In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-17-00022-CR

RICHARD ELTON SMITH JR., Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 252nd District Court
Jefferson County, Texas
Trial Cause No. 15-22128

MEMORANDUM OPINION

A jury found appellant Richard Elton Smith Jr. guilty of delivery of a controlled substance, namely cocaine, in an amount of at least one gram or more and less than four grams. The trial court sentenced Smith to a term of five years in prison. In two issues on appeal, Smith challenges the legal sufficiency of the evidence supporting his conviction. We affirm the trial court's judgment.

BACKGROUND

An undercover officer employed with the Beaumont Police Department testified that in March 2014, he was working as a narcotics detective performing undercover buys. The officer explained that he contacted Smith, who was a cocaine trafficker, and requested to purchase one hundred dollars' worth of cocaine. The officer testified that when he met Smith in a parking lot, the officer leaned into the passenger side of Smith's vehicle, handed Smith the money, and Smith gave the officer a "little baggy of two chunks of cocaine." The officer explained that he put the baggy of cocaine in an envelope and transported it to the crime lab. The trial court admitted State's exhibit four, which, according to the officer, contains the cocaine that Smith gave Courts during the drug transaction.

Rebekah Sweetenham, a forensic scientist with the Jefferson County Regional Crime Lab, testified that she has specialized training in all areas of drug chemistry analysis. Sweetenham testified that she analyzed the contents in State's exhibit four by documenting the description, weighing the evidence, and performing three tests. Sweetenham testified that after she performed a color test, which indicated the substance was possibly cocaine, she performed a confirmation using instrumental analysis. Sweetenham explained that she used a two-part test, a gas chromatograph and a mass spectrometer, to get two confirmatory tests. According to Sweetenham,

her analysis showed that the contents of State's exhibit four included 1.541 grams of cocaine. Sweetenham testified that cocaine is a Penalty Group 1 narcotic under the Texas Controlled Substances Act.

Sweetenham explained that in determining the weight of the cocaine, she weighed both chunks together using a weigh boat, but that she subtracted the weigh boat's weight to get the actual net weight of the substance. Sweetenham testified that the weight of 1.541 grams included adulterants and dilutants. Sweetenham explained that adulterants are generally something that can be added to a substance to give it bulk, add weight, or enhance the effect of the drug, and that a dilutant might be something that could dilute the drug or add weight. Sweetenham testified that her notes indicated that "there was a clear Ziploc containing off-white chunky powder[,]" and she explained that a powder is a solid. Sweetenham further testified that the two pieces of the chunky powder looked consistent with one another and appeared to be of the same composition. According to Sweetenham, she used a scalpel to shave two sample pieces from the chunky powder, and she testified that she was "not sure which pieces or piece I tested or if both were tested." Sweetenham explained that because her procedure requires her to treat a chunky powder as one sample, she weighed everything in the bag together, and that she was "not here to say that every single thing in this bag is pure cocaine."

At the conclusion of the State's case in chief, Smith moved for an instructed verdict based on the State's failure to produce legally sufficient evidence. The trial court overruled Smith's motion.

ANALYSIS

In issue one, Smith complains that the evidence is legally insufficient to sustain his conviction because the State failed to prove, beyond a reasonable doubt, that the substance alleged to have been delivered was cocaine in an amount of at least one gram or more and less than four grams. Smith argues that the testimony of the State's forensic scientist failed to establish that she obtained samples from the two distinct pieces of the substance that the undercover officer received, and thus there was no evidence that the entire substance contained cocaine. According to Smith, the State failed to establish an accurate weight of the substance containing cocaine. In issue two, Smith argues that the trial court erred by denying his motion for directed verdict because the evidence is insufficient to support his conviction. We treat Smith's complaint that the trial court erred by denying his motion for a directed verdict as a challenge to the legal sufficiency of the evidence. *See Williams v. State*, 937 S.W.2d 479, 482 (Tex. Crim. App. 1996).

