In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-10-00061-CR

RODNEY YOUNG ANDERSON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 359th District Court
Montgomery County, Texas
Trial Cause No. 09-07-07255 CR

MEMORANDUM OPINION

A jury convicted Rodney Young Anderson of possession with intent to deliver a controlled substance, and the trial court sentenced Anderson to forty years in prison. The jury also convicted Anderson of aggravated assault of a public servant, and the trial court sentenced Anderson on that charge to life. Anderson raises thirteen issues in his appeal from the judgments of conviction. We affirm the trial court's judgments.

Background

In February 2008, a paid confidential informant (Informant), in an effort to purchase methamphetamine, agreed to meet Anderson in a parking lot in Conroe. The Informant advised the police that Anderson and Timothy Sherber would be driving "a dually type pickup." During the trial, the Informant testified that he had purchased methamphetamine from Anderson on numerous occasions, and on many of those occasions, Anderson and Sherber were together.

Undercover officers were waiting in the parking lot when Sherber and Anderson arrived. After Sherber drove into the parking lot and parked, the Informant approached Anderson, who was sitting on the passenger-side of the pickup. After Anderson showed the Informant the drugs, the Informant signaled the police; but, as the undercover officers approached, Sherber began backing out of his parking space. As Sherber was leaving, an undercover officer yelled "Police officer. Get out of the vehicle." Although undercover officers were beside the pickup's doors, Sherber refused to stop, and he drove into two undercover vehicles being used to block him in. After striking two unmarked vehicles, Sherber continued to drive forward until he hit the side of a marked patrol car, which was equipped with red and blue lights. After striking the marked patrol car, Sherber's pickup pushed it approximately fifteen feet. At that point, another law enforcement officer, driving an undercover pickup, struck Sherber's pickup and brought it to a stop.

After being stopped, Anderson and Sherber were arrested. Two officers, Sergeant Womack and Deputy Kellum, testified that after the arrests, they collected methamphetamine which they had found inside Sherber's pickup and on the ground beside the passenger door. A whiteish substance was recovered from the floorboard on the passenger-side of Sherber's pickup, as well as by the passenger's door, from the ground. The substances recovered by the officers were placed in two plastic bags.

Sergeant Womack explained that one of the plastic bags contained a separate plastic bag containing a white substance which had been removed from the passenger's floorboard. A forensic scientist testified that her tests, conducted at the Texas Department of Public Safety Crime Laboratory, confirmed that the contents of the bags include methamphetamine. One of the bags contains a tannish crystal-like substance and weighs 8.51 grams. The other bag contains a brown substance and weighs 25.26 grams.

The jury convicted Anderson of aggravated assault against a public servant and possession of methamphetamine "in an amount of four grams or more but less than 200 grams by aggregate weight, including adulterants and/or dilutants[.]"[1] In thirteen issues, Anderson challenges his convictions.

[1]Timothy Sherber was also convicted of aggravated assault of a public servant and possession with intent to deliver a controlled substance. Sherber's convictions were affirmed by this Court in a separate appeal. *See Sherber v. State*, No. 09-10-00367-CR, 2011 Tex. App. LEXIS 7648 (Tex. App.—Beaumont Sept. 21, 2011, no pet.) (mem. op., not designated for publication).

Possession of Methamphetamine

In his second issue, which we address first, Anderson argues that the evidence is legally insufficient to support the jury's determination that he possessed at least four grams of methamphetamine. In a sufficiency review, we consider the evidence in the light most favorable to the verdict to determine whether any rational fact-finder could have found the essential elements of the offense beyond a reasonable doubt. *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007) (citing *Jackson v. Virginia*, 443 U.S. 307, 318-19, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)). Under the *Jackson* standard, the reviewing court gives full deference to the fact-finder's responsibility to fairly resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. *Id.* The fact-finder determines the weight to give the testimony of each witness, and the jury's determination may turn on an evaluation of the credibility and demeanor of the witnesses. *Cain v. State*, 958 S.W.2d 404, 408-09 (Tex. Crim. App. 1997).

Anderson's second issue attacks the sufficiency of the evidence supporting his conviction for "Possession with Intent to Deliver Controlled Substance, as alleged in Count I of the indictment." Count I of the indictment alleges that Anderson possessed "methamphetamine, in an amount of four grams or more but less than 200 grams by aggregate weight, including adulterants and/or dilutants[.]"

Anderson argues that the evidence is not sufficient to prove beyond a reasonable doubt that he possessed at least four grams of methamphetamine. Specifically, Anderson argues that the material the forensic scientist weighed was contaminated with other materials–grass, rocks, dirt, and other debris–gathered by police during their investigation. Anderson concludes that because the weight of the methamphetamine was not separated from the debris collected by the police, the testimony addressing the material's aggregate weight fails to establish that Anderson possessed at least four grams of methamphetamine.

With respect to the argument that materials were included that should not have been included in determining the weight of the bags, Anderson notes that the Texas Health and Safety Code categorizes the degree of the offense by the aggregate weight of the controlled substance "including adulterants or dilutants[.]" *See* Tex. Health & Safety Code Ann. § 481.112(d) (West 2010). The term "controlled substance" includes methamphetamine, and is defined to include "the aggregate weight of any mixture, solution, or other substance containing a controlled substance." Tex. Health & Safety Code Ann. §§ 481.002(5), 481.102(6) (West 2010). "Adulterant or dilutant" is defined to include "any material that increases the bulk or quantity of a controlled substance, regardless of its effect on the chemical activity of the controlled substance." *Id.* § 481.002(49) (West 2010). Anderson contends that despite the broad statutory definition of the term "adulterant or dilutant," the material added by police in gathering the

evidence should not have been included by the forensic scientist in evaluating the weight of the methamphetamine that he is alleged to have possessed.

