In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-16-00006-CR

WALLACE JOSEPH GREEN, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 252nd District Court
Jefferson County, Texas
Trial Cause No. 15-22864

MEMORANDUM OPINION

In ten issues, Wallace Joseph Green appeals his conviction for possession of a controlled substance, namely cocaine, in an amount of at least one gram or more but less than four grams. *See* Tex. Health & Safety Code. Ann. § 481.115(c) (West 2017). In Green's first two issues, he argues that the evidence is insufficient to support his conviction. In issues three, four, and five, Green challenges the trial court's ruling denying his motion to suppress. *See* U.S. CONST. amend. IV, XIV;

Tex. Const. art. I, § 9; Tex. Code Crim. Proc. Ann. art. 38.23(a) (West 2005). In issues six, seven, and eight, Green argues the trial court abused its discretion by admitting the same evidence that was the subject of his motion to suppress. *See id.* In issue nine, Green contends the State failed to establish a sufficient chain of custody tying him to the exhibit containing the cocaine that was admitted into evidence in his trial. In issue ten, Green argues the trial court erred by failing, sua sponte, to include language in the charge advising the jury that it could disregard evidence if it found that the evidence had been obtained by police in violation of his constitutional rights.[1] *See* Tex. Code Crim. Proc. Ann. art. 38.23(a).

We conclude that Green's issues have no merit. Accordingly, we affirm the trial court's judgment.

Background

Six witnesses testified in Green's trial. The State's first witness, Jesus Torres, testified that around 6:00 p.m. on the evening of November 3, 2014, he was on his way to a convenience store near his home when he "noticed a man that was driving a vehicle, went through a yield sign and a stop sign that -- like if it wasn't there and

[1] Green's tenth issue refers to article 38.22, but the argument presented in his brief makes it clear that his argument actually relies upon article 38.23(a) of the Code of Criminal Procedure to assert that the trial court had a duty to sua sponte instruct the jury that it could disregard any evidence that it determined the police obtained in violation of Green's constitutional rights.

actually stopped on the third stop sign on the road[.]" Torres explained that after pulling behind the car, which the evidence subsequently showed was being driven by Green, Green's car did not move for "a minute or so." At that point, Torres backed up, went around Green's car, and went on to the store. According to Torres, as he was pulling around Green's car, he noticed that Green was holding the steering wheel and looking straight ahead. Torres also testified that approximately twenty minutes later when he returned from the store, he noticed that Green's car was still stopped in the intersection at the stop sign. According to Torres, when he passed Green on his way home, he observed Green leaning toward the passenger's side of the car. Torres testified he pulled into his driveway, walked back toward Green's car, and that he called 911. Torres explained that when he approached Green's car on foot, he thought that Green was either passed out or asleep, and he became concerned "that [Green] probably had some medical issues."

Clevon Buxton, a police officer employed by the Port Arthur Police Department, responded to the call that Torres made to 911. During the trial, Officer Buxton identified Green as the individual that he saw in the driver's seat of a car that was stopped at an intersection in Port Arthur on November 3, 2014. Officer Buxton explained that as he approached the car, he noticed that its brake lights were on, that it was in gear, and that Green was slumped over the steering wheel. Officer Buxton

explained that when he opened the driver's door and reached inside and attempted to place the transmission into park, Green woke up. Officer Buxton indicated that he asked Green to place the car in park, but Green shifted the car's transmission into reverse. According to Officer Buxton, Green appeared to be "complacent" and "kind of dazed."

Officer Buxton explained that medical responders and a fire truck came to the scene while he was dealing with getting Green out of his car. Officer Buxton was able to stop Green's car by reaching inside, placing the transmission into park, turning it off, and removing the keys. When Green got out, he stumbled and fell, first to his knees and then "flat on his face." Officer Buxton explained that when he overheard Green talking with the medical responders who at that point were on the scene, Green was slurring his speech, Green's eyes were "glossy," and his reactions appeared to be slow. According to Officer Buxton, Green was not cooperative with the requests made by the medical responders who came to the intersection, and he heard Green tell them that he had smoked marijuana. After Green refused the offer the medical responders made to treat him, Officer Buxton placed Green under arrest based on his suspicion that Green had been driving while intoxicated.

