANDUM OPINION

Robert Eugene Brown was convicted by a jury for knowingly delivering a controlled substance—methamphetamine.[1] The trial court found two enhancement paragraphs to be true and sentenced Brown to 25 years' imprisonment.

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1 *See* TEX. HEALTH & SAFETY CODE § 481.112(a).

In two issues, Brown contends that (1) the evidence was insufficient to support his conviction and (2) the trial court should have declared a mistrial when a prosecutor showed the venire the punishment ranges for different levels of drug offenses. We affirm.

Background

A. Informant Smith arranges to buy methamphetamine from Brown

Agent S. Sanders of the Department of Public Safety began a confidential-informant arrangement with a person we will refer to as "Smith." Smith would help a drug-trafficking task force staffed by multiple law-enforcement agencies. In exchange, Smith's own drug charge would be dismissed. Smith was to buy methamphetamine from multiple sellers. The methamphetamine buys would be "controlled buys," in which Smith would arrange to meet a methamphetamine seller at a predetermined time and place, law enforcement would provide Smith with cash to make the buy, and law enforcement would surveil the scene.

Smith spoke with Brown a few times by phone to arrange a methamphetamine buy. Agent Sanders was present to hear Smith's side of these phone calls. After the calls, Smith was to make a controlled buy of methamphetamine from Brown. Smith agreed to meet at a certain gas station for the buy.

B. The "controlled buy" occurs

On the day of the controlled buy, Agent Sanders met Smith away from the gas station. He gave Smith $1,400 in cash to buy the methamphetamine. He searched Smith's clothing and truck and found no contraband and no currency besides the $1,400. He also gave Smith a small camera to record video and audio of the controlled buy. Smith then got in the truck, with the camera recording, and drove off toward the gas station.

Officer C. Scott of the Pasadena Police Department was the task-force member assigned to monitor the gas station in person. While he was watching from his unmarked car, Smith arrived. Officer Scott saw Brown approach Smith's truck and begin talking with Smith at the truck's driver's-side window. Their conversation was very short.

The camera recorded some of the events of the controlled buy. Smith angled the camera toward the truck's driver's-side window, but not all of it is visible on the recording. The recording includes Brown's face and voice while he was at Smith's window. The video shows Smith holding the $1,400 in cash that Agent Sanders had provided. Then it shows a black, cup-holder-shaped container in Smith's hand, which was not previously visible.

Officer Scott then saw Brown walk away from Smith's vehicle and back to his own. Based on his years of experience and training in investigating and

surveilling narcotics transactions, Officer Scott opined that what happened between Smith and Brown was a narcotics purchase.

Smith then called Agent Sanders and returned to their meeting location. Smith's body was pat-searched. Smith no longer had the $1,400 that Agent Sanders had provided. Smith handed over the black, cup-holder-shaped container. In it was a plastic bag containing a white, baseball-sized substance. The substance was field-tested, and it came up positive for methamphetamine.

Another task-force member, Officer R. Romano of the Houston Police Department, was present with Agent Sanders. Earlier, he had watched Agent Sanders give the cash for the controlled buy to Smith. After Smith returned, Officer Romano helped package the black container and its contents for transport to a Drug Enforcement Agency drug lab. The drug lab confirmed the presence of methamphetamine and weighed the baseball-sized sample at 54.5 grams.

C. Smith's testimony about the controlled buy

Smith testified at trial about the events of the controlled buy. Smith had agreed with Brown over the phone to a drug deal. Earlier on the day of the deal, police patted Smith down over the clothing and provided a camera. Smith's truck did not have drugs in it.

Smith called Brown and then drove to the gas station where they were to meet. After arriving, Smith called Brown. In Smith's words, Brown showed up,

and they "just did the transaction. . . . He just came up to the door of the truck, and I gave him the money, and he gave me the drugs." Smith gave Brown all of the money from Agent Sanders. Brown gave Smith a white substance in a plastic bag inside a black, cup-holder-shaped container.