In response to Anderson's argument, the State argues the plastic bags were introduced in the presence of the jury, and an inspection of the bags allowed the jurors to determine that the contaminants in the mixture of the bags' contents "could not have made any significant difference in the weighing of the substance." The State concludes that the jury could have found that Anderson possessed at least four grams of the controlled substance, excluding the foreign materials inadvertently collected by investigators in gathering the evidence.

The Texas Court of Criminal Appeals has interpreted the legislature's definition of "adulterant or dilutant" to include any substance that is added to the controlled substance at any time:

> The literal meaning of the legislature's adulterant and dilutant definition is that any substance that is added to or mixed with a controlled substance, regardless of when, how, or why that substance was added, may be added to the aggregate weight of the controlled substance as an adulterant or dilutant.

Seals v. State, 187 S.W.3d 417, 420 (Tex. Crim. App. 2005). Even though the Court of Criminal Appeals has indicated that the weight of a drug mixture includes materials added at any time, Anderson argues, and the State, in its response, contends that the definition of "adulterant and dilutant" was likely not intended to include substances like the grass and dirt gathered by officers during their collection efforts. While the State, for

purposes of this appeal, appears to concede that the mixture's aggregate weight should not have included all of the material in the bags, the State maintains that the evidence is, nevertheless, sufficient to support Anderson's conviction for possessing at least four grams of methamphetamine.

Based on the evidence in the record in this case, we agree with the State that the jury was not required to rely solely on the forensic scientist's testimony about the aggregate weight of the bags in determining whether Anderson was guilty of having possessed four or more grams of methamphetamine. Here, the jury could also consider the Informant's testimony that a policeman requested that he buy two ounces of methamphetamine from Anderson, and the Informant's testimony that he then had several conversations over the telephone to arrange a meeting with Anderson for that purpose. Additionally, we take judicial notice for the purposes of our appellate review that one ounce equals 28.349 grams. *See* Webster's Third New International Dictionary 1399, Measure and Weights Table (2002); *see also Office of Pub. Util. Counsel v. Pub. Util. Comm'n*, 878 S.W.2d 598, 600 (Tex. 1994) ("A court of appeals has the power to take judicial notice for the first time on appeal."); Tex. R. Evid. 201(c) ("A court may take judicial notice, whether requested or not."). Thus, the evidence reflects that Anderson contemplated a sale of methamphetamine weighing more than 56 grams.

In deciding whether Anderson possessed four grams or more of methamphetamine, the jury could also consider testimony showing the Informant agreed

to pay Anderson $2,500 in the transaction, as well as the Informant's testimony that an ounce of methamphetamine generally costs around $1,200. Thus, the agreed purchase price of $2,500 reflects a transaction for approximately two ounces of methamphetamine, or approximately 56 grams. Additionally, shortly after Anderson's arrest, the police found Anderson in possession of $3,500 in cash; and, according to Officer Womack, having that amount of cash was not surprising because "[a] dope dealer with a large amount of dope, normally carries around a large amount of money."

In considering the quantity of methamphetamine seized in the parking lot on the date of the sale, the jury could also view the two plastic bags containing the evidence gathered by the police, consider that the contents in the bags had tested positive for methamphetamine, and consider numerous pictures of a white substance on the passenger's-side floorboard of Sherber's pickup as well as a white substance found on the ground next to the passenger's-side of Sherber's pickup. By visually inspecting the plastic bags, the jury could have reasonably determined that the crystal substance in the bags constituted the majority of the volume of the mixture in each of the plastic bags.

The weight of the contents contained in each plastic bag was established by a forensic scientist with the Texas Department of Public Safety Crime Laboratory. According to the State's forensic scientist, one bag weighed 8.51 grams, and the other bag weighed 25.26 grams. The forensic scientist also testified that the samples from each bag tested positive for methamphetamine. Also, according to the forensic scientist, the

contents of the lighter bag contained a crystal-like substance that contained methamphetamine, and the contents of the heavier bag contained a brownish substance that contained methamphetamine. Based on the relative volumes obvious from a visual inspection, circumstantial evidence indicating the police recovered a significant amount of methamphetamine, as well as the evidence concerning the amount of methamphetamine the Informant intended to buy and the price Anderson requested that the Informant pay to purchase the drugs, a rational jury could determine that the weight of the methamphetamine recovered by police equaled at least four grams.[2] We also note that Anderson presented no estimate of the weight of the dirt, grass, and other debris contained in the bags. *See Gabriel v. State*, 900 S.W.2d 721, 722 (Tex. Crim. App. 1995) (holding evidence sufficient where the State tested only five of fifty-four bags containing cocaine and noting that "appellant could have conducted independent chemical tests on all fifty-four [bags] to show they did not contain the same substance"). We conclude that the record, viewed in the light most favorable to the judgment, contains sufficient evidence to prove beyond a reasonable doubt that Anderson possessed at least four grams of a "controlled substance." *Hooper*, 214 S.W.3d at 13. We overrule Anderson's second issue.