Following Green's arrest, Officer Buxton searched Green's clothing. Officer Buxton found a baggie containing a "white rock-like substance" in the pocket of

Green's pants. According to Officer Buxton, after he took the baggie from Green (Green's baggie), Officer Randy Daws took the baggie from him, and he then took Green to jail. Officer Buxton identified Green's baggie during Green's trial, and he testified that Green's baggie contained an off-white substance that he found in Green's pocket following Green's arrest.

Officer Jimmy Whitehead testified as the State's third witness. According to Officer Whitehead, Officer Buxton was already at the intersection when he arrived. Officer Whitehead explained that upon arriving at the intersection, he saw Green lying on the ground, Officer Buxton was questioning Green, and he noticed that Green had "very red glassy eyes." Officer Whitehead testified that it appeared to him that Green "was going unconscious" while Officer Buxton was attempting to question him.

Officer Daws testified after Officer Whitehead completed his testimony. Officer Daws explained that when got to the intersection, he saw Green on the ground. Officer Daws stated that based on what he saw, he thought Green was "very intoxicated." He heard Green slurring his speech, he observed Green refuse any medical treatment, and he saw Officer Buxton arrest and search Green. According to Officer Daws, while Officer Buxton was searching Green, he saw Officer Buxton remove a baggie from Green that contained an off-white substance. Officer Daws

explained that after he saw the baggie taken from Green's pocket, Officer Buxton placed Green's baggie on the trunk of his patrol car. According to Officer Daws, he subsequently took Green's baggie from the trunk of the patrol car to the police station and field tested the substance in the baggie to see if it was contraband. Officer Daws testified that the field test on the substance inside Green's baggie showed that the substance contained cocaine. Officer Daws placed Green's baggie inside another baggie (the container), initialed and dated the container, sealed it, and he then left the container in an evidence locker at the police station. When the prosecutor showed Officer Daws the container, which was marked as Exhibit 2A during the trial, Officer Daws confirmed that Green's baggie was inside.

Officer Daws explained that he was the officer who collected the items from Green's car that were later marked and admitted in Green's trial as Exhibits 2B and 2C. According to Officer Daws, he obtained these items from Green's car while inventorying the car before it was towed. He also explained that the inventory was performed pursuant to the policy of the department so that the department had a document showing the property inside a car before the car was towed. According to Officer Daws, when he performed an inventory on Green's car, he found two "hand-rolled cigar[s] possibly containing synthetic marijuana" and a "bag containing synthetic marijuana" inside the car. Officer Daws placed these items into baggies,

he marked the two baggies that he used to hold items he took from Green's car with the date and his badge number, and he logged the two baggies, which were marked as Exhibit 2B and 2C in Green's trial, into evidence at the station. Officer Daws identified Exhibits 2B and 2C in the trial as the baggies containing the items that he removed from Green's car.

Jennifer Antoine was the State's fifth witness. She explained that her job duties as the property manager for the Port Arthur Police Department included securing evidence submitted to the Department by other officers so the evidence could be used in court. According to Antoine, the items that Officer Daws logged into evidence in Green's case were all placed into an envelope, which was marked in Green's trial as Exhibit 2. Antoine testified that she took the envelope to the Jefferson County Regional Crime Lab so that the contents in the baggies inside could be tested. Antoine explained that the stickers on the envelope marked as Exhibit 2 had a number that matched the numbers on the stickers that Officer Daws used on the container for the baggy taken from Green and on the baggies used to hold the items that were removed from Green's car. Antoine testified that after the lab tested the contents in the baggies in the envelope, she retrieved the envelope containing the items from the lab, and she kept it in a locked box at the department until she was told the evidence was needed for Green's trial.

The contents of the baggies were tested at the Jefferson County Regional Crime Lab by Chris Fontenot, a forensic scientist. Fontenot, the State's sixth witness, explained that the lab received the envelope, marked at trial as Exhibit 2, from the Port Arthur police. Fontenot testified that he analyzed the contents in the baggies in Exhibit 2 and he then prepared a written report regarding his analysis of the contents in the baggies that were marked at trial as Exhibits 2A, 2B, and 2C.

