**In The**

# *Court of Appeals*

# *Ninth District of Texas at Beaumont*

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**NO. 09-10-00050-CR**

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**CARTER PEYTON MEYER, Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

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**On Appeal from the 284th District Court**
**Montgomery County, Texas**
**Trial Cause No. 09-06-06120-CR**

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## MEMORANDUM OPINION

Appellant, Carter Peyton Meyer, was charged by indictment with the felony offense of possession of a controlled substance. *See* Tex. Health & Safety Code Ann. § 481.115(a), (d) (West 2010). The jury found appellant guilty. After hearing enhancement evidence, the trial court assessed punishment at twenty-five years confinement in prison. In three issues, Meyer appeals his conviction. We affirm the judgment of the trial court.

## ISSUE ONE

In issue one, Meyer argues that he received ineffective assistance of counsel at trial because his counsel failed to object to the admission of certain evidence, as well as the State's failure to produce other evidence. Officers with the Conroe Police Department went to Meyer's residence on May 1, 2009, to execute a felony warrant. A female answered the door and gave the officers consent to enter the residence. Meyer was discovered hiding in the residence and was placed under arrest. When the female, later identified as Denaye Powell, attempted to leave the residence, officers obtained her consent to search a bag she was carrying. A liquid substance that field tested positive for methamphetamine was found in a sippy cup inside the bag, together with a syringe. Officers then obtained Meyer's consent to search the home. Officers found a puddle of liquid substance that field tested positive for methamphetamine on a shelf of the closet in the master bedroom.

The State's chemist, Dottie Collins, testified that the sample obtained from the bedroom tested positive for methamphetamine and weighed, by aggregate weight, 38.58 grams. The methamphetamine found in the sippy cup weighed, by aggregate weight, 12.11 grams. Meyer was charged and convicted of possession of a controlled substance, methamphetamine, in an amount of four grams or more but less than two hundred grams, by aggregate weight, including adulterants and/or dilutants.

On appeal, Meyer argues that he received ineffective assistance of counsel because his trial counsel did not object to the introduction of evidence regarding the liquid methamphetamine found in the overnight bag Powell was carrying when she attempted to leave. Meyer contends his trial counsel should have objected to this evidence on relevancy grounds because this evidence was not connected to Meyer and should not have been used in the trial against him. According to Meyer, the State had "no basis for submitting the evidence in the bag carried by Ms. Powell in its case in chief" against Meyer. Meyer further contends counsel was ineffective in failing to object to the State's "failure to produce affirmative links" between Meyer and the contraband found in the bag, and in failing to object to argument by the State in closing that Powell and Meyer had acted in concert in hiding the contraband in the bag to avoid its detection.

To prevail on a claim for ineffective assistance of counsel, the appellant must show that (1) counsel's representation fell below an objective standard of reasonableness; and (2) there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 688, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *Thompson v. State*, 9 S.W.3d 808, 812-12 (Tex. Crim. App. 1999). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Thompson*, 9 S.W.3d at 812. "Appellate review of defense counsel's representation is highly deferential and presumes that counsel's actions fell within the wide range of reasonable and professional assistance."

*Bone v. State*, 77 S.W.3d 828, 833 (Tex. Crim. App. 2002). Appellant must prove there was no plausible strategic reason for the acts or omissions of counsel. *See id*. at 836.

When reviewing complaints regarding trial counsel's deficient performance at trial, we must "avoid the deleterious effects of hindsight." *Thompson*, 9 S.W.3d at 813. "Any allegation of ineffectiveness must be firmly founded in the record, and the record must affirmatively demonstrate the alleged ineffectiveness." *Id*. (citing *McFarland v. State*, 928 S.W.2d 482, 500 (Tex. Crim. App. 1996)). "Under normal circumstances, the record on direct appeal will not be sufficient to show that counsel's representation was so deficient and so lacking in tactical or strategic decisionmaking as to overcome the presumption that counsel's conduct was reasonable and professional." *Bone*, 77 S.W.3d at 833. It will be a rare occasion for a trial record to have sufficient information to allow an appellate court to evaluate the merits of a claim for ineffective assistance of counsel. *Id*. In most cases, the record on direct appeal is simply not developed enough to show the ineffectiveness of trial counsel. *See id*. Trial counsel's representation is viewed with significant deference when trial counsel's reasons for not undertaking a specific course of action are absent from the record. *Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005).