The "*Jackson v. Virginia* legal-sufficiency standard is the only standard that a reviewing court should apply in determining whether the evidence is sufficient to

support each element of a criminal offense that the State is required to prove beyond a reasonable doubt." *Brooks v. State*, 323 S.W.3d 893, 895 (Tex. Crim. App. 2010). We assess all the evidence in the light most favorable to the prosecution to determine whether any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007). We give deference to the jury's responsibility to fairly resolve conflicting testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. *Hooper*, 214 S.W.3d at 13.

A person commits the offense of delivery of a controlled substance if he knowingly delivers a controlled substance in Penalty Group 1, which includes cocaine. *See* Tex. Health & Safety Code Ann. §§ 481.112(a), 481.102(3)(D) (West 2017). By definition, "controlled substance" includes the "aggregate weight of any mixture, solution, or other substance containing a controlled substance." *Id.* § 481.002(5) (West 2017). An offense is a felony of the second degree if the amount of the controlled substance is, by aggregate weight, including adulterants or dilutants, one gram or more but less than four grams. *Id.* § 481.112(c) (West 2017). An adulterant or dilutant is "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 2017). The State is not required to determine the amount of the controlled substance and the amount of the adulterant and dilutant that constitute the mixture. *Melton v. State*, 120 S.W.3d 339, 344 (Tex. Crim. App. 2003); *see* Tex. Health & Safety Code Ann. § 481.112.

Because all of the rocks of cocaine are treated as a mixture, the State does not have to test each rock of cocaine; rather, the State need only prove that the aggregate weight of the controlled substance mixture, including adulterants and dilutants, equals the alleged minimum weight. *Melton*, 120 S.W.3d at 343-44. A conviction may be based on a random sampling of rocks of cocaine when a chemist explains that she tested a representative amount of a homogenous substance. *See Zone v. State*, 118 S.W.3d 776, 777 (Tex. Crim. App. 2003) (concluding that evidence is legally sufficient when a chemist explains that scientific sampling is used to test and confirm the presence of cocaine in at least five of the twelve rocks of crack cocaine). The manner of testing the substances by random sampling goes only to the weight the jury may give to the tested substances in determining that the untested substance is the same as the tested substance. *Melton*, 120 S.W.3d at 341; *Gabriel v. State*, 900 S.W.2d 721, 722 (Tex. Crim. App. 1995) (plurality op.).

The jury heard testimony that during a drug transaction, Smith sold an undercover officer a "little baggy of two chunks of cocaine." The jury heard the

officer testify that State's exhibit four contains the cocaine that Smith gave him. The jury heard Sweetenham testify that State's exhibit four was a clear Ziploc containing "off-white chunky powder[,]" and that the two pieces of the chunky powder looked consistent with one another and appeared to be of the same composition. The jury was permitted to inspect the baggie and its contents to see if the chunks were similar in appearance. The jury heard Sweetenham explain that she weighed everything in the bag together because her procedure requires that she treat a chunky powder as one sample. The jury considered Sweetenham's testimony that she tested two sample pieces of the chunky powder and that State's exhibit four included 1.541 grams of cocaine, including adulterants and dilutants.

The jury was the sole judge of the weight and credibility of the evidence. *See Hooper*, 214 S.W.3d at 13. The jury could reasonably conclude that, based on Sweetenham's testimony, Smith delivered cocaine in an amount of at least one gram or more and less than four grams. *See Melton*, 120 S.W.3d at 343-44; *Zone*, 118 S.W.3d at 777; *see also* Tex. Health & Safety Code Ann. § 481.112(a), (c). Viewing all the evidence in the light most favorable to the jury's verdict, we conclude that a rational jury could find, beyond a reasonable doubt, that Smith committed the offense of delivery of a controlled substance. *See Melton*, 120 S.W.3d at 343-44; *see also Jackson*, 443 U.S. at 318-19; *Hooper*, 214 S.W.3d at 13. Because the evidence

is sufficient to establish, beyond a reasonable doubt, that Smith delivered cocaine in an amount of at least one gram or more and less than four grams, we conclude that the trial court did not err by denying Smith's motion for directed verdict. We overrule both of Smith's issues and affirm the trial court's judgment.

AFFIRMED.

STEVE McKEITHEN
Chief Justice

Submitted on August 21, 2017
Opinion Delivered November 8, 2017
Do Not Publish

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