Fontenot's testimony focused primarily on the contents in Exhibit 2A, since his tests on the contents of Exhibits 2B and 2C, which were the items removed from Green's car, were inconclusive. Fontenot's testimony indicates that when he inspected Exhibit 2A, Green's baggie was torn and the off-white substance in it was no longer entirely contained inside Green's baggie but was also inside the container used to hold Green's baggie. Fontenot's testimony reflects that he weighed the off-white substance that he found in both Green's baggie and the container, but he weighed the substances separately. According to Fontenot, the off-white substance in Green's baggie weighed 1.939 grams, and the off-white substance not contained in Green's baggie but in the container holding Green's baggie weighed 1.022 grams. Fontenot testified that he analyzed the off-white substance inside Green's baggie, but he did not analyze the off-white substance that had spilled from Green's baggie into the container. According to Fontenot, the substance in Green's baggie tested

positive for cocaine. Fontenot further explained that he took the off-white substance that he removed from Green's baggie that was not needed in his tests and placed it into a lab bag, which he then placed into Exhibit 2A.

Fontenot's report showing the results of the analysis that he performed on Exhibits 2A, 2B, and 2C was admitted into evidence without objection. Fontenot explained in Green's trial that he did not test the contents that had spilled into the container marked Exhibit 2A because the contents in the container "appeared to be substantially similar [to the contents he analyzed], and we test to a penalty weight threshold." Fontenot also testified that he tested the substances in Exhibits 2B and 2C, but that those tests were inconclusive.

During Fontenot's testimony, Green's attorney objected to the prosecutor's request to admit Exhibits 2A, 2B, and 2C into evidence. Green's attorney argued that the State failed to introduce sufficient testimony to establish a sufficient chain of custody tying Green to the contraband placed in the exhibits, and that the search and seizure of the items from Green and from his car were unreasonable and violated Green's constitutional rights.[2] The trial court overruled Green's objections, and admitted Exhibits 2, 2A, 2B, and 2C into evidence.

---

[2] Green relied on the Fourth Amendment to the United States Constitution and article I, section 9, of the Texas Constitution when he objected that the exhibits were inadmissible because they were the fruits of an illegal search. U.S. CONST. amend.

When the State rested, Green moved for an instructed verdict, arguing that the State had not introduced sufficient evidence to prove that Green was guilty of possession of cocaine. Additionally, Green clarified that with respect to his motion to suppress, he was claiming that the police did not have probable cause to justify Green's arrest for driving while intoxicated, which he argued made the search that followed illegal. The trial court denied Green's motion. Subsequently, Green called no witnesses during the guilt-innocence phase of his trial. At the conclusion of the trial, the jury found Green guilty of possessing cocaine with an aggregate weight of at least one gram or more but less than four grams.

Admissibility of the Fruits of the Search

In issues three through eight, Green argues that the trial court erred when it overruled his motion to suppress and his objections to the admission of Exhibits 2, 2A, 2B, and 2C. For convenience, we address these issues first.

Green argues that the police did not have probable cause to justify Officer Buxton's decision to arrest Green for driving while intoxicated. Green concludes

---

IV, Tex. Const. art. I, § 9. Additionally, Green filed a pretrial motion to suppress, which addressed his objections to the same exhibits. On the morning of trial, the trial court agreed that it would decide Green's objections to the evidence that were the subject of his motion to suppress during Green's trial.

that if probable cause did not exist for his detention, then his arrest and the search of his car that followed were unlawful.

We review a trial court's ruling on a motion to suppress evidence for abuse of discretion, and in our review, we use a bifurcated standard. *Amador v. State*, 221 S.W.3d 666, 673 (Tex. Crim. App. 2007) (citing *Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997)). The bifurcated standard requires the reviewing court to give almost total deference to the trial court's findings if they were based on the trial court's findings of historical fact, or if the trial court resolved mixed questions of law and fact if the trial court's findings turned on the court's evaluation of the credibility and demeanor of the witnesses who gave the testimony relevant to the trial court's decision on the motion. *Id*. We use a de novo standard to review mixed questions of law and fact that do not depend upon the credibility and demeanor of the witnesses whose testimony was relevant to the trial court's ruling. *Id*. (quoting *Montanez v. State*, 195 S.W.3d 101, 107 (Tex. Crim. App. 2006)); *Guzman*, 955 S.W.2d at 89. Because no findings of fact were requested or filed regarding the ruling the trial court made on Green's motion to suppress, we "impl[y] the necessary fact findings that would support the trial court's ruling if the evidence (viewed in the light most favorable to the trial court's ruling) supports these implied fact findings."

