In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-16-00071-CR

BERNABE FLORES, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

On Appeal from the 364th District Court
Lubbock County, Texas
Trial Court No. 2012-436,377, Honorable William R. Eichman II, Presiding

February 26, 2018

MEMORANDUM OPINION

Before QUINN, CJ., and CAMPBELL and PARKER, JJ.

A Lubbock County jury convicted appellant Bernabe Flores of the first-degree felony offense of possession of methamphetamine, four grams or more but less than 200 grams, with intent to deliver, within 1,000 feet of a school,[1] and imposed a sentence of 99 years of imprisonment.[2] Appellant challenges his conviction through seven issues. We will affirm the trial court's judgment.

[1] *See* TEX. HEALTH & SAFETY CODE ANN. §§ 481.115(d); 481.134(b), (c) (West 2015).

[2] *See* TEX. PENAL CODE ANN. § 12.42 (West 2016).

Background

After receiving information that a stolen vehicle was at a Lubbock residence, and that the residence and vehicle might be related to a missing juvenile, officers with the Lubbock police department's Special Operations Unit began surveillance of the residence. They found the vehicle parked in the driveway.

When appellant emerged from the residence and got into the vehicle's driver's seat, officers blocked the car with their patrol car. They arrested appellant and searched his person, finding a baggie with a small amount of methamphetamine. In response to their inquiry, appellant told them a woman was in the house. Officers entered the house for a "protective sweep," finding the back door standing open but no one in the house. During their sweep, however, they saw items they suspected were stolen. They obtained a search warrant and, in the subsequent search, found some nineteen grams of methamphetamine packaged in baggies in a camera case in a bedroom, along with a sizable quantity of hydrocodone pills. The camera case also contained a quantity of small, clear Ziplock baggies. A sticky note with appellant's last name and the name of another person also was found in that bedroom.

Some of the baggies in the camera case were decorated with a red symbol.[3] The baggie found on appellant's person had the same red decoration.

Appellant was indicted with a three-count indictment, but was tried only on the count alleging he possessed methamphetamine, with intent to deliver, in an amount of

[3] One officer once referred to it as an "emblem." Another testified that the decorated baggies can be purchased at "smoke shops." He said some dealers use them as a "signature or brand" for their drug sales.

four grams or more but less than 200 grams, in a drug-free zone. The indictment also included two enhancement paragraphs. Appellant filed a motion to suppress all tangible evidence, statements and testimony obtained through the search incident to arrest, the protective sweep and warrant-authorized search. The trial court held a hearing at which investigator Brady Lewis was the only witness. It thereafter denied appellant's motion to suppress and filed findings of fact and conclusions of law supporting its ruling.

At trial, contrary to appellant's subsequent not-guilty plea, the jury found him guilty as charged in the indictment. After a hearing on punishment, the jury assessed punishment as noted and this appeal followed.

Analysis

Motion to Suppress

Via appellant's first issue, he contends the trial court erred in denying his motion to suppress the evidence. He argues the officers did not have probable cause to arrest him and their search of his person incident to his arrest was therefore unlawful. He further argues that entry into the residence was unlawful, regardless whether the search of his person was proper. We disagree with appellant's analysis, and will overrule the issue.

In reviewing a trial court's ruling on a motion to suppress, we apply a bifurcated standard of review. *Carmouche v. State,* 10 S.W.3d 323, 327 (Tex. Crim. App. 2000). Under this standard, we give almost total deference to a trial court's determination of historical facts but review *de novo* the trial court's application of the law to those facts. *Id.* Probable cause for an arrest exists when the totality of the circumstances shows that law enforcement has "reasonably trustworthy information sufficient to warrant a reasonable

person to believe a particular person has committed or is committing an offense." *Guzman v. State,* 955 S.W.2d 85, 87 (Tex. Crim. App. 1997). While probable cause requires a relatively high level of suspicion, it is a much lower standard than preponderance of the evidence. *Hacker v. State*, 389 S.W.3d 860, 865 (Tex. Crim. App. 2013).

