**Affirmed and Memorandum Opinion filed December 14, 2010.**

**In The**

# Fourteenth Court of Appeals

**NO. 14-09-00467-CR**

**GABRIEL GARCIA, Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

**On Appeal from the 434th District Court**
**Fort Bend County, Texas**
**Trial Court Cause No. 46891A**

## MEMORANDUM OPINION

Appellant Gabriel Garcia appeals his conviction for possession of cocaine with intent to deliver, claiming that the testimony of a confidential informant was not sufficiently corroborated by evidence and that the evidence is legally insufficient to support a finding of "true" that the alleged narcotics transaction occurred in a drug-free zone for enhancement purposes. We affirm.

### FACTUAL AND PROCEDURAL BACKGROUND

Appellant was charged by indictment with the offense of possession of cocaine, amounting to more than one gram but less than four grams, with the intent to deliver.

The State alleged in the indictment that the offense occurred in a drug-free zone and included two enhancement paragraphs relating to two prior felony convictions.

Appellant pleaded "not guilty" and waived his right to a jury trial. At the bench trial, three witnesses testified: (1) Officer Wade, the officer who organized the narcotics transaction between appellant and a confidential informant, (2) Michael Cortez, the confidential informant who was working with law enforcement officers, and (3) forensic scientist Andrew Gardiner. Officer Wade described meeting with Cortez before and after the transaction. Although Officer Wade was not present during the transaction between Cortez and appellant, he captured the transaction on an audiovisual recording device that Cortez wore. In his testimony, Cortez described the transaction in which he claimed to have purchased cocaine from appellant. Gardiner confirmed in his testimony that the substance recovered from Cortez contained cocaine.

The trial court found appellant guilty of the charged offense. The trial court sentenced appellant to thirteen years' confinement.

## ISSUES AND ANALYSIS

### A. Is the evidence sufficient to corroborate the confidential informant's testimony?

In his first issue, appellant claims that the evidence is insufficient to corroborate Cortez's testimony. Article 38.141 of the Texas Code of Criminal Procedure, entitled "Testimony of Undercover Peace Officer or Special Investigator," provides:

> (a) A defendant may not be convicted of an offense under Chapter 481, Health and Safety Code, on the testimony of a person who is not a licensed peace officer or a special investigator but who is acting covertly on behalf of a law enforcement agency or under the color of law enforcement unless the testimony is corroborated by other evidence tending to connect the defendant with the offense committed.
>
> (b) Corroboration is not sufficient for purposes of this article if the corroboration only shows commission of the offense.

TEX. CODE CRIM. PROC. ANN. art. 38.141(a), (b) (West 2005). Traditional standards of review for the sufficiency of evidence are not applicable to a review of covert witness testimony under article 38.141. *See id.*; *Cathey v. State*, 992 S.W.2d 460, 462–63 (Tex. Crim. App. 1999). We review a claim challenging the sufficiency of evidence to corroborate the testimony of a covert witness under the same statutorily required standard that is applied to a challenge of the testimony of an accomplice. *See* TEX. CODE CRIM. PROC. ANN. art. 38.141(a), (b); *Malone v. State*, 253 S.W.3d 253, 257 (Tex. Crim. App. 2008); *see also* TEX. CODE CRIM. PROC. ANN. art. 38.14 (pertaining to corroboration required of accomplice witness). Under this standard, a reviewing court must exclude the testimony of a covert witness from consideration when weighing the sufficiency of corroborating evidence under article 38.141(a) and examine the remaining evidence to determine whether the evidence "tends to connect" the defendant to the commission of the offense. *Malone*, 253 S.W.3d at 258; *see* TEX. CODE CRIM. PROC. ANN. art. 38.141(a).

