In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-15-00218-CR

JELANI RASHAD MCNEAL, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

On Appeal from the 84th District Court
Hutchinson County, Texas
Trial Court No. 10,699; Honorable William D. Smith, Presiding

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April 19, 2017

MEMORANDUM OPINION

Before QUINN, C.J., and HANCOCK and PIRTLE, JJ.[1]

Appellant, Jelani Rashad McNeal, was convicted of possession of a controlled substance, to-wit: methamphetamine, in an amount of four grams or more but less than 200 grams, with intent to deliver, following a jury trial.[2] The offense was enhanced by two prior felony convictions, making the offense punishable by confinement for a term of

[1] Justice Mackey K. Hancock, retired, not participating.

[2] *See* TEX. HEALTH & SAFETY CODE ANN. § 481.112(a), (d) (West 2010). An offense under this section is a first degree felony.

not more than 99 years or less than 25 years.[3] The jury sentenced Appellant to twenty-eight years confinement and assessed a $3,000 fine.[4]

By four issues, Appellant asserts (1) the evidence is legally insufficient to convict him of possession with intent to deliver, (2) Johnta McNeal, Appellant's brother, was an accomplice and there was insufficient evidence of corroboration to permit the jury to consider his statements, (3) Johnta was an accomplice as a matter of law and the trial court's failure to include an accomplice instruction in the jury charge caused Appellant egregious harm, and (4) Johnta may have been an accomplice as a matter of fact entitling Appellant to an accomplice-as-a-matter-of-fact instruction and the trial court's failure to include such an instruction in the jury charge caused Appellant egregious harm. We modify the judgment to delete the unauthorized fine and affirm as modified.

BACKGROUND

In August 2011, a Hutchinson County grand jury returned a two-count indictment charging Appellant with possession of a controlled substance. Count one alleged that on or about October 5, 2010, Appellant knowingly possessed, with the intent to deliver, a controlled substance, to wit: methamphetamine, in an amount by aggregate weight including any adulterants or dilutants of four grams or more but less than 200 grams. Count two alleged that on the same date, Appellant intentionally and knowingly possessed a controlled substance, to-wit: cocaine in an amount by aggregate weight

[3] TEX. PENAL CODE ANN. § 12.42(d) (West Supp. 2016).

[4] The *Court's Charge on Punishment* incorrectly advised the jury that the applicable range of punishment included the possibility of a fine "not to exceed $10,000.00."

including adulterants or dilutants of less than one gram.[5] A three-day jury trial was held in May of 2015.

At trial, Officer Russell Radney testified that, in his five years as a law enforcement officer, he participated in over 300 drug investigations and arrests as a narcotics investigator. He further testified that on October 2, 2010, he stopped a white Cadillac due to a non-working headlight and a passenger riding without a seat belt. Upon investigation, he learned Appellant was driving the vehicle, which turned out to be owned by the passenger, his brother, Johnta. After approaching Appellant, Officer Radney noticed a pipe and digital scale on the center console in the cup holder. He asked Appellant what the scale was used for and Appellant answered that he used the scale to weigh his marijuana. Officer Radney observed a white residue on the scales and a small cellophane bag was recovered from inside the console that contained trace amounts of cocaine. A second pipe was found inside the console. After exiting the vehicle, Johnta told officers he had pipes and threw a glass pipe and metal pipe on the pavement. Johnta then attempted to flee before being stopped by another officer.

When Officer Radney performed a pat-down search of Appellant, he discovered Appellant was carrying $720—$220 in loose twenties, and $500 in twenties wrapped together in a hair band. When he patted down Johnta, he discovered nearly an ounce of methamphetamine enclosed within two plastic bags that had been placed in a cigarette package and concealed in his underwear.

[5] Ultimately, the jury returned a "Not Guilty" verdict as to the possession of cocaine charge.

Officer Radney testified that the methamphetamine weighed 23.2 grams, i.e., approximately five grams less than an ounce.[6] He also testified that, based on his experience, an ounce of methamphetamine was an amount customarily purchased and handled by dealers because, typically, users bought a gram or less. He also testified that the standard price for methamphetamine on the street at the time was $100 to $110 a gram. Accordingly, the sale of five grams of methamphetamine (the amount "missing" from the ounce customarily handled by a dealer) would generate roughly $500, the amount of money found on Appellant that was segregated and tied with a hair band.