In light of our disposition of issue two, we need not reach Anderson's third issue, in which he argues that section 481.002(49) of the Texas Health and Safety Code is

[2]Anderson has not raised an issue on appeal concerning the admissibility of Collins's testimony as related to the aggregate weight of the bags.

unconstitutionally broad and vague. *See* Tex. R. App. P. 47.1. We also need not reach Anderson's fourth issue, which asserts that the police, after Anderson's arrest, increased the severity of his punishment in violation of his due process rights. *See id.*

Aggravated Assault Against a Public Servant

In issue one, Anderson contends that the evidence is legally insufficient to support his conviction for committing aggravated assault against a public servant. A person commits the offense of aggravated assault on a public servant if he intentionally or knowingly threatens a person that the actor knows to be a public servant with imminent bodily injury while the public servant is lawfully discharging an official duty, and the person employs a deadly weapon in the assault. Tex. Penal Code Ann. §§ 22.01(a)(2), 22.02(a)(2), (b)(2)(B) (West 2011). In reviewing Anderson's issue challenging the sufficiency of the evidence supporting his conviction for aggravated assault, we consider the evidence admitted during the trial in the light most favorable to the verdict, and we determine whether any rational fact-finder could have found the essential elements of the offense beyond a reasonable doubt. *Hooper*, 214 S.W.3d at 13.

Anderson's conviction for aggravated assault was based on his having been a party to the assault committed by Sherber. Under the law of parties, a defendant may be convicted as a party to an offense if the offense is committed by his own conduct or by the conduct of another for which the defendant is criminally responsible. Tex. Penal Code Ann. § 7.01(a) (West 2011). A defendant may be criminally responsible for another's

conduct in two ways: (1) by being a party to the offense under subsection 7.02(a), which means the defendant acted with the intent to promote or assist the commission of the offense, by soliciting, encouraging, directing, aiding, or attempting to aid the other person to commit the offense; or (2) by being a part of a conspiracy[3] to commit a felony under subsection 7.02(b).[4] *Id.* § 7.02 (West 2011).

When convicted under the law of parties, reviewing courts do not limit their review to the evidence that is closely associated in time with the charged offense. Rather, "[i]n determining whether the accused participated as a party, the court may look to events occurring before, during and after the commission of the offense, and may rely on actions of the defendant which show an understanding and common design to do the prohibited act." *Cordova v. State*, 698 S.W.2d 107, 111 (Tex. Crim. App. 1985). "Also, it is not necessary that every fact point directly and independently to the defendant's guilt;

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[3]"Conspiracy" is an agreement between two or more persons, with intent that a felony be committed, that they, or one or more of them, engage in conduct that would constitute the offense. Tex. Penal Code Ann. § 15.02(a) (West 2011). An agreement constituting a conspiracy may be inferred from acts of the parties. *Id.* § 15.02(b) (West 2011).

[4]Section 7.02(b) states that

> [i]f, in the attempt to carry out a conspiracy to commit one felony, another felony is committed by one of the conspirators, all conspirators are guilty of the felony actually committed, though having no intent to commit it, if the offense was committed in furtherance of the unlawful purpose and was one that should have been anticipated as a result of the carrying out of the conspiracy.

Tex. Penal Code Ann. § 7.02(b) (West 2011).

it is enough if the conclusion is warranted by the combined and cumulative force of all the incriminating circumstances." *Johnson v. State*, 871 S.W.2d 183, 186 (Tex. Crim. App. 1993). Nor are the inferences from the evidence limited to those that arise from the eyewitnesses to the prohibited conduct. Direct evidence to prove the defendant participated as a party is not required, as "circumstantial evidence is as probative as direct evidence in establishing the guilt of an actor. Circumstantial evidence alone can be sufficient to establish guilt." *Hooper*, 214 S.W.3d at 14-15 (citing *Guevara v. State*, 152 S.W.3d 45, 49 (Tex. Crim. App. 2004)). In measuring the sufficiency of the evidence proving the elements of an offense, we evaluate the evidence based on a hypothetically correct jury charge. *See Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997). If the charge authorizes the jury to convict on more than one theory, as it did here, the verdict will be upheld if the evidence is sufficient on any of the theories. *Guevara*, 152 S.W.3d at 49.

To have found Anderson guilty of committing aggravated assault, the jury must have determined, beyond a reasonable doubt, that 1) Anderson intended to promote or assist in the aggravated assault of Deputy Kellum, or that 2) the aggravated assault was committed by Sherber in furtherance of a conspiracy to commit the felony offense of possession with intent to deliver a controlled substance, and that Anderson should have anticipated that an aggravated assault of a public servant could result from the parties carrying out their conspiracy.

First, we evaluate whether Anderson's conviction can be affirmed under a conspiracy theory. The evidence admitted during trial, when viewed in the light most favorable to the jury's verdict, reflects that Sherber and Anderson traveled to Conroe to sell the Informant a large quantity of methamphetamine. In fleeing from the police, and despite various officers having identified themselves as being law enforcement officers, Sherber collided with at least two unmarked vehicles before his pickup struck Deputy Kellum's marked patrol car. The evidence also reflects that the methamphetamine was in Sherber's possession as well as having been in his view. Based on the evidence, it was reasonable for the jury to infer from the circumstances that Sherber committed the aggravated assault in furtherance of his conspiracy with Anderson to commit the felony offense of possession with intent to deliver a controlled substance. The evidence is also sufficient to support the reasonable inference that Anderson should have anticipated that, under the circumstances of this case, police officers would face injury as a result of Sherber's attempt to flee. *See Hooper*, 214 S.W.3d at 15-16 (explaining that reasonable inferences are permitted "as long as each inference is supported by the evidence presented at trial"). We conclude that rational jurors could find, beyond a reasonable doubt, that Anderson was guilty as a party to aggravated assault of a public servant under the conspiracy theory of party liability. *See Hooper v. State*, 255 S.W.3d 262, 266 (Tex. App.—Waco 2008, pet. ref'd). Because the evidence is legally sufficient to support

Anderson's conviction as a party on the charge of aggravated assault against a public servant, we overrule issue one.