State v. Kelly, 204 S.W.3d 808, 818-19 (Tex. Crim. App. 2006); *accord State v. Ross,* 32 S.W.3d 853, 855 (Tex. Crim. App. 2000).

In this case, Green's objections to Exhibits 2, 2A, 2B and 2C required the trial court to decide whether the witnesses who observed Green at the scene provided accurate and truthful accounts about what they observed regarding whether Green had lost normal control over his mental and physical faculties. Therefore, the trial court's conclusion that Green was exhibiting signs of intoxication that gave a police officer sufficient probable cause to justify Green's arrest was a matter the trial court resolved as a mixed question of law and fact. *See Amador,* 221 S.W.3d at 673; *Montanez*, 195 S.W.3d at 108-09; *Johnson v. State*, 68 S.W.3d 644, 652-53 (Tex. Crim. App. 2002).

In reviewing the testimony of the witnesses who observed Green before he was arrested, we are required to view their testimony about what they observed in the light most favorable to the trial court's ruling. *Kelly*, 204 S.W.3d at 818; *see also State v. Duran*, 396 S.W.3d 563, 571 (Tex. Crim. App. 2013). In this case, Green did not ask the trial court to provide him with written findings relevant to Officer Buxton's decision to arrest Green. Therefore, we imply that the trial court found that Officer Buxton had probable cause to believe that Green had lost the normal use of his mental or physical faculties due to the introduction of alcohol, a controlled

substance, a drug, a dangerous drug, or a combination of those substances into his body. *See* Tex. Penal Code Ann. § 49.01(2) (West 2011); *see also Gutierrez v. State*, 221 S.W.3d 680, 687 (Tex. Crim. App. 2007). On appeal, we will reverse the trial court's ruling "only if it is arbitrary, unreasonable, or 'outside the zone of reasonable disagreement.'" *State v. Story*, 445 S.W.3d 729, 732 (Tex. Crim. App. 2014) (quoting *State v. Dixon*, 206 S.W.3d 587, 590 (Tex. Crim. App. 2006)). Under the circumstances in Green's case, the ruling that Green challenges, whether Officer Buxton had sufficient probable cause to arrest Green, is a ruling that is given almost total deference. *See Amador*, 221 S.W.3d at 673.

The Fourth Amendment to the United States Constitution protects citizens against unreasonable searches and seizures by government officials. U.S. CONST. amend. IV; *see also* Tex. Code Crim. Proc. Ann. art. 38.23(a) (explaining that no evidence obtained in violation of the United States and Texas constitutions shall be admitted into evidence). A defendant asserting that a search violated his constitutional rights bears the burden of producing evidence to rebut the presumption of proper conduct by law enforcement. *State v. Woodard*, 341 S.W.3d 404, 412 (Tex. Crim. App. 2011). The defendant can satisfy this burden by establishing the search occurred without a warrant. *Amador*, 221 S.W.3d at 672. The burden then shifts to the State to prove the search was reasonable under the totality of the circumstances.

Id. at 672-73. The State may satisfy its burden by proving the existence of an exception to the warrant requirement. *See Gutierrez*, 221 S.W.3d at 685.