Lieutenant Brandon Strope testified that he documented the scene where Johnta and Appellant were arrested. He identified two pipes on the ground—one with a white residue that appeared to be narcotics. Two straight pipes were found in the vehicle—one with a bulb where methamphetamine was usually placed prior to use. The other straight pipe was black in color consistent with the use of narcotics, probably marijuana. He also documented the methamphetamine within the two plastic bags enclosed in the cigarette pack, $220 in loose twenties, and $500 in twenties wrapped in a hair band. Other items found in the vehicle were three cell phones and a digital scale with a white residue on it—possibly cocaine, crack, or methamphetamine.

Jeremy Kelln, a financial advisor for Herring Bank, brought statements depicting dates, times, and balances of cash withdrawals from Appellant's account. The records showed that Appellant's account was overdrawn when, in late September, a deposit for a little over $3,000 was wired to his account. Between October 1 and October 3, Appellant withdrew $2,820. Kelln testified he assumed, but did not know, the money

[6] Brandon Conrad, DPS Laboratory Manager, testified the methamphetamine found on Johnta actually weighed 22.44 grams. An ounce is equivalent to twenty-eight grams.

came from student financial aid. He further testified that he did not know how the money was spent.

Johnta was called by the State as a witness. He testified he had been convicted of possession of the 22.44 grams of methamphetamine concealed in his underwear.[7] He admitted that, at his punishment hearing, he testified Appellant gave him the methamphetamine to conceal prior to their interaction with Officer Radney. At Appellant's trial, however, he testified that his attorney had told him to say that as part of a plan to gain leniency. He insisted that the true facts were that Appellant did not hand him the drugs and that he alone possessed the methamphetamine prior to, and during, the traffic stop.

When recalled, Lieutenant Strope testified that a financial accounting supported a finding that Appellant and his brother were dealing in methamphetamine. According to his testimony, the $220 in loose twenties possessed by Appellant at the time of his arrest was the sum left over from the $2,820 withdrawn from Appellant's account after purchasing an ounce of methamphetamine for the customary street value, for a dealer, of $2,600. He further surmised that the $500 wrapped together in the hair band was the proceeds from the sale of approximately five grams of methamphetamine (the approximate amount missing from the original ounce hypothetically purchased).

Upon submission, the jury returned a verdict of "Guilty" as to count one, possession of a controlled substance, to-wit: methamphetamine, and a verdict of "Not Guilty" as to count two, possession of a controlled substance to-wit: cocaine. At the

[7] That conviction was subsequently upheld on appeal. *See McNeal v. State*, 07-14-00355-CR, 2015 Tex. App. LEXIS 7433 (Tex. App.—Amarillo July 17, 2015, no pet.) (mem. op., not designated for publication).

punishment phase of trial, Appellant pled "True" to the enhancement offenses (two prior felony convictions for possession of a controlled substance) and the jury returned a sentence of twenty-eight years confinement and a fine of $3,000. This appeal followed.

Because a sufficiency of the evidence review must incorporate the accomplice witness rule stated in article 38.14 of the Texas Code of Criminal Procedure,[8] logic dictates that we address Appellant's second issue pertaining to sufficiency of the evidence corroborating Johnta's accomplice witness testimony before addressing issue one dealing with the overall sufficiency of the evidence supporting the conviction. Having addressed issues one and two, we will then turn to issues three and four.

ISSUE TWO—CORROBORATION OF ACCOMPLICE WITNESS TESTIMONY

Appellant's brother, Johnta, was called by the State as a witness. By the time he testified in Appellant's trial, he himself had been indicted for and convicted of the very offense Appellant was being tried for. He was, therefore, an accomplice as a matter of law. *See Casanova v. State*, 383 S.W.3d 530, 533 (Tex. Crim. App. 2012). Because Johnta was an accomplice witness, Appellant's conviction cannot rest on his testimony absent sufficient corroboration. *See* art. 38.14.

Article 38.14 of the Code sets forth the statutory requirement for corroboration of accomplice witness testimony. It provides as follows:

> A conviction cannot be had upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the offense committed; and the corroboration is not sufficient if it merely shows the commission of the offense.

See art. 38.14.

[8] See TEX. CODE CRIM. PROC. ANN. art. 38.14 (West 2005). All future references to the "Code" are references to the Texas Code of Criminal Procedure, unless otherwise designated.