Motion for Continuance

In his fifth issue, Anderson complains the trial court erred by denying his motion for continuance, filed on August 14, 2009, three days before his trial was scheduled to begin. In his motion, Anderson suggested that he needed a continuance because he first learned in late July that one of the State's witnesses, Caryn McAnarny, had been terminated for cause, and he needed information that the State had not yet provided on fifty-five other cases in which McAnarny had performed tests. *See Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) (holding that the State, upon request from the defendant, has a constitutional duty to disclose to the defendant material, exculpatory evidence); *see also Little v. State*, 991 S.W.2d 864, 866 (Tex. Crim. App. 1999) (stating that exculpatory and impeachment evidence is material if its effective use may make the difference between conviction and acquittal).

"We review a trial court's ruling on a motion for continuance for abuse of discretion." *Gallo v. State*, 239 S.W.3d 757, 765 (Tex. Crim. App. 2007). To establish an abuse of discretion, a defendant must show he was actually prejudiced by the denial of his motion. *Id.* An abuse of discretion occurs "'only if the record shows with considerable specificity how the defendant was harmed by the absence of more preparation time than he actually had.'" *Gonzales v. State*, 304 S.W.3d 838, 842 (Tex. Crim. App. 2010)

(quoting George E. Dix & Robert O. Dawson, *42 Tex. Practice: Criminal Practice & Procedure* § 28.56 (2d ed. 2001)).

Ordinarily, a defendant develops the evidence showing how he was harmed by the trial court's denial of a requested continuance during a hearing on a motion for new trial. *Id.* at 842-43. Although Anderson filed a motion for new trial, his motion does not assert that the trial court's ruling on his request to continue the case as a basis for the trial court to grant a new trial. Additionally, we find no indication the trial court conducted an evidentiary hearing on Anderson's motion for new trial. Speculation about the evidence that a defendant might have developed had he been granted a continuance is not sufficient to demonstrate harm. *See Renteria v. State*, 206 S.W.3d 689, 702 (Tex. Crim. App. 2006).

On the record before us, Anderson has not shown that the trial court erred in denying the motion or that he suffered harm. The record shows that Anderson was aware that the State terminated McAnarny for cause, but the record also shows that McAnarny was not the person who tested the contents of the plastic bags that the trial court admitted into evidence. During the trial, Anderson did not call McAnarny to show she possessed material information concerning his alleged crimes, nor did he demonstrate, following the trial, that McAnarny had a material role in handling the evidence which supports his conviction. Finally, the trial court did not restrict Anderson's efforts during the trial to develop information on McAnarny's duties as they related to Anderson's case.

Anderson also suggests that he needed a continuance to interview Sherber and to interview Detective Glission. According to Anderson's brief, he needed additional time so that his counsel could "prepare to confront the witnesses" against Anderson and to "marshal them as defense witnesses."

The record reveals that neither Sherber nor Detective Glission testified at Anderson's trial. Therefore, Anderson was not required to prepare to confront either of these witnesses. Nor did Anderson demonstrate that these witnesses would have provided testimony material to his defense. A defendant must show how an absent witness's testimony would have been material to preserve a claim alleging error in connection with a trial court's ruling denying a motion to continue. *Hubbard v. State*, 912 S.W.2d 842, 844 (Tex. App.—Houston [14th Dist.] 1995, no pet.).

The written motion to continue filed by Anderson is limited to Anderson's stated desire to receive evidence regarding cases other than Anderson's in which McAnarny's testing of evidence might be questioned. Anderson's sworn motion for continuance does not complain that he was unable to interview Sherber or Detective Glission, or assert that he was unable to compel them to appear as witnesses at his trial. Generally, a person with personal knowledge must swear to the facts he relies on for the continuance he is requesting. Tex. Code Crim. Proc. Ann. art. 29.08 (West 2006); *see also* Tex. Code Crim. Proc. Ann. arts. 29.06, 29.07 (West 2006). Furthermore, to compel a witness to attend a

trial, a defendant must file an application for subpoena with the clerk of the trial court, but nothing indicates that Anderson did so here. *See id*. 24.03(a) (West 2009).

Anderson also complains that because his bond was revoked and he was in jail shortly before trial, his counsel was unable to adequately prepare for trial. During a pretrial hearing, defense counsel explained that traveling to the facility housing Anderson took six hours, and that his travel requirements interfered with his ability to prepare for trial. However, Anderson's complaint about needing additional time to confer with counsel is not one of the matters raised in Anderson's sworn written motion. Also, Anderson's counsel acknowledged during the trial that he had not been prevented from meeting with Anderson. We conclude that Anderson's complaint concerning any restrictions on the amount of time that he had to meet with his counsel were not preserved for review on appeal.