D. Brown is tried and convicted

Brown was indicted for knowingly delivering methamphetamine, which is a controlled substance in Health and Safety Code Penalty Group 1. He chose to try guilt–innocence to a jury but punishment to the court.

During jury selection, a prosecutor showed a slide to the venire that described the different punishment ranges for different levels of drug offenses. Brown's counsel objected because punishment was to be tried to the court only. The court sustained the objection but refused to declare a mistrial. Brown's counsel reurged his request for a mistrial before the jury was impaneled, and the court again refused. Brown's counsel did not request any instruction to disregard. The jury convicted Brown, and the court assessed punishment at 25 years' imprisonment.

Evidence Sufficiency

In his first issue, Brown contends that the evidence was insufficient to support his conviction beyond a reasonable doubt.

A. Standard of review

Evidence sufficiency is reviewed under the standard from *Jackson v. Virginia*, 443 U.S. 307 (1979). *Brooks v. State*, 323 S.W.3d 893, 912 (Tex. Crim. App. 2010). A reviewing court examines all of the evidence in the light most favorable to the verdict and determines whether a rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Jackson*, 443 U.S. at 318–19.

Our review includes both direct and circumstantial evidence, as well as any reasonable inferences that may be drawn from that evidence. *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007). Circumstantial evidence alone can establish guilt. *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007).

It is for the jury, not a reviewing court, "fairly 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; *accord Isassi v. State*, 330 S.W.3d 633, 638 (Tex. Crim. App. 2010). Because the jury is the sole judge of the credibility of the witnesses and the weight given to their testimony, any conflicts or inconsistencies in the evidence are resolved in favor of the verdict. *Wesbrook v. State*, 29 S.W.3d 103, 111 (Tex. Crim. App. 2000). For the same reason, the jury may choose to believe some testimony and disbelieve other testimony. *See Lancon v. State*, 253 S.W.3d 699, 707 (Tex. Crim. App. 2008). The jury may accept one

version of the facts and reject another and reject any part of a witness's testimony. *Febus v. State*, 542 S.W.3d 568, 572 (Tex. Crim. App. 2018). A reviewing court simply guards against "the rare occurrence when a factfinder does not act rationally." *Isassi*, 330 S.W.3d at 638.

The evidence is sufficient when "the cumulative force of all the incriminating circumstances" establishes guilt beyond a reasonable doubt. *See Hooper*, 214 S.W.3d at 13. If inferences are necessary to establish guilt beyond a reasonable doubt, a reviewing court views the evidence in the light most favorable to the verdict and weighs whether the inferences are reasonable based on the cumulative force of all the evidence. *Murray v. State*, 457 S.W.3d 446, 448 (Tex. Crim. App. 2015).

B. Elements of offense

A person commits the offense for which Brown was convicted when the person knowingly delivers a controlled substance listed in Penalty Group 1. TEX. HEALTH & SAFETY CODE § 481.112(a). Methamphetamine is in Penalty Group 1. *Id.* § 481.102(6). Delivering four grams or more, but less than 200 grams, of methamphetamine is a first-degree felony. *See id.* § 481.112(d).

The definition of "deliver" includes transferring a controlled substance to another. *See id.* § 481.002(8). In this context, a "transfer" is "a voluntary relinquishment of possession in favor of another," such as a manual transfer of a

controlled substance to another. *Jackson v. State*, 84 S.W.3d 742, 744 (Tex. App.—Houston [1st Dist.] 2002, no pet.). A person knowingly delivers a controlled substance when the person is aware of the nature of his conduct. *Cf.* TEX. PENAL CODE § 6.03(b).

C. The evidence was sufficient

Brown disputes whether the evidence was sufficient to support the jury's finding of guilt beyond a reasonable doubt that he knowingly transferred methamphetamine to Smith.

The State's evidence supports the following chain of events. Smith set up a drug buy over the phone with Brown while Agent Sanders could hear Smith's end of the conversation. The buy was set up to happen at a certain time at the gas station. On the day of the buy, Agent Sanders made sure that Smith did not have any drugs and any cash besides the $1,400 that he provided.