The trial court's findings of fact state[4] Investigator Lewis and another investigator, Williams, began surveillance of the house based on information from the Juvenile Section of the police department. The information was to the effect a stolen vehicle, a gray, four-door car with South Carolina plates, was possibly at the house, and its residents were possibly involved with a missing child case. When the investigators drove by the residence, they saw the vehicle matching the description in the driveway near the garage. They gave its license plate number to their dispatch, and received confirmation the vehicle was stolen.[5] After the officers watched the house for thirty minutes to an hour, appellant walked out. He had a pill bottle in his hand. When he entered the stolen vehicle, they pulled their undercover patrol car behind the stolen car. Lewis and a third investigator, Roberson, walked up to the driver's side while appellant was sitting in the driver's seat. As they did so, Lewis saw appellant drop the pill bottle on the floorboard. He saw the bottle had no "markings" on it and contained 20 to 30 white pills.

[4] The findings begin by stating that the court found Lewis credible and his testimony true. *See Ex parte Moore,* 395 S.W.3d 152, 158 (Tex. Crim. App. 2013) (at a hearing on a motion to suppress, the trial court is the sole judge of the credibility of the witnesses and the weight to be given their testimony).

[5] Lewis agreed that dispatch runs a car "through various databases to confirm whether the vehicle has been reported stolen." He agreed "that was done in this case."

The trial court's findings go on to say Lewis and Roberson arrested appellant for two reasons, because of his "being in and having care, custody, and control of a stolen vehicle," and his being in possession of a controlled substance without a prescription.

In this Court, appellant argues neither reason gave the officers probable cause to arrest him. *See Parker v. State,* 206 S.W.3d 593, 596 (Tex. Crim. App. 2006) ("[t]o establish probable cause to arrest, the evidence must show that 'at that moment [of the arrest] the facts and circumstances within the officer's knowledge and of which he had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the arrested person had committed or was committing an offense.'") (citing *State v. Steelman,* 93 S.W.3d 102, 107 (Tex. Crim. App. 2002)).

The Court of Criminal Appeals long ago upheld an arrest and search incident to the arrest of the driver of a car after police confirmed an NCIC report the car was stolen. *Stevens v. State,* 667 S.W.2d 534, 538 (Tex. Crim. App. 1984) (facts gave probable cause to arrest driver for theft of automobile). In *Brown v. State,* 986 S.W.2d 50, 52 (Tex. App.—Dallas 1999, no pet.), the appellate court concluded an NCIC report of a stolen car provided independent probable cause to arrest the defendant for theft. (citation omitted). Federal cases have reached a similar result. *Id.* (citing *United States v. Davis,* 568 F.2d 514, 516 (7th Cir. 1978) (holding an NCIC identification of a stolen vehicle is sufficient to establish probable cause for the arrest of one possessing it)). The court in *Brown* noted that "[w]e are aware of no case, and appellant has cited none, in which a court has failed to accept an NCIC report or 'hit' of a stolen car as sufficient to support probable cause to arrest an individual possessing it." *Id.* at 52. *See also Williams v. State*, No. 14-08-00268-CR, 2009 Tex. App. LEXIS 8483, at *10 (Tex. App.—Houston [14th Dist.] Nov. 5, 2009,

pet. ref'd) (mem. op., not designated for publication); *Wright v. State,* No. 05-03-01082-CR, 2004 Tex. App. LEXIS 10894, at *7 (Tex. App.—Dallas Dec. 3, 2004, pet. ref'd) (mem. op., not designated for publication) (stolen car provided probable cause to arrest).

Appellant argues nothing in the facts suggested he knew the vehicle was stolen, or that he knew he did not have the owner's effective consent to sit in it. Appellant's arguments are merely challenges to the concept that possession of a car reported stolen warrants a prudent person to hold the belief that the possessor has committed or is committing theft. The case law we have cited holds otherwise. *See also Illinois v. Gates,* 462 U.S. 213, 231, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983) ("in dealing with probable cause, . . . as the very name implies, we deal with probabilities.") (citation omitted).