Finally, with respect to Anderson's argument that denying his request for continuance violated his rights to receive due process, "'[t]here are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly the reasons presented to the trial judge at the time the request is denied.'" *Rosales v. State*, 841 S.W.2d 368, 374 (Tex. Crim. App. 1992) (quoting *Ungar v. Sarafite*, 376 U.S. 575, 589, 84 S.Ct. 841, 11 L.Ed.2d 921 (1964)). "In the absence of an abuse of discretion, there generally can be no violation of due process." *Nwosoucha v. State*, 325 S.W.3d 816, 828

(Tex. App.—Houston [14th Dist.] 2010, pet. dism'd) (citing *Hicks v. Wainwright*, 633 F.2d 1146, 1148 (5th Cir. 1981) ("When a denial of a continuance forms a basis of a petition for a writ of habeas corpus, not only must there have been an abuse of discretion, but it must have been so arbitrary and fundamentally unfair that it violates constitutional principles of due process.")). On this record, we are unable to conclude that the trial court's decision was either arbitrary or that the trial court abused its discretion in denying Anderson's motion to continue. Issue five is overruled.

Alleged *Brady* violation

We interpret Anderson's sixth issue to argue that his due process rights were violated by the State's alleged failure to disclose all of the evidence concerning McAnarny's termination. To establish reversible error under *Brady*, a defendant must show:

> 1) the State failed to disclose evidence, regardless of the prosecution's good or bad faith;
> 2) the withheld evidence is favorable to [the defendant];
> 3) the evidence is material, that is, there is a reasonable probability that had the evidence been disclosed, the outcome of the trial would have been different.
>
> Under *Brady*, the defendant bears the burden of showing that, in light of all the evidence, it is reasonably probable that the outcome of the trial would have been different had the prosecutor made a timely disclosure.

Hampton v. State, 86 S.W.3d 603, 612 (Tex. Crim. App. 2002) (footnotes omitted). Additionally, under *Brady*, the materiality of undisclosed information is not sufficiently proven by showing a mere possibility that undisclosed information might have helped in

the defense or that the undisclosed information might have affected the outcome of the trial. *Id.*

In this case, Anderson requested a continuance because the State informed him, apparently in late July, that McAnarny had been terminated for "'general incompetence[.]'" During the hearing on the motion to continue, Anderson's counsel informed the trial court that there were numerous unrelated cases in which it was being alleged that McAnarny had failed to properly test evidence. Anderson's counsel requested a continuance to allow him to develop information regarding those cases in which McAnarny's integrity was being questioned. With respect to Anderson's case, the State acknowledged that McAnarny participated in the investigation at the scene, but stated that McAnarny had worked with three other technicians who worked together "as a team" in collecting the evidence. The State also advised the trial court that McAnarny had "handled the drugs in this case at one time and logged them into evidence[,]" but that McAnarny was not being accused of any wrongdoing with respect to her role in Anderson's case. Finally, the State notified the trial court and defense counsel that it did not intend to call McAnarny during its case in chief.

The State did not call McAnarny as a witness during Anderson's trial. Other police officers authenticated the plastic bags containing the methamphetamine collected at the scene. Additionally, McAnarny did not perform the tests used to determine that the material in the bags included methamphetamine that they weighed. During the trial, the

most meaningful mention of McAnarny occurred during defense counsel's cross-examination of Deputy Kellum. Deputy Kellum stated that he knew McAnarny, indicated that she had been on the scene, explained that she was no longer employed by the Sherriff's Department, stated that he did not know whether she was fired, and asserted that he did not recall whether he had given her the evidence that night.

On this meager record, we cannot say the trial court erred by concluding in Anderson's case, McAnarny's actions or her omissions in other cases were irrelevant. The duty to disclose all material, exculpatory evidence does not extend to evidence that is inadmissible at trial. *Lagrone v. State*, 942 S.W.2d 602, 615 (Tex. Crim. App. 1997); *see also* Tex. R. Evid. 402 ("Evidence which is not relevant is inadmissible."). Additionally, Anderson never asserted that the State failed to sufficiently establish a proper chain of custody with respect to the plastic bags containing methamphetamine. In light of the testimony of the witnesses who gathered the evidence at the scene, as well as the strength of the State's evidence proving Anderson's guilt, the trial court could also reasonably conclude that McAnarny's role in gathering evidence in Anderson's case was not a material fact with respect to Anderson's defense. *See Hampton*, 86 S.W.3d at 612-13. Because McAnarny's involvement in the other cases was neither shown to be relevant nor material to Anderson's case, we overrule issue six.

Extraneous Offenses

In issue seven, Anderson complains that the trial court erred by admitting evidence of other instances of his use and sale of drugs. In issue eight, Anderson asserts that the trial court erred by failing to give the jury his proposed limiting instruction about the jury's use of evidence regarding extraneous crimes.

We review claims challenging the admission of extraneous offenses under an abuse of discretion standard. *De La Paz v. State*, 279 S.W.3d 336, 343 (Tex. Crim. App. 2009). "As long as the trial court's ruling is within the 'zone of reasonable disagreement,' there is no abuse of discretion, and the trial court's ruling will be upheld." *Id.* at 343-44 (quoting *Montgomery v. State*, 810 S.W.2d 372, 391 (Tex. Crim. App. 1991) (op. on reh'g)). Generally, a trial court's ruling to admit evidence of an extraneous offense is within the zone of reasonable disagreement if the evidence is relevant to a material issue and if the probative value of that evidence is not substantially outweighed by the danger of unfair prejudice. *Id.* at 344.