Smith drove to the designated gas station and called Brown. Then Brown arrived and approached Smith's truck, and they talked for a very short period of time. Officer Scott saw this, and the video and audio recording confirm it. Smith testified to giving Brown the $1,400, and the video shows Smith holding the money. Smith says that Brown handed over the black, cup-holder-shaped container containing the methamphetamine, and the video shows Smith later holding the previously unseen container.

Then Officer Scott saw Brown depart. In Officer Scott's opinion, Brown and Smith had concluded a narcotics purchase.

When Smith returned to Agent Sanders, he concluded after a search that Smith no longer had the $1,400 and now had a white substance that tested positive as methamphetamine. Smith did not have any other drugs during these events.

This evidence is sufficient to support the jury's conclusion that Brown manually transferred the methamphetamine to Smith. Based on Smith's testimony, Agent Sanders' testimony, Officer Scott's testimony, and the video evidence, the jury reasonably could have inferred that Brown voluntarily relinquished possession of the black container with the methamphetamine to Smith. *See Jackson*, 84 S.W.3d at 744. The evidence is also sufficient to support the jury's conclusion that Brown made the transfer knowingly, especially because of the reasonable inference that Brown met Smith at the gas station as a result of their agreeing to a drug buy. *See Murray*, 457 S.W.3d at 448. The jury therefore acted rationally in accepting Smith's, Agent Sanders', and Officer Scott's version of events, so the conviction must be affirmed. *See Febus*, 542 S.W.3d at 572; *Isassi*, 330 S.W.3d at 638; *Lancon*, 253 S.W.3d at 707.

Brown responds by listing what he calls the "reasonable doubt" elicited by his counsel's cross-examination of the State's witnesses. He notes that (1) Agent Sanders did not personally see the drug transfer, (2) the video does not show a

hand-to-hand transfer of the money or container between Brown and Smith, (3) the video's date stamp shows the wrong date, (4) no photographs show Brown bringing the container to Smith's truck, (5) the container and plastic bag were never examined for DNA or fingerprints, (6) Smith's own drug charge was dismissed in exchange for working as a confidential informant,[2] (7) the $1,400 was not recovered, (8) Officer Scott could not hear Brown's and Smith's conversation, (9) Officer Scott never saw Brown holding the container, (10) Officer Romano did not see Brown's and Smith's interaction, and (11) the pat-down searches of Smith's person both before and after the controlled buy were simply over-the-clothes pat-downs.

Even if these points make Smith's or the police officers' testimony less believable, the evidence is not thereby rendered insufficient. The jury resolves

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[2] Brown generally argues that Smith was not a reliable confidential informant. We note that Code of Criminal Procedure article 38.141 deals with corroboration of confidential-informant testimony in certain drug cases. Brown does not cite Article 38.141, does not cite any authority concerning corroboration of confidential-informant testimony, does not provide any argument for a lack of corroboration testimony here, and does not cite to the record to contend that there is a lack of corroboration. We therefore do not address the issue of informant corroboration in connection with Brown's evidentiary-sufficiency challenge. *See* TEX. R. APP. P. 38.1(i); *Ray v. State*, 176 S.W.3d 544, 553 n.7 (Tex. App.—Houston [1st Dist.] 2004, pet. ref'd); *Barrera v. State*, No. 01-03-00102-CR, 2004 WL 637954, at *2–3 (Tex. App.—Houston [1st Dist.] Apr. 1, 2004, no pet.) (mem. op., not designated for publication); *Fields v. State*, No. 13-01-00167-CR, 2003 WL 25580006, at *3 (Tex. App.—Corpus Christi June 19, 2003, no pet.) (mem. op., not designated for publication).

inconsistencies in the evidence to reach their verdict, so any inconsistencies raised before a reviewing court must be resolved in the verdict's favor. *See Wesbrook*, 29 S.W.3d at 111. The jury determines credibility and chooses who to believe from among the witnesses. *See Febus*, 542 S.W.3d at 572; *Lancon*, 253 S.W.3d at 707. The jury apparently believed Smith about Brown having provided the methamphetamine in exchange for the money, notwithstanding Smith's arrangement with law enforcement that Smith's own drug case would be dismissed. Despite the claimed inconsistencies, the cumulative force of all the evidence, as resolved by the jury, still supports the finding that Brown knowingly transferred the methamphetamine to Smith. *See Hooper*, 214 S.W.3d at 13.