Because we find appellant's possession of the reportedly-stolen vehicle gave the officers probable cause to arrest him, we need not address the State's alternative contention that appellant's possession of the white pills provided probable cause for his arrest.[6]

Because the officers had probable cause to arrest appellant, their search of his person incident to arrest also was proper. *Arizona v. Gant,* 556 U.S. 332, 338, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009); *see McGee v. State*, 105 S.W.3d 609, 614 (Tex. Crim. App. 2003) (once an officer has probable cause to arrest, he may conduct a search incident to the arrest); *State v. Ballard*, 987 S.W.2d 889, 892 (Tex. Crim. App. 1999).

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[6] The State argues, and the trial court found, that Lewis's observation of an "unmarked pill bottle containing numerous pills that [appellant] did not appear to have a prescription for" justified his arrest for violation of the statute prohibiting possession of a controlled substance listed in Penalty Group 3, without a valid prescription. TEX. HEALTH & SAFETY CODE ANN. § 481.117 (West 2013). We express no opinion on the correctness of the court's finding of probable cause on that ground.

Lewis testified, and the court's findings of fact state, the officers' arrest of appellant and search of his person were conducted in the driveway of the residence within view of any person still inside, and that officers necessarily would "process the vehicle" and ultimately have it towed to impound, also in view of any such person. The findings also state that Lewis asked appellant if anyone was inside the residence, because of his "dual concerns" over the possibility that anyone inside could have weapons and the initial report that the missing child case could be connected with the residence. In response, the findings state, "[Appellant] said that there was an unknown female still inside the residence, though he was not very cooperative or forthcoming in giving them the name of the woman still inside the residence." The court found appellant's reticence raised further concerns over possible occupants of the house.

A protective sweep is a "quick and limited search of the premises, incident to an arrest and conducted to protect the safety of the police officers or others." *Maryland v. Buie,* 494 U.S. 325, 327, 110 S. Ct. 1093, 108 L. Ed. 2d 276 (1990). "The Fourth Amendment permits a properly limited protective sweep in conjunction with an in-home arrest when the searching officer possesses a reasonable belief based on specific and articulable facts that the area to be swept harbors an individual posing a danger to those on the arrest scene." *Ables v. State*, No. 07-11-00214-CR, 2013 Tex. App. LEXIS 6269, at *4 (Tex. App.—Amarillo May 21, 2013, no pet.) (mem. op., not designated for publication) (citing *Reasor v. State,* 12 S.W.3d 813, 816 (Tex. Crim. App. 2000)).

In *Reasor,* the Court of Criminal Appeals addressed a protective sweep of a house that followed the drug-related arrest of the defendant in the driveway of his home. *Reasor,* 12 S.W.3d at 814-16. It found the testifying police officer had expressed no articulable

fact necessitating a protective sweep. In particular, the court noted the officer "did not express his belief that any third persons were inside the [defendant's] home." *Id*. at 817.

That key factor missing in *Reasor* is present in the case before us. Appellant told the officers a woman was in the house but did not identify her. And, as the trial court found, Lewis knocked on the front door and when no one responded, opened the door and announced police presence. Still getting no answer, he and other officers entered the house for a protective sweep, "limited to looking for people . . . ."

The court heard also that the officers arrived at the residence with information it might be connected with a missing juvenile. And, officers found a stolen car in the driveway and observed other indications of criminal activity. Lewis told the court he believed he needed to secure the home because weapons are commonly associated with the dealing of narcotics. A person inside a house with weapons presents a significant threat to the safety of police officers. *Reasor*, 12 S.W.3d at 816 (police officers had a strong interest in "taking steps to assure themselves that the house in which a suspect is being, or has just been arrested is not harboring other persons who are dangerous and who could unexpectedly launch an attack") (citing *Buie,* 494 U.S. at 333). Having been told an unidentified person was in the house, but receiving no response to their announcement, we find reasonable the steps the officers took to ensure their safety while they processed the scene and concluded their investigation.