Under Rule 404(b) of the Texas Rules of Evidence, evidence of other crimes, wrongs, or acts is not inadmissible "'to prove the character of a person in order to show action in conformity therewith[.]'" *Berry v. State*, 233 S.W.3d 847, 858 (Tex. Crim. App. 2007) (quoting Tex. R. Evid. 404(b)). The evidence may be admissible, however, as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Tex. R. Evid. 404(b); *see De La Paz*, 279 S.W.3d at 342-43; *see also*

Powell v. State, 63 S.W.3d 435, 439 (Tex. Crim. App. 2001) (noting that a trial court has discretion to admit extraneous offense evidence to rebut a defensive theory raised in an opening statement); *Ransom v. State*, 920 S.W.2d 288, 301 (Tex. Crim. App. 1996) (op. on reh'g) ("[E]xtraneous offenses are admissible to rebut defensive theories raised by the testimony of a State's witness during cross-examination."); *Halliburton v. State*, 528 S.W.2d 216, 219 (Tex. Crim. App. 1975) (op. on reh'g) ("If the extraneous offense is relevant in tending to disprove the defensive theory, it should be admissible.").

In Anderson's trial, the trial court could reasonably determine that Anderson's previous drug-related transactions with the Informant and the results of his urinalysis were probative to the jury's determining whether the drugs were in Anderson's actual or constructive possession, and in determining that Anderson was not in Sherber's vehicle with the drugs by accident. The trial court could have also reasonably admitted the extraneous crimes because they were probative to show that Anderson's presence at the parking lot was part of a plan to deliver the drugs to the Informant. Anderson claimed that the drugs were not his, and he claimed that he was merely a passenger in Sherber's pickup when Sherber hit the marked patrol car. Thus, the evidence of Anderson's prior drug use and sale of drugs involving the Informant was relevant to disproving Anderson's defensive theory that he had no knowledge of the drug deal with the Informant. Finally, the evidence of Anderson's prior relationship with the Informant, which involved their

involvement with drugs, was also relevant to show that Anderson knew that the meeting on this occasion with the Informant was for the purpose of delivering drugs.

The trial court stated the reasons it decided to admit the evidence which addressed Anderson's extraneous crimes. The trial court stated:

> [I]n light of the cross-examination that [the court has] heard from the defense, opening statements which alluded to the same thing, I do find that evidence of other prior drug dealings between this confidential informant and the defendant should be admissible extraneous offenses under 404[(b)]. And that they may show knowledge, opportunity, preparation, plans, scheme or design, absence of mistake or accident, on behalf of the defendant.
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> [The court is] further finding that the last page of State's Exhibit 180 . . ., which included a UA showing that this defendant had methamphetamine in his system, will also be admissible for the same purposes -- same reasons.
> . . . .
>
> [T]o show absence of mistake or accident in that this defendant, from the cross and opening statement that he had no criminal intent, and [this court] find[s] that the evidence is necessary to show an absence of mistake or accident, that there was criminal intent there. And as far as preparation, plans, scheme or design, those are also involved here with past drug dealings and transactions between this confidential informant and this defendant. Knowledge of the situation that existed of the delivery of controlled substance and to prove the motive of this defendant for being there, for being in the parking lot, for being in the pickup truck with Timothy Sherber, for those reasons.

In our opinion, the reasons the trial court gave are valid reasons for admitting the evidence about Anderson's prior transactions with the Informant and the evidence addressing his prior drug use.[5] *See* Tex. R. Evid. 404(b); *see also Powell*, 63 S.W.3d at

[5]Anderson did not object at trial nor does he argue on appeal that the trial court failed to properly balance the probative value of the evidence concerning his extraneous

439; *Ransom*, 920 S.W.2d at 301; *Halliburton*, 528 S.W.2d at 219. Issue seven is overruled.

In issue eight, Anderson argues the trial court erred by failing to give the jury a limiting instruction contemporaneous with the jury's receiving the evidence that addressed Anderson's extraneous offenses. Rule 105(a) of the Texas Rules of Evidence provides that "[w]hen evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly[.]" Tex. R. Evid. 105(a). The Court of Criminal Appeals has held that trial courts should instruct the jury during the trial about the limited purpose of evidence concerning a defendant's extraneous offenses, reasoning that giving the instruction at the end of the trial might improperly allow the jury to prematurely form a negative impression of the defendant that cannot easily be cured by an instruction in the jury charge given after the parties have rested. *Jackson v. State*, 992 S.W.2d 469, 477 (Tex. Crim. App. 1999); *see also Rankin v. State*, 974 S.W.2d 707, 712-13 (Tex. Crim. App. 1996).

On appeal, Anderson claims that the "lack of a contemporaneous instruction was harmful error[,]" but he provides no harm analysis. A trial court's failure to give a limiting instruction about extraneous offenses does not constitute constitutional error. *See*

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offenses against the prejudicial value of that evidence under Rule 403 of the Texas Rules of Evidence. *See* Tex. R. Evid. 403. Therefore, we are not asked to review the trial court's decision under Rule 403.

Jones v. State, 944 S.W.2d 642, 653 (Tex. Crim. App. 1996) (holding harmless error analysis is applicable to failure to give contemporaneous limiting instruction); *Rankin v. State*, 995 S.W.2d 210, 215 (Tex. App.—Houston [14th Dist.] 1999, pet. ref'd) (noting it was non-constitutional error when trial court gave limiting instruction to jury when jury charged but did not provide a contemporaneous instruction when the extraneous offense testimony was admitted). Any error, other than constitutional error, "that does not affect substantial rights must be disregarded." Tex. R. App. P. 44.2(b). In evaluating whether a defendant has been harmed in a case where there is a limiting instruction on extraneous offense evidence in the charge, the existence of the limiting instruction is relevant. *See Lemmons v. State*, 75 S.W.3d 513, 525 (Tex. App.—San Antonio 2002, pet. ref'd); *see also Gregory v. State*, 159 S.W.3d 254, 262 (Tex. App.—Beaumont 2005, pet. ref'd).