To prove possession of a controlled substance, the State must prove, either directly or through circumstantial evidence, that the defendant exercised actual care, custody, control, or management over the contraband and that the defendant knew the matter

possessed was contraband. *See* Tex. Health & Safety Code Ann. § 481.002(38) (West 2010); *Poindexter v. State*, 153 S.W.3d 402, 405-06 (Tex. Crim. App. 2005). The State does not have to prove the defendant had exclusive possession of the contraband; joint possession is sufficient to sustain a conviction. *See Cude v. State*, 716 S.W.2d 46, 47 (Tex. Crim. App. 1986). When a defendant is not shown to have had exclusive possession of the place where the contraband was found, the State must offer additional independent facts and circumstances affirmatively linking him to the contraband. *See Evans v. State*, 202 S.W.3d 158, 161-62 (Tex. Crim. App. 2006); *Poindexter*, 153 S.W.3d at 406. This is referred to as the "affirmative links" rule. *See Poindexter*, 153 S.W.3d at 406. The evidence must show a defendant's connection to the contraband was more than merely fortuitous.[1] *Evans*, 202 S.W.3d at 161-62.

Significantly, Meyer's trial counsel did move for a directed verdict on sufficiency grounds based on lack of affirmative links tying Meyer to the methamphetamine found in Powell's bag. The trial court denied counsel's motion for directed verdict. There was sufficient evidence other than the amounts found in the sippy cup for the jury to have

[1] Courts have considered a number of different factors in determining whether a defendant can be affirmatively linked to contraband. *See Evans*, 202 S.W.3d at 162, n.12. Among others, relevant factors include the defendant's presence when a search is conducted, the defendant's proximity to and the accessibility of the contraband, whether the defendant possessed other contraband or narcotics when arrested, whether the defendant made incriminating statements when arrested, whether the defendant attempted to flee, whether other drug paraphernalia or contraband were present in the residence, whether the defendant owned or had the right to possess the place where the contraband was found, and whether the conduct of defendant indicated consciousness of guilt. *See id*.

otherwise found Meyer guilty of possession of a controlled substance in the indicted amounts. The liquid methamphetamine was found on a closet shelf in the master bedroom, which contained men's clothing, shoes, belts, and ties. Meyer made a statement to the officers that the liquid found on the closet shelf was water from a bong, and that he smokes methamphetamine out of a bong. Meyer referred to the residence as "my house." These facts affirmatively link Meyer to the methamphetamine found in the closet.

In his motion for new trial, Meyer did not assert his ineffective assistance of counsel claim regarding failure to object to admission of evidence pertaining to methamphetamine found in the sippy cup. There is no direct evidence in the record regarding the reasons behind trial counsel's strategy. Based on the record before us, we cannot conclude that trial counsel's challenged conduct was "so deficient and so lacking in tactical or strategic decisionmaking as to overcome the presumption that counsel's conduct was reasonable and professional." *Bone*, 77 S.W.3d at 833. Even if an objection had been warranted, Meyer has not shown that the result of the proceeding would have been different. Meyer's ineffective assistance of counsel claim is not firmly founded in the record. *Thompson*, 9 S.W.3d at 813. We overrule issue one.

ISSUE TWO

In issue two, Meyer argues that the trial court erred in not including an instruction on the law of parties in the jury charge. Because some of the methamphetamine was

found in the sippy cup in Powell's bag, Meyer contends the only manner in which he could have been found guilty of possession is under the law of parties. Meyer further contends that the jury should have been charged on the law of parties because the State hypothesized in closing argument that Meyer may have poured liquid methamphetamine from a container on the top shelf of his closet into the sippy cup and hidden it in Powell's bag, thereby explaining the liquid puddle found on the closet shelf.

The jury charge must set forth the law applicable to the case. Tex. Code Crim. Proc. Ann. § 36.14 (West 2007); *see also Hutch v. State*, 922 S.W.2d 166, 170 (Tex. Crim. App. 1996). Meyer was charged and convicted as a principal for the offense of possession of a controlled substance. The jury was charged that "a person commits the offense of Possession of a Controlled Substance if he intentionally or knowingly possesses a controlled substance . . . namely, Methamphetamine, in an amount of 4 grams or more but less than 200 grams[.]" Possession was defined in the charge as the "actual care, custody, control, or management of the property." *See* Tex. Health & Safety Code Ann. § 481.002(38). Absent evidence to the contrary, we presume the jury followed the law provided by the charge. *Hutch,* 922 S.W.2d at 170. The jury in the present case found the evidence sufficient to convict Meyer of possession of methamphetamine as charged.

In essence, Meyer's argument is a challenge to the sufficiency of the evidence supporting his conviction for possession of the methamphetamine found in Powell's bag.

Based on our review of the record, we conclude the evidence sufficient to support Meyer's conviction, as a principal, for the charged offense. *See Brooks v. State*, 323 S.W.3d 893, 912 (Tex. Crim. App. 2010); *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L.Ed.2d 560 (1979) (setting forth standard for reviewing sufficiency of evidence).