Consequently, we find the trial court did not abuse its discretion in concluding the protective sweep was proper. While the officers conducted the sweep, they gained additional information, including, in plain view in a bedroom, an assault rifle and items such as "numerous car stereos" in other areas of the home that the officer included in his

affidavit in support of a search warrant. It was with that information the officer obtained a search warrant and on execution, gathered additional evidence.

In this Court, appellant raises no additional challenge to the lawfulness of the search warrant or the search conducted pursuant to the warrant, which produced the methamphetamine supporting appellant's conviction. Because we have agreed with the trial court appellant's arrest, his search incident to arrest and the protective sweep of the residence did not violate search and seizure principles, we find the court did not err in denying appellant's motion to suppress the evidence. Appellant's first issue is overruled.

Brady Material

In appellant's second issue, he argues the trial court reversibly erred in failing to order the State to disclose Lewis's personnel file. He contends the file contained material required for disclosure under *Brady v. Maryland.*[7]

A *Brady* violation occurs when the state suppresses, willfully or inadvertently, evidence favorable to a defendant. *Harm v. State*, 183 S.W.3d 403, 406 (Tex. Crim. App. 2006). The Court of Criminal Appeals has held that to find reversible error from a violation of *Brady,* a defendant must show: (1) the State failed to disclose evidence, regardless of the prosecution's good faith or bad faith; (2) the withheld evidence is favorable to him; and (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. *Pena v. State,* 353 S.W.3d 797, 809 (Tex. Crim. App. 2011). The court also requires that the

[7] *Brady v. Maryland,* 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963) ("the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution").

evidence central to the *Brady* claim be admissible in court. *Id*. (citing *Ex parte Kimes*, 872 S.W.2d 700, 703 (Tex. Crim. App. 1993)). *Kimes* also holds that evidence offered by a party to show bias of an opposing witness should be excluded if the evidence "has no legitimate tendency to show bias" of the witness. 872 S.W.2d at 703.

Favorable evidence is any evidence that, "if disclosed and used effectively, may make the difference between conviction and acquittal." *Little v. State*, 991 S.W.2d 864, 866 (Tex. Crim. App. 1999). It includes both exculpatory and impeachment evidence. *Id.* "Exculpatory evidence is testimony or other evidence which tends to justify, excuse or clear the defendant from alleged fault or guilt." *Id.* at 866-67. "Impeachment evidence is that which is offered to dispute, disparage, deny, or contradict." *Little,* 991 S.W.2d at 867.

The trial court reviewed Lewis's personnel file *in camera* during a pretrial hearing and concluded the file did not contain any material requiring disclosure under the standard set forth in *Brady.* In this Court, the parties' arguments focus on three incidents reflected in the file.[8] It shows Lewis's violations of police department policy by use of excessive force during an arrest in November 2005 when he jumped on the back of a suspect and placed both of his knees on the suspect's back. The file also shows Lewis violated department policy in November 2007 when he failed to control the speed of his patrol car and collided with the rear of a suspect's vehicle during pursuit. Lastly, the file reflects Lewis's violation of police department policy when he and other officers left a residence in disarray after the March 2013 execution of a search warrant. Lewis was given letters

[8] The State points out the file also contains positive information regarding Lewis's service.

of reprimand for the November 2005 and November 2007 violations; the officers received documented counseling for the March 2013 violation.

Appellant does not contend the personnel file contained exculpatory evidence. The disciplinary actions shown by the file had nothing to do with appellant or the events that led to appellant's prosecution.