Here, during the guilt/innocence phase of Anderson's trial, the trial court charged the jury separately on each of Anderson's offenses. In the charge on each offense, the trial court provided a limiting instruction explaining that evidence of extraneous offenses could only be considered "in determining the intent or motive of the defendant . . . and for no other reason." Nothing in the record demonstrates that any juror failed to comply with the limiting instruction as related to either offense. On this record, we conclude that the trial court's error in failing to provide a contemporaneous instruction did not influence the jury or had but a slight effect. *See Motilla v. State*, 78 S.W.3d 352, 355-56 (Tex. Crim. App. 2002). We further conclude that the trial court's failure to instruct the

jury during the witness's testimony did not affect Anderson's substantial rights. *See id*. We overrule Anderson's eighth issue.

Confrontation Clause

In issues nine and ten, Anderson argues the trial court erroneously limited his right to impeach the Informant by prohibiting him from cross-examining the Informant to show that the Informant was not arrested and remained free from custody even though a warrant had issued for his arrest. Because Anderson contends that he was not allowed to show that the Informant received beneficial treatment by not being arrested on the outstanding warrant, Anderson contends he was denied the rights given him by the Confrontation Clause. *See* U.S. CONST. amend. VI (providing that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."); Tex. Const. art. I, § 10.

We review the trial court's decision to limit cross-examination under an abuse of discretion standard. *See Carroll v. State*, 916 S.W.2d 494, 498 (Tex. Crim. App. 1996); *Love v. State*, 861 S.W.2d 899, 903 (Tex. Crim. App. 1993) (en banc). "The Constitutional right of confrontation is violated when appropriate cross-examination is limited." *Carroll,* 916 S.W.2d at 497. The scope of appropriate cross-examination "necessarily includes cross-examination concerning criminal charges pending against a witness and over which those in need of the witness'[s] testimony might be empowered to exercise control." *Id.* at 498.

Nonetheless, a trial court may impose some limits on a party's efforts at cross-examination that are stated by a party as having been intended to reveal a witness's bias. *McDuff v. State*, 939 S.W.2d 607, 617-18 (Tex. Crim. App. 1997). For example, trial courts retain discretion to limit the scope of a witness's cross-examination to avoid harassment, prejudice, confusion of the issues, endangering the witness, or the injection of cumulative or collateral evidence. *Delaware v. Van Arsdall*, 475 U.S 673, 679, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986); *Stults v. State*, 23 S.W.3d 198, 204 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd). When a trial court limits cross-examination for a proper reason, an appellate court, in reviewing a Confrontation Clause complaint, evaluates whether despite the limitation, the witness's possible bias and motive for testifying is clear to the jury, and whether the accused, despite the limitation placed on him, received an opportunity to conduct a thorough and effective cross-examination. *See Stults*, 23 S.W.3d at 204. In cases raising confrontation complaints, the underlying facts are examined on an individual basis "to determine whether the Confrontation Clause demands the admissibility of certain evidence." *Lopez v. State*, 18 S.W.3d 220, 225 (Tex. Crim. App. 2000). In evaluating whether a trial court erred in refusing to admit specific evidence under a Confrontation Clause claim, courts balance the probative value of the proffered evidence against the appropriate reasons that the trial court could have properly limited the cross-examination of the witness. *See id.* at 222.

During Anderson's case, the jury learned that a warrant had been issued for the Informant's arrest after the Informant failed to stop and give information following an accident. The Informant testified before the jury that, although a warrant had issued, he was not arrested. The Informant also told the jury that when he met with the State's prosecutors, they instructed him to take care of the warrant, but he had not done so because he did not have the money. The Informant also told the jury that no one had promised him any benefit in exchange for his testimony. We conclude that the Informant's possible bias, as it relates to the State's failure to take Informant into custody, was clearly made known to the jury.

Additionally, the record before us shows that the trial court allowed the defendant to develop other testimony before the jury regarding the Informant's possible bias against Anderson. The Informant testified that he believed that Anderson had previously sold him drugs that were not of good quality, and the Informant agreed that he was "mad about the quality of drugs." The Informant also confirmed that the police had paid him between three and four hundred dollars to serve as an informant. The jury was also aware that the Informant had an outstanding warrant and that he had not been arrested despite his subsequent contact with State officials.[6]

[6]Following the Informant's testimony, the State informed the trial court and Anderson that it obtained a personal recognizance bond out of its concern for the Informant's safety. Later in the trial, the trial court informed the jury of the parties' stipulation that the Informant had been released on bond at the State's request. During closing argument, while asking the jury to assess the credibility of the Informant, defense