It is undisputed that the police did not obtain a warrant to search Green or to search his car. Warrantless searches are presumptively unreasonable. *McGee v. State*, 105 S.W.3d 609, 615 (Tex. Crim. App. 2003). However, there are a number of exceptions to the requirement that police obtain a warrant before conducting a search, and "[i]t is the State's burden to show that the search falls within one of these exceptions." *Id.* Two of the recognized exceptions to the requirement that police obtain a warrant before conducting a search are the search-incident-to-arrest exception and the exception that allows the police to inventory a car when the inventory has been performed pursuant to the police department's policies. *See Colorado v. Bertine*, 479 U.S. 367, 371 (1987) (concluding that an inventory search may be reasonable even though conducted without a warrant when the search is performed based on police caretaking procedures); *United States v. Robinson*, 414 U.S. 218, 224 (1973) ("It is well settled that a search incident to a lawful arrest is a traditional exception to the warrant requirement of the Fourth Amendment."); *see also State v. Rodriguez*, 521 S.W.3d 1, 10 (Tex. Crim. App. 2017) (listing various exceptions that include the search-incident-to-arrest and inventory-search exceptions).

In his brief, Green suggests that the State's evidence that he was unconscious while sitting in the driver's seat of the car and stopped at a stop sign did not show that he was intoxicated because this same evidence would be consistent with the way a person would look if he was suffering from some unexplained medical problem. However, there was no testimony showing that Green actually had any medical problem, as the testimony of Torres was just that he suspected based on what he observed that Green might have one. The evidence showed that Green refused medical treatment, and the trial court was not required to give any weight to Torres' subjective impression that Green might have been suffering from some undefined medical issue. Officers Buxton, Whitehead, and Daws all testified to their observations of Green, and their observations are consistent with the trial court's conclusion that Green exhibited signs of intoxication when the police encountered him at the intersection. In our opinion, the evidence before the trial court allowed the trial court to reasonably conclude that Officer Buxton had sufficient facts to justify his decision to arrest Green for driving while intoxicated.

Because Officer Buxton had probable cause to support his decision to arrest Green, it follows that the police could lawfully search Green without first obtaining a warrant. *State v. Granville*, 423 S.W.3d 399, 410 (Tex. Crim. App. 2014) ("Under the Fourth Amendment, police officers may search an arrestee incident to a lawful

arrest.”). We conclude the trial court acted properly by denying Green’s objection that Exhibit 2A was seized in violation of Green’s constitutional rights.

Next, we address Exhibit 2B and 2C, the exhibits that contain the evidence seized from Green’s vehicle. In Green’s case, Officer Buxton explained that Green’s car was towed because it was blocking traffic. During Green’s trial, Officer Daws testified that he did the inventory of Green’s car based on a policy of the Department requiring inventories on vehicles that are to be towed. It is well-settled law that Texas law allows an automobile to be impounded if the driver is removed from the automobile and placed under a custodial arrest where there are not any other alternatives available to ensure the protection of the car. *Benavides v. State*, 600 S.W.2d 809, 811 (Tex. Crim. App. 1980); *Jackson v. State*, 468 S.W.3d 189, 195 (Tex. App.—Houston [14th Dist.] 2015, no pet.). The inventory must be conducted in good faith and pursuant to a reasonable standardized police procedure. *Jackson*, 468 S.W.3d at 195. The State must show that the search occurred because a policy on conducting an inventory of vehicles exists, and that its officers followed the department’s policy. *Id.* Typically, the testimony of a police officer establishes that the department has a policy on inventorying vehicles and that the policy was followed. *See Harris v. State*, 468 S.W.3d 248, 255 (Tex. App.—Texarkana 2015, no pet.).

In this case, the testimony of Officers Buxton and Daws satisfied the State's burden to prove that a policy requiring an inventory existed and that Green's car was inventoried based on that policy. There was no testimony tending to show that any alternatives existed to towing Green's car, as the car was in an intersection and Green was the only person in it when he was found by police. We conclude the trial court acted within its discretion when it denied Green's objection claiming that Exhibits 2B and 2C had been seized in violation of his right not to have his car searched without a warrant.

We have explained that the trial court did not abuse its discretion by admitting Exhibits 2A, 2B, and 2C into evidence. Consequently, the trial court did not abuse its discretion by admitting Exhibit 2, the envelope that contained these three exhibits. Because the trial court had the discretion to admit Exhibits 2, 2A, 2B, and 2C, we overrule issues three through eight.