In reviewing the specific facts of each case to determine whether evidence is sufficient to corroborate covert witness testimony, even insignificant circumstances may satisfy the tends-to-connect standard. *See Cantelon v. State*, 85 S.W.3d 457, 461 (Tex. App.—Austin 2002, no pet.). Evidence is insufficient if it shows merely that an accused was present during the commission of the offense. *McAfee v. State*, 204 S.W.3d 868, 872 (Tex. App.—Corpus Christi 2006, pet. ref'd). Rather, the corroborating evidence must provide "suspicious circumstances" in addition to "mere presence" at the scene of the offense to rebut the premise that an accused's presence at the scene of an offense was "innocent coincidence." *Id.* There must be "*some* evidence which *tends* to connect the accused of the commission of the offense." *Hernandez v. State*, 939 S.W.2d 173, 178–79 (Tex. Crim. App. 1997). Although evidence that tends to connect an accused to an offense may not be sufficient for a conviction, the evidence need not rise to such a high threshold for purposes of corroboration under the prevailing standard. *See Gill v. State*, 873 S.W.2d 45, 48 (Tex. Crim. App. 1994).

Absent the testimony of Cortez, the confidential informant, the remaining evidence establishes the following:

- Officer Wade was conducting an investigation of narcotics trafficking at a specific, known address that he identified on the record.
- Officer Wade knew appellant lived at that address.
- Cortez was a willing and cooperative informant acting under Officer Wade's direction.
- Officer Wade provided currency to Cortez for the anticipated narcotics transaction.
- Officer Wade searched Cortez and Cortez's vehicle prior to Cortez's meeting with appellant, finding no contraband and no KOOL cigarette package.
- Officer Wade fitted Cortez with an audiovisual recording device before Cortez met with appellant.
- Officer Wade was able to listen to the transaction as it occurred and then review a video recording of the transaction later.
- Officer Wade would have been able to discern any tampering with the recording device.
- The recording depicts a person driving in a vehicle and arriving at a residence and talking briefly with an individual who exited the residence.
- The recording captures the driver of the vehicle directing the individual to "put it back in there; I can't touch it."
- The recording captures the driver stating he was "fixing to have me some fun" as he then waved a KOOL cigarette package in front of the camera.
- Officer Wade estimated that Cortez was gone approximately ten minutes "give or take," although he claimed that Cortez appeared to go directly to appellant's residence and returned right away, as reflected in the video recording.
- Upon Cortez's return, Officer Wade recovered from Cortez a substance appearing to be crack cocaine contained inside a KOOL cigarette package after Cortez met with appellant.

- Officer Wade testified that the audiovisual recording was consistent with how Cortez described the transaction to him.
- Officer Wade conducted a photo line-up after the transaction, in which Cortez identified appellant as the person involved in the transaction.
- Gardiner testified that the substance recovered from the cigarette package contained cocaine.

Appellant points out that Officer Wade did not directly see the narcotics transaction and that the recording does not depict the actual exchange of cocaine for money. Corroborating evidence under article 38.141 need not directly link the accused to the commission of the offense. *See* TEX. CODE CRIM. PROC. ANN. art 38.141; *Gill*, 873 S.W.2d at 48; *Malone*, 253 S.W.3d at 259 (involving a tape recording that sufficiently corroborated covert agent's testimony).

The recording depicts appellant's participation in a transaction that Officer Wade testified to orchestrating and monitoring. *See Malone*, 253 S.W.3d at 259 (concluding tape recording was important corroborating evidence); *McAfee*, 204 S.W.2d at 872. The sequence of events, as narrated by Officer Wade—that he searched Cortez and his vehicle prior to the transaction, finding no contraband and no KOOL cigarette package and subsequently recovered contraband from Cortez from within a KOOL cigarette package after his meeting with appellant—further tends to connect appellant to the commission of the offense. *See Malone* 253 S.W.3d at 258. Although each of the circumstances, when taken alone, might not be sufficient to corroborate Cortez's testimony, the weight of all the circumstances taken together provides the basis for a rational jury to conclude that this evidence sufficiently tended to connect appellant to the commission of the charged offense. *See Malone*, 253 S.W.3d at 259. Therefore, we overrule appellant's first issue.