We conclude that the evidence was legally sufficient to support the conviction and overrule Brown's first issue.

Motion for Mistrial During Jury Voir Dire

In his second issue, Brown contends that the court erred by refusing to grant a mistrial when a prosecutor showed the venire the punishment ranges even though Brown had requested that punishment be tried to the court only.

A. Standard of review

A denial of a mistrial is reviewed for an abuse of discretion. *Morris v. State*, 530 S.W.3d 286, 290 (Tex. App.—Houston [1st Dist.] 2017, pet. ref'd); *Gonzalez v. State*, 455 S.W.3d 198, 205–06 (Tex. App.—Houston [1st Dist.] 2014, pet.

ref'd). The evidence must be viewed in the light most favorable to the denial, and it must be upheld if it falls within the zone of reasonable disagreement. *See Archie v. State*, 221 S.W.3d 695, 699 (Tex. Crim. App. 2007); *Gonzalez*, 455 S.W.3d at 206. A reviewing court may not substitute its judgment for the trial court's; it simply determines whether the denial was arbitrary or unreasonable. *Webb v. State*, 232 S.W.3d 109, 112 (Tex. Crim. App. 2007). A trial court abuses its discretion when no reasonable view of the record could support the trial court's ruling. *See id.*

A mistrial is required only in extreme circumstances—when prejudice is otherwise incurable. *See Archie*, 221 S.W.3d at 699; *Gonzalez*, 455 S.W.3d at 206. When a party requesting a mistrial does not first seek a lesser remedy—usually a judge's instruction to the venire or jury to disregard what they heard—reversal is inappropriate if any prejudice could have been cured by a less drastic alternative. *See Young v. State*, 137 S.W.3d 65, 69–70 (Tex. Crim. App. 2004). An instruction to disregard usually cures any prejudice. *Gonzalez*, 455 S.W.3d at 206. There is an appellate presumption that an instruction to disregard will be obeyed. *See Gardner v. State*, 730 S.W.2d 675, 696 (Tex. Crim. App. 1987). An instruction fails to cure prejudice when the instruction fails to "leave the jury in an acceptable state to continue the trial." *Young*, 137 S.W.3d at 69. Determining whether an instruction would have cured any prejudice is fact-specific. *See Gonzalez*, 455 S.W.3d at 206.

When error occurs that might warrant a mistrial, the preferred procedure is usually to object; request an instruction to disregard; and, only if an instruction is refused, request a mistrial. *See Young v. State*, 137 S.W.3d 65, 69–70 (Tex. Crim. App. 2004). However, that procedure is not always required to preserve error when material has been improperly disclosed to a venire if the skipped step would not have assisted in the continuation of the trial by an impartial jury. *See id.*

Here, Brown made a timely, specific objection, which was sustained, and then requested a mistrial, which was refused. He did not also request an instruction to disregard the information on the slide improperly shown to the venire. When a party objects, skips a request for an instruction to disregard, and moves directly to a motion for mistrial, the party "will have forfeited appellate review of that class of events that could have been 'cured' by" the skipped instruction. *Id.* at 70. Thus, we must determine whether the allegedly objectionable material is within "that class of events" that could have been cured by a proper instruction. *See id.* If it is, Brown has forfeited review of his denied motion for mistrial. *See id.*

B. An instruction would have cured any prejudice

The trial court sustained Brown's objection when the prosecutor showed the slide with the punishment ranges. The parties do not dispute that it was error for the venire to be shown the punishment ranges. *Cf.* TEX. R. EVID. 402 ("Irrelevant evidence is not admissible."); *Leasure v. State*, No. 05-95-00950-CR, 1997 WL