Chain of Custody

In issue nine, Green argues that the State failed to prove the chain of custody that was required to tie Exhibits 2, 2A, 2B, and 2C to Green. Generally, Rule 901(a) requires a proponent of an exhibit to present evidence sufficient to establish a chain of custody to authenticate that the evidence is what the party offering it claims it to be. Tex. R. Evid. 901(a). In his appeal, Green argues that the fact that cocaine was

found outside Green's baggie in the container and the fact that a lab baggie was introduced into Exhibit 2A when the contents in Exhibit 2A were tested is evidence showing that someone tampered with Exhibit 2A prior to the trial. Green concludes that the exhibits in Exhibit 2 should not have been admitted into evidence because the evidence showed that someone tampered with Exhibit 2A after Officer Daws logged the container marked as Exhibit 2A into evidence at the property room maintained by the Port Arthur Police Department.

Once a party has shown the evidence that it is seeking to introduce is authentic, the trial court enjoys a great deal of discretion in deciding whether to admit the evidence in a trial. *See Druery v. State*, 225 S.W.3d 491, 503 (Tex. Crim. App. 2007). The Court of Criminal Appeals has explained that "[t]he chain of custody is conclusively proven if an officer is able to identify that he or she seized the item of physical evidence, put an identification mark on it, placed it in the property room, and then retrieved the item being offered on the day of trial." *Stoker v. State*, 788 S.W.2d 1, 10 (Tex. Crim. App. 1989), *abrogated on other grounds by Leday v. State*, 983 S.W.2d 713 (Tex. Crim. App. 1998); *see also Martinez v. State*, 186 S.W.3d 59, 62 (Tex. App.—Houston [1st Dist.] 2005, pet. ref'd) (stating that the chain of custody issues are proven "once the State has shown the beginning and the end of the chain of custody, particularly when the chain ends at a laboratory"). However,

the issue Green raises is not whether the State conclusively proved an unbroken chain of custody to the exhibits, but whether the trial court abused its discretion by admitting the exhibits based on the chain the State established. Generally, in the absence of evidence of tampering, most questions concerning the care and custody of a substance after it is taken into custody by police are matters that relate to the weight that the factfinder might choose to attach to the evidence, and not its admissibility. *See Lagrone v. State*, 942 S.W.2d 602, 612 (Tex. Crim. App. 1997). Generally, authenticating evidence for the purpose of showing that it is admissible amounts to showing that the item was tagged in some manner by the police when it was seized, and then having an officer who saw the evidence tagged identify the evidence during the defendant's trial. *See Stoker*, 788 S.W.2d at 10.

In Green's case, although Officer Buxton did not mark Green's baggie, he identified it in the trial as the baggie that he removed from Green's pocket. Additionally, Officer Daws testified during Green's trial that he observed Officer Buxton remove a baggie containing an off-white rock-like substance from Green's pocket, and that he saw Officer Buxton place Green's baggie on the trunk of his patrol car. Officer Daws explained that he took Green's baggie from Officer Buxton's patrol car, placed it in his patrol car, and he then took it to the police station, where he field tested the substance for cocaine. According to Officer Daws, after

testing the substance in Green's baggie, he placed Green's baggie inside a container, sealed it, and then dated and placed his badge number on the container. Officer Daws identified the container that he used to hold Green's baggie as Exhibit 2A when he testified during Green's trial.

Officer Daws also explained during the trial that he searched Green's car after Officer Buxton arrested Green. According to Officer Daws, he placed the items he removed from Green's car into separate baggies, which he also dated and initialed. These two baggies were marked in Green's trial as Exhibits 2B and 2C. According to Officer Daws, after labeling and sealing all three baggies, he placed them in a locker in the property room operated by the Port Arthur Police Department. On the day Green's trial began, Officer Daws testified that he retrieved the evidence that he had gathered during his investigation into Green's case from the Department's property room so that the evidence could be used in Green's trial.