**B. Is the evidence legally sufficient to support a finding of "true" for a drug-free zone for enhancement purposes?**

In his second issue, appellant asserts that the evidence does not support a "true" finding that the alleged offense occurred within 1000 feet of a school, which is considered a drug-free zone under the Texas Health and Safety Code.[1] Appellant asserts that because no evidence was admitted regarding this enhancement, the trial court improperly considered it in assessing his punishment at thirteen years' confinement.

In assessing the legal sufficiency of the evidence to support a criminal conviction, we view the evidence in the light most favorable to the verdict. *Wesbrook v. State*, 29 S.W.3d 103, 111 (Tex. Crim. App. 2000) (citing *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789, (1979)). We determine whether, based on the evidence and reasonable inferences therefrom, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *McDuff v. State*, 939 S.W.2d 607, 614 (Tex. Crim. App. 1997); *Ingram v. State*, 213 S.W.3d 515, 518 (Tex. App.—Texarkana 2007, no pet.).

The first paragraph in the indictment charged appellant with knowingly and intentionally possessing, with intent to deliver, a controlled substance, cocaine, weighing more than one gram and less than four grams. The indictment contained an additional paragraph alleging that the offense was committed in a drug-free zone, which was within 1000 feet of a premises owned, rented, or leased by an elementary school. In two enhancement paragraphs, the State alleged that appellant had two previous felony convictions for robbery and tampering with physical evidence, both occurring on the same date.

[1] *See* TEX. HEALTH & SAFETY CODE ANN. § 481.134(c)(1) (West 2010) (providing that a second-degree felony offense for delivery of a controlled substance increases the minimum confinement to five years and doubles the maximum fine if the offense was committed within 1000 feet of the premises of a school).

A drug-free zone finding is necessary to enhance punishment but is not an element of the offense itself or a separate offense.[2] *See Williams v. State*, 127 S.W.3d 442, 445 (Tex. App.—Dallas 2004, pet. ref'd); *see also Calton v. State*, 176 S.W.3d 231, 233–34 (Tex. Crim. App. 2005) (delineating difference between enhancement and element of offense). A finding that a narcotics offense occurred within 1000 feet of an elementary school raises the minimum punishment for an accused's indicted offense by five years and doubles the maximum fine. *See* TEX. HEALTH & SAFETY CODE ANN. §§ 481.112(c), 481.134(c)(1) (West 2010).

The State did not present evidence that the charged offense occurred near a school; the State acknowledges as much on appeal. As reflected in the record, at the beginning of the guilt–innocence phase, both parties agreed to proceed with the evidence pertaining to a drug-free zone at the punishment phase of trial. After the parties rested, the trial court found appellant "guilty of the crime of which he is charged." The trial court then recessed for a pre-sentence investigation. At the conclusion of the punishment phase, the trial court stated:

> Alright, Mr. Garcia, having been found guilty of the crime of delivery of a controlled substance in a school zone, it is the judgment of this Court that you be confined in the Texas Department of Criminal Justice Institutional Division for a period of 13 years, and I hereby commend you into custody of the Sheriff of Fort Bend County for imposition of that sentence at this time.

Appellant claims that "[t]he trial court expressly announced he was finding the [drug-free zone] allegation 'true' and assessed punishment at confinement for thirteen years. . . ." However, appellant has provided no record citation directing this court to where in the record the trial court expressly found the drug-free allegation true; and an independent review of the record yields no such finding. The trial court's written judgment and order of commitment indicate the trial court found appellant guilty of the

[2] As such, appellant does not challenge the sufficiency of the evidence to support his conviction for delivery of a controlled substance.

offense of delivery of a controlled substance; neither document contains a reference to a determination that the offense occurred in a drug-free zone. Although the judgment reflects that appellant pleaded "true" to enhancement paragraphs and that the trial court found the enhancements to be true, the record does not reflect that appellant entered a plea to any enhancements or that the trial court expressly made a "true" finding for the drug-free-zone enhancement as appellant contends on appeal.[3]