In determining whether accomplice witness testimony is properly corroborated, we refer to the guidelines provided by the Texas Court of Criminal Appeals in *Smith v. State*, 332 S.W.3d 425, 442 (Tex. Crim. App. 2011). First, we must decide whether the non-accomplice evidence tends to connect the appellant to commission of the crime. *Id.* The sufficiency of such non-accomplice evidence is determined on a case-by-case basis according to the facts of the particular case under review. *See id.* Direct or circumstantial non-accomplice evidence is sufficient corroboration if it shows that a rational fact finder could have found the evidence tends to connect the accused to the offense. *Id.* If there are conflicting views of the evidence—one that tends to connect the appellant to the offense and one that does not—we will defer to the fact finder's resolution of the evidence. *Id.*

Next, there needs to be only *some* non-accomplice evidence that tends to connect the appellant to the crime. The non-accomplice evidence need not establish every element of the crime. *See Joubert v. State,* 235 S.W.3d 729, 731 (Tex. Crim. App. 2007). Another way the Texas Court of Criminal Appeals has described the "tends to connect" requirement is that "the evidence must simply link the accused in some way to the commission of the crime and show that rational jurors could conclude that this evidence sufficiently tended to connect [the accused] to the offense." *Simmons v. State,* 282 S.W.3d 504, 508 (Tex. Crim. App. 2009) (quoting *Malone v. State,* 253 S.W.3d 253, 257 (Tex. Crim. App. 2008)). Additionally, all of the non-accomplice evidence is viewed together, rather than as isolated, unrelated activities, to determine whether it tends to connect the appellant to the offense. *See id.* at 511. Finally, if the combined weight of the non-accomplice evidence tends to connect the defendant to the offense, then the testimony of the accomplice may be considered by the jury in the

same manner as any other competent evidence. *See Herron v. State*, 86 S.W.3d 621, 632 (Tex. Crim. App. 2002); *Cathey v. State,* 992 S.W.2d 460, 462 (Tex. Crim. App. 1999).

Here, Appellant asserts there was insufficient evidence to corroborate Johnta's statements, given during the punishment phase of his trial, that Appellant gave him the drugs to conceal during the traffic stop. Appellant asserts this is particularly true since Johnta recanted those statements and specifically testified in the case at hand that Appellant did not give him the drugs to conceal.

Interpreting the evidence in a light most favorable to the verdict, we find a rational fact finder could have found that the combined weight of the non-accomplice evidence was sufficient to tend to connect the defendant to the offense. Appellant was driving Johnta's vehicle which was littered with drug paraphernalia. There was a drug pipe on the console and one in the console. There were digital scales on the console with trace amounts of a white residue—possibly cocaine, crack, or methamphetamine. There was a plastic bag with trace amounts of cocaine in the console. Appellant admitted that he used the scale to weigh marijuana, although no marijuana was found in the vehicle. Johnta had two pipes used to ingest drugs on his person when they were stopped. There were three cell phones in the vehicle. Johnta had 22.44 grams of methamphetamine hidden in his underwear and Appellant had $220 in loose twenties and $500 in twenties tied with a hair band in the back pocket of his jeans. Johnta was not carrying any cash. Officer Radney testified that in his experience (1) an ounce of methamphetamine was an amount typically handled by dealers, not users, (2) the drugs in Johnta's underwear were a little more than five grams less than a full ounce, (3) five

grams of methamphetamine was worth approximately $100 per gram, or $500—the amount of cash Appellant had wrapped in a hair band. Lieutenant Strope testified that, based on his training and experience, the amount of money remaining on Appellant at the time of his arrest, when combined with Appellant's previous deposits and withdrawals, made sense from a financial accounting point of view of a narcotics transaction.[9] Taken as a whole, we conclude this evidence sufficiently tended to connect Appellant to the offense. Issue two is overruled.