Antoine and Fontenot also explained their respective roles with the exhibits that Green argues should not have been admitted into evidence in his trial. Fontenot's testimony indicates that Exhibit 2A consists of three separate baggies: (1) Green's baggie, (2) the baggie that Officer Daws used as a container, and (3) the baggie that Fontenot placed inside Daws' baggie to hold the cocaine that he took from Green's baggie and tested. In our opinion, the testimony before the jury relevant to Exhibit

2A allowed the trial court to conclude that the contraband inside the exhibit, whether in Green's baggie, the container, or the baggie that Fontenot placed in the container, consisted of contraband that Officer Buxton took from Green. In summary, the testimony from the trial explains why some of the contents in Green's baggie spilled into the container Officer Daws put Green's baggie into, and explains why Fontenot placed a baggie into the container when the container was in the lab. Green does not argue that there was other evidence of tampering relevant to Exhibits 2B and 2C that is separate from his arguments that are directed at Exhibit 2A. Because the evidence does not show that anyone added contraband to Exhibit 2A, and because the evidence allowed the trial court to conclude that the contraband in Exhibit 2A was all taken from Green, we conclude the trial court did not abuse its discretion by overruling Green's chain of custody objection and admitting Exhibits 2, 2A, 2B, and 2C in Green's trial. *See* Tex. R. Evid. 901(a). We overrule Green's ninth issue.

Sufficiency of the Evidence

In issue one, Green argues the evidence is legally insufficient to sustain his conviction for possession of cocaine. In issue two, Green argues the trial court erred by denying his motion for instructed verdict. A challenge to a trial court's ruling on a directed verdict is treated as a challenge to the legal sufficiency of the evidence in reviewing the arguments presented by defendants on appeal. *Williams v. State*, 937

S.W.2d 479, 482 (Tex. Crim. App. 1996). Therefore, we address issues one and two together.

When reviewing a challenge to the sufficiency of the evidence admitted in a trial, we determine "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Johnson v. State*, 364 S.W.3d 292, 293-94 (Tex. Crim. App. 2012) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). The jury is the sole judge of the credibility of the witnesses and the weight that should be afforded the testimony. *Montgomery v. State*, 369 S.W.3d 188, 192 (Tex. Crim. App. 2012). In a jury trial, the jury is given the responsibility to decide what testimony that it wants to choose to believe and to decide the weight that it wants to give to the testimony of the various witnesses that testify. *See Penagraph v. State*, 623 S.W.2d 341, 343 (Tex. Crim. App. [Panel Op.] 1981). In resolving a defendant's sufficiency challenge on appeal, our resolution must be deferential to the responsibility that juries are given to resolve the conflicts that exist between the testimony the witnesses gave when they testified in a trial, to weigh the evidence that was admitted in the trial, and to draw reasonable inferences from the evidence the jury considered reliable in determining the defendant's guilt. *See Hooper v. State,* 214 S.W.3d 9, 13 (Tex. Crim. App. 2007). We further note that "'[c]ircumstantial

evidence is as probative as direct evidence in establishing [a defendant's guilt], and circumstantial evidence alone can be sufficient to establish guilt.'" *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007) (quoting *Hooper*, 214 S.W.3d at 13). As a reviewing court, our role is to "'determine whether the necessary inferences are reasonable based upon the combined and cumulative force of all the evidence when viewed in the light most favorable to the verdict.'" *Id*. (quoting *Hooper*, 214 S.W.3d at 16-17).

In Green's trial, and based on Green's indictment, the State was required to prove beyond a reasonable doubt that Green intentionally or knowingly possessed cocaine that weighed at least one gram. *See* Tex. Health & Safety Code Ann. § 481.115(c). The evidence shows that after Green was arrested, he had an off-white rock substance in a baggie in his pants' pocket. The substance that remained inside the baggie that Officer Buxton took from Green was subsequently weighed and tested at the Beaumont Crime Lab by Fontenot. Fontenot's tests showed that the sample removed from Green's baggie, which was taken from Green's pocket, weighed 1.939 grams, and the sample that was tested showed that the sample contained cocaine.

Viewed in the light most favorable to the verdict, we conclude that the evidence admitted in Green's trial authorized the jury to convict Green for

possessing a controlled substance, namely cocaine, that weighed at least one gram. *See Jackson*, 443 U.S. at 320; *Brooks v. State*, 323 S.W.3d 893, 896 (Tex. Crim. App. 2010). Green's first and second issues are overruled.