Nor does appellant argue the records provided a basis to impeach Lewis's testimony by contradicting the accuracy of his memory of his observations or actions on the occasion of appellant's arrest. Again, the matters reflected in the file were unrelated to the events to which Lewis testified. Instead, appellant contends the incidents reflected in the personnel file could have been used to show Lewis had a "motive to testify to protect himself from further disciplinary action and to preserve his position . . . as an investigator." Appellant further argues the actions documented in the file show Lewis's "bias toward arresting suspects and obtaining evidence regardless of the policies and procedures," and show "a pattern" of violations of procedure. As authority, appellant relies on Rule of Evidence 613(b) and the opinions in *Hammer v. State*, 296 S.W.3d 555 (Tex. Crim. App. 2009) and *Billodeau v. State*, 277 S.W.3d 34 (Tex. Crim. App. 2009). Both those cases involve the exclusion of evidence that an alleged victim of sexual molestation had a motive to falsely accuse the defendant.

On review by the Court of Criminal Appeals, the court held in *Billodeau* that Rule 613(b) permitted cross examination of the victim about his threats to accuse neighbors with whom he was angry, of sexual molestation, falsely, and, if he denied the threats, to present the neighbors' testimony about his threats to falsely accuse them. 277 S.W.3d at 43. There was evidence the victim was subject to fits of rage and displays of intense

anger, and the victim acknowledged during his testimony that his outcry against the defendant occurred the day after he had been angry at him. *Id.* at 42. The court pointed out that the victim's accusation against the defendant and his threatened accusations against the neighbors involved the same conduct, molestation. *Id.* at 40. It concluded exclusion of the evidence denied the defendant the opportunity to present relevant evidence of the victim's motive to fabricate an allegation of sexual molestation. *Id*. at 43. *Hammer* similarly involved the exclusion of evidence offered by the defendant, the father of the complaining witness, to support his theory his daughter fabricated her accusation of molestation "to get out from under [her father's] heavy hand" of discipline. 296 S.W.3d at 566. The court found parts of the proffered evidence admissible, citing Rule 613(b) and other evidentiary rules, and held the trial court erred by excluding it as more prejudicial than probative under Rule of Evidence 403. *Id.* at 567-68.

The opinions in *Hammer* and *Billodeau* involve evidence having a "legitimate tendency" to show the witness's motive or bias, *Kimes*, 872 S.W.2d at 703, a tendency that is completely absent from the evidence contained in Lewis's personnel file. We agree with the State that no pattern of conduct indicative of a motive to testify falsely or of a bias against appellant can be seen in Lewis's three unrelated disciplinary actions over the course of his then-thirteen-year service. Appellant points to no evidence that any of Lewis's actions in this case were likely to lead to "further disciplinary action," or put his position as an investigator at risk. Appellant thus does not present a persuasive contention anything from the personal file would be admissible under Rule 613(b) as circumstances tending to show Lewis's bias or interest. *See McMillon v. State,* 294 S.W.3d 198, 202 (Tex. App.—Texarkana 2009, no pet.) (affirming trial court's exclusion of evidence of instances of misconduct by testifying trooper, unrelated to case being

tried). Appellant does not contend the file contained evidence properly admissible under Rules of Evidence 608 and 609 to attack Lewis's character for truthfulness. Accordingly, we agree with the State no evidence from the personnel file would have been admissible at appellant's trial to impeach Lewis's testimony. The file was not evidence favorable to appellant. *Pena,* 353 S.W.3d at 809.

Appellant's argument fails also to establish the personnel file was material to his prosecution. To be material, a defendant must show the excluded information had a reasonable probability, had it been disclosed, to cause a different result in the proceeding. Appellant's argument does not indicate which aspects of Lewis's testimony he expected to attack as resulting from bias or improper motive. Even if the jury had been told about Lewis's departmental policy violations, it had before it Williams's testimony. Williams told the jury he also was present at the time of appellant's arrest, and described the methamphetamine and other evidence found in the residence. There is nothing in the record to indicate the jury would have reached a different result had it been privy to the information in Lewis's file. For those reasons, we overrule appellant's second issue.