ISSUE ONE—SUFFICIENCY OF THE EVIDENCE

STANDARD OF REVIEW

We review the sufficiency of the evidence under the standard set forth in *Jackson v. Virginia*, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). *Fernandez v. State*, 479 S.W.3d 835, 837 (Tex. Crim. App. 2016). We examine all the evidence in the light most favorable to the verdict and determine whether any rational fact finder could have found the essential elements of the offense beyond a reasonable doubt. *Jackson*, 443 U.S. at 319; *Fernandez*, 479 S.W.3d at 837-38. The standard recognizes "the responsibility of the trier of fact to fairly resolve conflicts in testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Jackson*, 443 U.S. at 319. *See Adames v. State*, 353 S.W.3d 854, 860 (Tex. Crim. App. 2011). The fact finder is entitled to judge the credibility of the witnesses and can choose to believe all, some, or none of the testimony presented by the parties. *Chambers v. State*, 805 S.W.2d 549, 461 (Tex. Crim. App. 1991). *See Wise v. State*,

[9] Appellant asserts that Lieutenant Strope's financial accounting opinion was nothing more than pure speculation; however, no objection was ever made at trial. Having failed to object at trial, this assertion is waived on appeal. *See* TEX. R. APP. P. 33.1(a). *See also Burt v. State*, 396 S.W.3d 574, 577-78 (Tex. Crim. App. 2013*); Wilson v. State*, 71 S.W.3d 346, 349 (Tex. Crim. App. 2002).

364 S.W.3d 900, 903 (Tex. Crim. App. 2012) (fact finder exclusively determines the weight and credibility of the evidence).

We may not substitute our judgment for that of the fact finder. *Thornton v. State*, 425 S.W.3d 289, 303 (Tex. Crim. App. 2014). When there is conflicting evidence, we must presume the fact finder resolved the conflict in favor of the verdict and defer to that resolution. *Blea v. State*, 483 S.W.3d 29, 33 (Tex. Crim. App. 2016). Circumstantial evidence is as probative as direct evidence and, alone, can be sufficient to establish guilt. *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007). Evidence is sufficient if "the inferences necessary to establish guilt are reasonable based upon the cumulative force of all the evidence when considered in the light most favorable to the verdict." *Wise v. State,* 364 S.W.3d 900, 903 (Tex. Crim. App. 2012). A verdict of guilt will be upheld if the evidence is sufficient on any one of the theories submitted. *See Hooper*, 214 S.W.3d at 14.

Furthermore, the "sufficiency of the evidence should be measured by the elements of the offense as defined by the hypothetically correct jury charge for the case." *Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997). Here, the record shows that, as to the elements of the offense charged, a hypothetically correct jury charge would have been consistent with the actual jury charge given. Therefore, the evidence is sufficient to support Appellant's conviction as long as it shows he engaged in the conduct with the requisite culpable mental state.

POSSESSION WITH INTENT TO DELIVER

A person commits the offense of possession of a controlled substance with intent to deliver if the person knowingly possesses with intent to deliver a controlled substance

listed in Penalty Group 1. TEX. HEALTH & SAFETY CODE ANN. § 481.112(a) (West 2010). Methamphetamine is a substance listed in Penalty Group 1. *Id.* at § 481.102(2). Under the law of parties, a person is criminally responsible for an offense committed by the conduct of another if, acting with intent to promote or assist that offense he solicits, encourages, directs, aids, or attempts to aid the other person in the commission of the offense. TEX. PENAL CODE ANN. § 7.02(a)(2) (West 2010).

In this case, the jury was charged with the law of parties. Under that theory, the State is required to show that at the time of the offense, Appellant and his co-defendant were acting together, each contributing some part towards the execution of a common purpose. *Minton v. State*, 485 S.W.3d 655, 661 (Tex. App.—Amarillo 2016, pet. ref'd) (citing *Wooden v. State*, 101 S.W.3d 542, 546 (Tex. App.—Fort Worth 2003, pet. ref'd)). "A person is criminally responsible as a party to an offense if the offense is committed by his own conduct, by the conduct of another for which he is criminally responsible, or by both," and "[e]ach party to an offense may be charged with the commission of the offense." TEX. PENAL CODE ANN. § 7.01(a), (b) (West 2011). "A person is criminally responsible for an offense committed by the conduct of another if . . . acting with the intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense . . . ." *Id.* at § 7.02(a)(2).