Charge Error

In issue ten, Green argues the trial court was required to instruct the jury, without having been requested to do so by his attorney, that the jury could disregard any evidence that it concluded police had illegally obtained. *See* Tex. Code Crim. Proc. Ann. art. 38.23(a). The record shows that in the charge conference, Green's attorney never lodged any objections to the charge.

When reviewing jury-charge issues, we first determine whether an error exists. *Phillips v. State*, 463 S.W.3d 59, 64 (Tex. Crim. App. 2015). It would be error to admit evidence obtained against a defendant that was illegally seized by police in violation of a defendant's constitutional rights. *See* Tex. Code Crim. Proc. Ann. art. 38.23(a) ("No evidence obtained by an officer or other person in violation of [the Texas or United States constitutions] shall be admitted in evidence against the accused on the trial of any criminal case.") When there is evidence admitted in a trial that creates a question regarding whether "the fruits of a police-initiated search or arrest were illegally obtained, 'the jury shall be instructed that if it believes, or has a reasonable doubt, that the evidence was obtained in violation of the provisions of

this [a]rticle, then and in such event, the jury shall disregard any such evidence so obtained.'" *Robinson v. State*, 377 S.W.3d 712, 719 (Tex. Crim. App. 2012) (quoting Tex. Code Crim. Proc. Ann. art. 38.23(a)).

"A defendant's right to the submission of jury instruction under [a]rticle 38.23(a) is limited to disputed issues of fact that are material to his claim of a constitutional or statutory violation that would render evidence inadmissible." *Madden v. State*, 242 S.W.3d 504, 509-10 (Tex. Crim. App. 2007). To justify the necessity of an article 38.23(a) instruction, there must be controverted evidence demonstrating a "'*factual* dispute about how the evidence was obtained.'" *Robinson*, 377 S.W.3d at 719 (quoting *Garza v. State*, 126 S.W.3d 79, 85 (Tex. Crim. App. 2004)). In other words, before the trial court is required to instruct the jury that it can disregard evidence, the record must include evidence sufficient to create a genuine issue of material fact on whether the evidence was illegally obtained. *See Madden*, 242 S.W.3d at 513. "Where the issue raised by the evidence at trial does *not* involve controverted historical facts, but only the proper application of the law to undisputed facts, that issue is properly left to the determination of the trial court." *Robinson*, 377 S.W.3d at 719.

Green argues that the testimony before the jury raised a genuine issue of material fact about whether the evidence the police illegally searched him and his

car. In his argument, Green relies on the presumption that the searches were unlawful because they were conducted without a search warrant. He also argues that the evidence allowed the jury to infer that his condition as described by the officers who encountered him at the intersection indicated he had an undefined medical condition that explained his symptoms and appearance. However, we have already explained in resolving Green's other issues that the search-incident-to-arrest exception and the inventory-search exception allowed the searches that occurred in Green's case. *See Robinson*, 414 U.S. at 225; *Bertine*, 479 U.S. at 371.

We have previously explained why the searches that Green complains about in his appeal were lawful warrantless searches under recognized exceptions to the Fourth Amendment. We have rejected Green's complaints that the trial court did not properly apply the search-incident-to-arrest and the inventory-search exceptions to the facts of his case. In our opinion, the legality of the searches the police conducted on Green and on his car did not depend on the jury's resolution of disputed historical facts, as the testimony relevant to the reasons the searches occurred was undisputed. We conclude the trial court was not required to charge the jury that it could disregard evidence that it found had been illegally obtained by police because there was no evidence showing that the evidence was illegally obtained. *See Robinson*, 377 S.W.3d at 719; *Madden*, 242 S.W.3d at 513. Given our conclusion, we further

conclude that no analysis for harm is required. *See Villarreal v. State*, 453 S.W.3d 429, 433 (Tex. Crim. App. 2015) (explaining that an unpreserved charge error is reviewed based on the existence of egregious harm). Issue ten is overruled.

Conclusion

We conclude that Green's issues are without merit. We affirm the trial court's judgment.

AFFIRMED.

____

HOLLIS HORTON
Justice

Submitted on May 23, 2017
Opinion Delivered November 8, 2017
Do Not Publish

Before Kreger, Horton and Johnson, JJ.