Right to Speedy Trial

In his third issue, appellant argues his constitutional right to a speedy trial was violated. He was indicted in October 2012 and tried in December 2015. He asserts the more than three-year delay weighs heavily in favor of finding a speedy trial violation. The State argues appellant failed to preserve this issue for our review and we agree.

The Sixth Amendment of the United States Constitution, which is applicable to the states through the Fourteenth Amendment, guarantees an accused the right to a speedy trial. U.S. CONST. amends. VI, XIV; *Gonzales v. State,* 435 S.W.3d 801, 808 (Tex. Crim.

App. 2014); *Cantu v. State,* 253 S.W.3d 273, 280 (Tex. Crim. App. 2008). We analyze speedy trial claims "on an ad hoc basis," weighing and balancing the factors set forth in *Barker v. Wingo*: (1) the length of the delay; (2) the reason for the delay; (3) the assertion of the right; and (4) the prejudice to the accused. *Gonzales,* 435 S.W.3d at 808 (citing *Barker v. Wingo*, 407 U.S. 514, 530, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972)).

In *Henson v. State,* the Court of Criminal Appeals held that an appellant must properly raise a speedy-trial claim in the trial court to preserve the issue for appellate review. 407 S.W.3d 764, 768-69 (Tex. Crim. App. 2013). The circumstances before us differ from those shown in *Henson*. The defendant in *Henson* did not file a speedy-trial motion, did not request a hearing on the delays in trial and "explicitly" agreed to each of the 25 resettings of the case. *Id*. at 766, 769.

Appellant's original trial counsel filed a motion on December 31, 2013, asking that the case be tried on what the motion says is the "current trial setting," of February 10, 2014, or that the indictment be dismissed if the case were not then tried. That lawyer shortly thereafter was replaced because, the record reflects, a conflict of interest arose between appellant and the lawyer. Appellant's counsel who tried the case was appointed in March 2014. The record contains a November 2014 motion for continuance filed by appellant, and the court's order granting the request. The motion told the court a conflict of interest had arisen between appellant and his newly-appointed lawyer, that appellant had filed a grievance with the State Bar, and that it was in the best interest of "all parties" that the case not proceed to trial until the grievance could be resolved.

During a hearing before the beginning of voir dire in December 2015, which concerned, among other topics, appellant's differences with his counsel over trial strategy

and appellant's interest in representing himself, the 2013 speedy trial motion was discussed. The attorneys and the court, and appellant during his own remarks to the court, discussed the time line of events that had transpired since the motion's filing. But appellant neither sought nor obtained a ruling on the motion, nor did he request any relief. Appellant did not assert he had been prejudiced by the delay in his trial, and did not ask that the case be dismissed.

The rules that govern our review of trial court rulings, and case law applying those rules, make clear that preservation of error for violation of the right to a speedy trial involves more than the mere filing of a motion. *See* TEX. R. APP. P. 33.1.; *Van Hook v. State,* No. 13-13-00198-CR, 2015 Tex. App. LEXIS 8965, at *3-6 (Tex. App.—Corpus Christi Aug. 27, 2015, no pet.) (mem. op., not designated for publication) (oral motion to dismiss on speedy-trial grounds raised after trial begun; no hearing requested or evidence presented; issue not preserved for appeal); *Crocker v. State,* No. 01-11-00095-CR, 2013 Tex. App. LEXIS 643 (Tex. App.—Houston [1st Dist.] Jan. 24, 2013, pet. ref'd) (mem. op., not designated for publication) (letter, even if construed as assertion of right to speedy trial, never presented to trial court and ruled on, so complaint not preserved); *Grimaldo v. State*, 130 S.W.3d 450 (Tex. App.—Corpus Christi 2004, no pet.) (speedy trial claim may be waived by not presenting evidence of the claim to the trial court or by not obtaining a ruling after presentation of evidence); *Guevara v. State*, 985 S.W.2d 590, 592 (Tex. App.—Houston [14th Dist.] 1999, pet. ref'd) (pro se motion not reiterated when case reindicted; claim not preserved).