105007, at *3 (Tex. App.—Dallas Mar. 11, 1997, no pet.) (not designated for publication) (noting that rules of evidence apply to jury voir dire); *Watson v. State*, 917 S.W.2d 65, 67 (Tex. App.—Fort Worth 1996, pet. ref'd) (same). But, because Brown's counsel did not request an instruction to disregard, we review for whether an instruction to disregard would have cured any prejudice stemming from the objected-to slide. *See Young*, 137 S.W.3d at 69–70.

The objected-to slide is not in the appellate record, so any prejudice that the exact material shown to the venire would have caused cannot be readily identified.

Even were we to assume that the material shown to the venire revealed the statutory 5-to-99-year punishment range along with other punishment ranges,[3] Brown offers no argument how an instruction to disregard would not have cured any prejudice. We conclude that a proper instruction to disregard would have cured any prejudice in light of two considerations. First, it is a matter of common sense that delivering more of a controlled substance calls for higher punishment than delivering comparatively less of the substance. *Cf.* TEX. HEALTH & SAFETY CODE § 481.112(b)–(f) (providing for higher punishments for delivery of comparatively more of controlled substance). This information, if conveyed to the venire, was not

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[3] Brown was charged with delivery of more than four grams and less than 200 grams of methamphetamine, a first-degree felony. *Cf.* TEX. HEALTH & SAFETY CODE § 481.112(d). Brown's offense, once proven, required punishment of at least 5 years' imprisonment and not more than 99 years' imprisonment. *Cf.* TEX. PENAL CODE § 12.32(a).

of such an extreme character that one would question the venire's ability to set the information aside and continue "in an acceptable state" with trial. *See Young*, 137 S.W.3d at 69.

Second, more extreme statements than punishment ranges have been held to be curable by instructions to disregard. *See, e.g.*, *Williams v. State*, 417 S.W.3d 162, 171–73 (Tex. App.—Houston [1st Dist.] 2013, pet. ref'd) (holding that prejudice from prosecutor's statement to venire that he would dismiss case if defendant were not guilty was curable by instruction); *Decker v. State*, 894 S.W.2d 475, 476–77 (Tex. App.—Austin 1995, pet. ref'd) (per curiam) (holding that prejudice from prosecutor's suggestion to venire that defendant had molested other children was curable by instruction); *Long v. State*, 820 S.W.2d 888, 894 (Tex. App.—Houston [1st Dist.] 1991, pet. ref'd) (holding that prejudice from testimony that murder defendant had confessed to other murders was curable by instruction). An instruction usually cures prejudice. *Gonzalez*, 455 S.W.3d at 206.

The venire's simply knowing the punishment ranges therefore is not so extreme as to fail to "leave the jury in an acceptable state to continue the trial." *See Young*, 137 S.W.3d at 69. A hypothetical instruction to disregard would have cured any prejudice stemming from knowledge of punishment ranges. *See id.* at 69–70; *Gonzalez*, 455 S.W.3d at 206. Because we conclude that an instruction would have

cured any prejudice, Brown has forfeited appellate review of his contention. *See Young*, 137 S.W.3d at 70.

To the extent Brown contends that his due-process rights under either the federal or state constitution were violated, Brown waived that contention by failing to raise it first in the trial court. *See Alexander v. State*, 137 S.W.3d 127, 130–31 (Tex. App.—Houston [1st Dist.] 2004, pet. ref'd).

Conclusion

The evidence was sufficient to support Brown's conviction. And because a proper instruction to disregard the objected-to slide of punishment ranges would have cured any error in the State showing the slide to the venire, and because Brown failed to request such an instruction, he has forfeited appellate review of the denial of his motion for a mistrial.

We affirm the trial court's judgment.

Harvey Brown
Justice

Panel consists of Chief Justice Radack and Justices Massengale and Brown.

Do Not Publish. TEX. R. APP. P. 47.2(b).