Intent to assist or promote may be inferred from the acts, words, and conduct of the defendant and from the circumstances in which the offense occurred. *Roberts v. State,* 319 S.W.3d 37, 39 (Tex. App.—San Antonio 2010, pet. ref'd). Circumstantial evidence may be used to prove party status. *Escobar v. State*, 28 S.W.3d 767, 774

(Tex. App.—Corpus Christi 2000, pet. ref'd). Whether an accused participated as a party to an offense may be determined by examining events occurring before, during, and after the commission of the offense and by the actions of the accused that show an understanding and common design to commit the offense. *Id.*

Considering the evidence outlined above that corroborated Johnta's accomplice witness testimony, we conclude that the totality of the circumstances would permit any rational fact finder to find beyond a reasonable doubt that there was an understanding and common design that Appellant and Johnta possessed methamphetamine with an intent to deliver. The evidence is also sufficient under the law of parties to support the conclusion that any rational fact finder could have found beyond a reasonable doubt that Appellant promoted or assisted the offense by aiding Johnta in committing the charged offense. Appellant's first issue is overruled.

ISSUES THREE AND FOUR—ACCOMPLICE JURY INSTRUCTION

Appellant's issues three and four deal with the trial court's failure to give an accomplice witness instruction, either as an accomplice as a matter of law (issue three) or as an accomplice as a matter of fact (issue four), with respect to Johnta's testimony. Where, as here, Appellant did not object to the absence of an appropriate jury instruction, charge error does not require reversal unless the appellant shows "egregious harm." *See Almanza v. State*, 686 S.W.2d 157, 160-174 (Tex. Crim. App. 1985) (op. on reh'g). *See also Zamora v. St*ate, 411 S.W.3d 504, 506 (Tex. Crim. App. 2013).

"Jury charge error is egregiously harmful if it affects the very basis of the case, deprives the defendant of a valuable right, or vitally affects a defensive theory." *Stuhler*

v. State, 218 S.W.3d 706, 719 (Tex. Crim. App. 2007). We examine "the entire jury charge, the state of the evidence, including the contested issues and the weight of the probative evidence, the arguments of counsel, and any other relevant information revealed by the record of the trial as a whole." *Sanchez v. State*, 376 S.W.3d 767, 774-75 (Tex. Crim. App. 2012) (quoting *Almanza*, 686 S.W.2d at 171). Additionally, Appellant must "have suffered actual harm, not merely theoretical harm." *Id.* at 775.

Under the egregious harm standard, the omission of an accomplice witness instruction is generally harmless unless the corroborating (non-accomplice) evidence is "so unconvincing in fact as to render the State's overall case for conviction clearly and significantly less persuasive." *Herron*, 86 S.W.3d at 632 (quoting *Saunders v. State*, 817 S.W.2d 688, 692 (Tex. Crim. App. 1991)). "Direct or circumstantial non-accomplice evidence is sufficient corroboration if it shows that rational jurors could have found that it sufficiently tended to connect the accused to the offense," and "[o]nce it is determined that such non-accomplice evidence exists, the purpose of the instruction is fulfilled, and the instruction plays no further role in the factfinder's decision-making." *Id.* Therefore, non-accomplice evidence can render harmless a failure to submit an accomplice witness instruction by fulfilling the purpose that such an instruction is designed to serve. *Id.*

As previously discussed, there was sufficient evidence to show that a rational fact finder could have found a connection between Appellant and the offense without consideration of Johnta's testimony, and that evidence was clearly sufficient to support Appellant's conviction. Because the trial court's failure to give an accomplice witness instruction was not egregious, Appellant failed to preserve error. Issues three and four are overruled.

REFORMATION OF JUDGMENT

We also note an issue not raised by Appellant regarding the assessment of a fine.[10] The jury's verdict and written judgment in Cause No. 10,699 orders the defendant to pay a fine of $3,000. Because Appellant's offense was "double-enhanced" pursuant to the provisions of section 12.42(d) of the Texas Penal Code, the range of punishment did not include the option to assess a fine. *See* TEX. PENAL CODE ANN. § 12.42(d) (West Supp. 2016). Because no fine is authorized by statute, we modify the judgment of the trial court to delete the fine.

CONCLUSION

The trial court's judgment is affirmed as modified.

Patrick A. Pirtle
Justice

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[10] When a defendant appeals his conviction, courts of appeals have jurisdiction to address any error in that case. *Pfeiffer v. State*, 363 S.W.3d 594, 599 (Tex. Crim. App. 2012). Where, as here, the error appears on the face of the judgment and does not involve the merits of the trial, but instead solely addresses the legality of the sentence, we find that the interest of justice dictates that we address the issue.