During cross-examination, the defense counsel sought more detail about the circumstances of the accident that led to the State's issuing a warrant for the Informant's arrest. The State's attorney objected and asserted that the matter was not relevant. At the bench, the trial court expressed a concern that, before testifying further, the Informant had a right to be informed regarding his right not to incriminate himself on the charge leading to the arrest warrant. During the hearing outside the presence of the jury, the trial court learned that the accident concerned a collision with a parked vehicle, and that the Informant left without providing his insurance information or providing his driver's license. According to the police, the Informant contacted them about the incident after hearing that the police were looking for a car registered to his mother-in-law, and at that point, the Informant stated that he had not realized that the car he had been driving hit another vehicle. The State noted that leaving the scene under these circumstances was a Class B misdemeanor, and that the alleged offense was not a crime of moral turpitude. After having heard evidence on the circumstances, the trial court sustained the State's relevance objections and restricted defense counsel from developing further details regarding the circumstances leading to the warrant being issued. In explaining its reasons for sustaining the State's objections, the trial court stated that additional details about the collision were not relevant, and if admitted, further testimony about the matter would

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counsel reminded the jury that the Informant benefited by not being arrested and referred to the arrangement as a "get-out-of-jail-free card."

cause delay, and would be confusing and misleading to the jury. *See* Tex. R. Evid. 401, 403.

The record shows that the jury heard evidence regarding the existence of the outstanding warrant and evidence addressing the nature of the charges on which the warrant was based. The jury also heard testimony that the Informant had not been arrested on the charge on which the warrant was based. Given the information the jury received regarding the collision and the outstanding warrant, the trial court could reasonably conclude that allowing further detail about the Informant's collision with a parked vehicle would constitute a waste of the jury's time. *See* Tex. R. Evid. 401, 403. After carefully reviewing the record, we conclude that Anderson was not deprived of his right to confront the Informant, that the bases of the Informant's possible bias were made clear to the jury, and that the trial court did not err in limiting further testimony about the Informant's collision with a parked vehicle. We overrule Anderson's ninth and tenth issues.

Recorded Interviews

After Anderson was arrested, the police interrogated him two separate times–once, at the hospital following his arrest, and the second, after the police transported him to jail. In issue thirteen, Anderson argues that "[t]he statement or parts thereof are admissible[,]" and that Anderson's "statements contain many areas that are admissible."

In his brief, Anderson suggests the trial court should have admitted the portions of his recorded statements where he denied having knowledge that a drug deal was going to happen, and portions in which he stated that he never saw the patrol car before Sherber hit it. Anderson concludes that these "selected portions of [his] statements should be admitted into evidence."

A trial court's decision to admit evidence is reviewed under an abuse of discretion standard. *Walters v. State*, 247 S.W.3d 204, 217 (Tex. Crim. App. 2007) (citing *Apolinar v. State*, 155 S.W.3d 184, 186 (Tex. Crim. App. 2005)). A trial court abuses its discretion only when the decision lies "'outside the zone of reasonable disagreement.'" *Id.* (quoting *Apolinar*, 155 S.W.3d at 186).

In his appeal, Anderson argues that some parts of his statements were admissible to show a then existing mental, emotional, or physical condition under Rule 803(3). *See* Tex. R. Evid. 803(3). However, during the trial, Anderson asked the trial court to admit his statements in their entirety; he did not ask that only parts of his recorded statements be admitted. We conclude that Anderson's complaint on appeal is not consistent with the complaint he made in the trial court; therefore, his complaint that portions of his statement should have been admitted is not been preserved for our review. *See* Tex. R. App. P. 33.1(a)(1).

However, even had Anderson limited his request to the parts of his statements he now asserts the trial court should have admitted, we note that self-serving declarations

made by a defendant during a police interview are generally considered to be inadmissible hearsay when offered into evidence by the defendant. *See Allridge v. State*, 762 S.W.2d 146, 152 (Tex. Crim. App. 1988). Moreover, the portions of the recorded statements Anderson complains the trial court did not admit were properly excluded as hearsay; each portion that Anderson argues was improperly excluded is a statement "of memory or belief" offered "to prove the fact remembered or believed[.]" Tex. R. Evid. 803(3); *Gibbs v. State*, 819 S.W.2d 821, 837 (Tex. Crim. App. 1991); *Delapaz v. State*, 228 S.W.3d 183, 206-11 (Tex. App.—Dallas 2007, pet. ref'd) (discussing the difference between a stand of mind exception to the hearsay rule and a statement that is inadmissible if it is "'a statement of memory or belief'" offered to "'prove the fact remembered or believed'"). We also disagree that the statements at issue can be properly considered as present sense impressions, given the time that elapsed between the events and the point that Anderson made the statements. *See* Tex. R. Evid. 803(1). We hold Anderson failed to preserve his complaint concerning the admission of portions of his statements for review, and that if preserved for review on appeal, the trial court did not abuse its discretion in refusing to admit the portions of Anderson's statements that Anderson now argues were admissible. We overrule Anderson's thirteenth issue.

In issues eleven and twelve, Anderson contends that the trial court's denial of his request to admit his statements violated his due process rights under the Texas and United States Constitutions. However, Anderson did not assert any constitutional claim when he

asked the trial court to admit his recorded statements into evidence. Because Anderson did not give the trial court an opportunity to rule on his constitutional arguments, the arguments are not preserved for our review on appeal. *See* Tex. R. App. P. 33.1(a); *Aldrich v. State*, 104 S.W.3d 890, 894-95 (Tex. Crim. App. 2003) (stating that even constitutional error may be waived). We overrule issues eleven and twelve.

Having considered each of Anderson's arguments and issues, and having overruled each of the issues he has raised on appeal, we affirm the trial court's judgments.

AFFIRMED.

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HOLLIS HORTON
Justice

Submitted on June 17, 2011
Opinion Delivered December 21, 2011
Do Not Publish

Before McKeithen, C.J., Gaultney and Horton, JJ.