As noted by the parties, the State presented no evidence to support enhancement of punishment by virtue of the drug-free zone allegation under section 481.134 of the Texas Health and Safety Code. *See Ingram*, 213 S.W.3d at 519. To the extent that the trial court's pronouncement in assessing punishment, as referenced above, arguably may be construed as a "true" finding that the offense occurred in a drug-free zone, appellant has not been harmed. *See* TEX. R. APP. P. 44.2(b). A harm analysis may be applied when the State fails to sustain its burden of proving an enhancement allegation because the evidence still may support an accused's assessed punishment. *See Jordan v. State*, 256 S.W.3d 286, 292 (Tex. Crim. App. 2008) (involving issue of whether evidence was sufficient to support a "true" finding on enhancement by prior conviction).

The offense of delivery of a controlled substance, including cocaine, weighing between one and four grams is a second-degree felony. *See* TEX. HEALTH & SAFETY CODE ANN. §§ 481.102(3)(d), 481.112(a), (c) (West 2010). A second-degree felony carries a punishment range of "not more than 20 years or less than 2 years." TEX. PENAL CODE ANN. § 12.33 (West 2003). The State alleged appellant had been convicted of two prior felony offenses that occurred on the same day, but the State acknowledged it could not seek habitual-offender status based on the non-sequential convictions. If, at a trial of a second-degree felony, as in this case, the State proves that the accused has been previously convicted of a felony, the accused, on conviction, shall be punished for a first-degree felony. *See* TEX. PENAL CODE ANN. § 12.42(b). A first-degree felony carries a

[3] However, appellant does not assert error on these grounds.

punishment of five to ninety-nine years. TEX. PENAL CODE ANN. § 12.32 (West 2003). The State presented evidence, without objection, that appellant was previously convicted of the felony offenses of robbery and tampering with evidence.[4]

Because there was no evidence that would support a finding that the charged offense occurred within 1000 feet of an elementary school, the drug-free zone allegation was not proven and appellant's conviction remained a first-degree felony with enhancement by the prior convictions. *See* TEX. HEALTH & SAFETY CODE ANN. §§ 481.102(3)(d), 481.112(a), (c); TEX. PENAL CODE ANN. §§ 12.42(b), 12.32. The trial court assessed appellant's punishment at thirteen years' confinement, which was clearly within the available range of punishment. *See* TEX. HEALTH & SAFETY CODE ANN. §§ 481.102(3)(d), 481.112(a), (c); TEX. PENAL CODE ANN. §§ 12.42(b), 12.32; *see also Ingram*, 213 S.W.3d at 520 n.6 (noting that the conviction and not the punishment determines enhancement). Therefore, reversal is improper.[5] *Cf. Ingram*, 213 S.W.3d at 520 (reversing for insufficient evidence supporting a drug-free zone allegation because the assessed sentence was more than statutorily authorized). We overrule appellant's second issue.

[4] Appellant asserts no error on appeal as to the sufficiency of the evidence to support enhancement of his punishment based on the prior felony convictions.

[5] Appellant claims this cause should be reversed and relies on *Turk v State*, 867 S.W.2d 883, 888 (Tex. App.—Houston [1st Dist.] 1993, pet. ref'd), for reversing based on an erroneous finding on an enhancement paragraph. Appellant's reliance on *Turk* is misplaced. The issue presented in *Turk* involved an assertion that "no fact finder ever found the enhancements to be true"; however, appellant's second issue challenges the legal sufficiency of the evidence to support a finding of "true" to the drug-free-zone enhancement, in which appellant argues that the trial court "expressly announced he was finding the [drug-free zone] allegation 'true. . . .'" *See id.* Furthermore, the defendant in *Turk* was convicted on two counts and sentenced to fifty years, unlike appellant in this case, who was convicted on only one count. *See id.* The *Turk* court remanded both counts to the trial court for a new punishment hearing because it would not assume that the trial court would have assessed fifty years on each count. *See id.*

The trial court's judgment is affirmed.

/s/ Kem Thompson Frost
Justice

Panel consists of Justices Anderson, Frost, and Brown.

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