Charging the jury on the law of parties would only have served to enlarge the circumstances and potential for conviction of the charged offense. *See generally* Tex. Penal Code Ann. §§ 7.01, 7.02 (West 2011). Assuming, but without finding, error by the trial court in omitting an instruction on the law of parties, where the evidence clearly supports the appellant's guilt as a principal actor, any error of the trial court in not submitting an instruction on the law of parties is harmless. *See generally Ladd v. State*, 3 S.W.3d 547, 564-65(Tex. Crim. App. 1999). Moreover, when charge error is not preserved by a timely objection, an appellant must show "egregious harm" to obtain reversal of the jury's verdict. *See Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1984) (op. on reh'g). Under the circumstances of this case, Meyer cannot show egregious harm. We overrule issue two.

ISSUE THREE

In issue three, Meyer argues that the trial court erred in failing to grant a motion for mistrial following a "prejudicial and inflammatory" question by the State. Specifically, Meyer complains that the State asked one of the officers the following

question during the guilt/innocence phase of trial: "The house and the way that it is, how you saw it that night, is it also consistent with a battered woman moving out?" Defense counsel objected that this question called for speculation, and the court sustained the objection and instructed the jury to disregard the question. The following day, before the evidence resumed, Meyer made a motion for mistrial in part on the basis that the question was inflammatory and prejudicial to the minds of the jury. The Court denied the motion for mistrial but instructed the State not to refer to it again.

In conjunction with issue three, Meyer also complains of a statement made by the State in closing argument, which Meyer contends was outside the record, violated the court's earlier instruction not to refer to the battered woman issue, and effectively denied him the right to a fair and impartial trial. During the State's closing argument, the following exchange took place:

> [Prosecutor]: How do we prove our case beyond a reasonable doubt? April 28th, 2009 Sergeant Stowe was given information to run a blue warrant on the defendant. Why? Because an assault occurred and the defendant was seen running away from the police.
>
> [Defense counsel]: I'm going to object. There's absolutely no evidence in the record, Judge --
>
> [Prosecutor]: Yes, there is.
>
> [Defense counsel]: -- of that testimony.
>
> [Prosecutor]: Sergeant Stowe was the one who testified to that, Your Honor.

[Defense counsel]: I will withdraw my objection as long as the jury understands they are the judges of the fact and not what she says.

THE COURT: If there is such evidence in the record, you may consider it. If you can recall such evidence, you may consider it. If there's not such evidence, I will instruct the prosecutor to stay within the record.

The State argues that defense counsel's motion for mistrial was not timely. To preserve a complaint for appellate review, Rule 33.1 of the Rules of Appellate Procedure requires that the record reflect that the complaint, including a motion for mistrial, was made to the trial court by a timely and specific request, objection, or motion. *Griggs v. State*, 213 S.W.3d 923, 927 (Tex. Crim. App. 2007); *see also* Tex. R. App. P. 33.1. If the motion for mistrial is made as soon as the grounds for it become apparent, the motion is timely. *Griggs*, 213 S.W.3d at 927 (citing *Wilkerson v. State*, 881 S.W.2d 321, 326 (Tex. Crim. App. 1994)). In this case, the grounds became apparent when the State asked the question. Though counsel objected, he did not make his motion for mistrial until the following day. Because the motion for mistrial was not made at the earliest opportunity, error was not preserved. Tex. R. App. P. 33.1(a); *see also King v. State*, 953 S.W.2d 266, 268 (Tex. Crim. App. 1997).

However, even had error been preserved, we find no reversible error in the trial court's denial of the motion for mistrial. The trial court instructed the jury to disregard the State's comment. When a trial court instructs a jury to disregard improper jury argument, we presume the jury followed the trial court's instruction. *Wesbrook v. State*,

29 S.W.3d 103, 116 (Tex. Crim. App. 2000). The trial court did not abuse its discretion in denying the motion for mistrial. *See Archie v. State*, 221 S.W.3d 695, 699 (Tex. Crim. App. 2007); *Tennard v. State*, 802 S.W.2d 678, 685 (Tex. Crim. App. 1990) (holding that prompt limiting instruction given after a witness referred to the defendant's prior prison time cured any error); *Barney v. State*, 698 S.W.2d 114, 125 (Tex. Crim. App. 1985) (holding that instruction to disregard a reference to defendant's status as an "ex-con" cured any error). Likewise, Meyer is not entitled to a new trial as a result of the State's reference during closing argument to a prior alleged assault. Counsel withdrew his objection to the State's statement, and the trial court instructed the jury to consider the comment only if it was supported by evidence. Again, we presume the jury followed the trial court's instruction. *See Ladd*, 3 S.W.3d at 567. We overrule issue three.

Having overruled all of appellant's issues, we affirm the judgment of the trial court.

AFFIRMED.

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CHARLES KREGER
Justice

Submitted on July 8, 2011
Opinion Delivered August 24, 2011
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Before McKeithen, C.J., Gaultney and Kreger, JJ.