Appellant's speedy trial motion was not presented or brought to the trial court's attention when it was filed, and subsequent events make clear appellant no longer desired

a speedy trial when his new attorney was initially appointed in March 2014. When the motion was discussed with the trial court on the morning of trial in December 2015, no evidence was presented,[9] and no ruling sought or obtained. Although there was discussion of the events that delayed the trial, the focus of the discussion was appellant's disagreement with his attorney over trial strategy and whether appellant would represent himself or be represented by counsel.[10] In its context, the parties' discussion with the court cannot fairly be characterized as the presentation of a complaint of the violation of appellant's speedy trial right.

Moreover, the absence of evidence of prejudice would have left the trial court, and this Court, entirely unable to assess that important aspect of a speedy trial complaint. As in *Van Hook*, appellant "failed to develop a sufficient evidentiary record from which we could accurately apply, analyze, and balance the *Barker* factors to assess his speedy-trial claim." *Van Hook,* 2015 Tex. App. LEXIS 8965, at *6 (citing *Henson,* 407 S.W.3d at 769). Finding appellant's third issue preserves nothing for our review, we resolve the issue against him. TEX. R. APP. P. 33.1.

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[9] As the Court of Criminal Appeals noted in *Henson*:

> [A] requirement of preservation allows the trial court to develop the record sufficiently for a *Barker* analysis. At least two of the *Barker* factors (the reason for delay and the prejudice to the accused) are fact-specific inquiries and may not be readily apparent from the trial record. A requirement that the appellant assert his complaint at the trial level enables the court to hold a hearing and develop this record so that the appellate courts may more accurately assess the claim.

407 S.W.3d at 769.

[10] Appellant eventually decided to be represented by his counsel at trial. After that decision, there was no further mention of the speedy trial motion.

Punishment Charge

Appellant's fourth issue addresses error in the court's punishment charge to the jury.

Appellant pled "true" to the State's two enhancement allegations of prior convictions. The charge then instructed the jury that the punishment range for the offense was thirty years to ninety-nine years or life imprisonment. On appeal, appellant points out the offenses used for enhancement were state jail felonies subject to section 12.35(a) of the Penal Code, not available for enhancement purposes under section 12.42(d). *See* TEX. PENAL CODE ANN. §§ 12.35(a) (state jail felonies), 12.42(d) (felonies other than state jail felonies) (West 2018). The correct punishment range was ten years to ninety-nine years or life imprisonment.[11]

The State concedes the punishment instruction on the range of punishment was incorrect. However, it argues the erroneous jury charge did not egregiously harm appellant. We agree.

In determining whether there is reversible error in the jury charge, we first decide whether error exists, and if error exists, then we determine whether the defendant was harmed. *Cortez v. State,* 469 S.W.3d 593, 598 (Tex. Crim. App. 2015). If we find the trial court erred in its charge but that its error was not called to its attention, we must apply the egregious harm standard in our harm analysis. *Almanza v. State,* 686 S.W.2d 157, 171

[11] *See* TEX. HEALTH & SAFETY CODE ANN. § 481.134(c) (providing for five-year increase if it is shown on the trial of the offense that the offense was committed in, on, or within 1,000 feet of the premises of a school).

(Tex. Crim. App. 1984). Under that standard, appellant "will obtain a reversal only if the error was so egregiously harmful that he has not had a fair and impartial trial." *Id.*

Considering whether egregious harm occurred, we review the error "in light of the entire jury charge, the state of the evidence, including the contested issues and weight of probative evidence, the argument of counsel and any other relevant information revealed by the record as a whole." *Almanza*, 686 S.W.2d at 171. Errors resulting in egregious harm are those that affect the very basis of the case, deprive the defendant of a valuable right, or vitally affect a defensive theory, or make the case for conviction or punishment clearly and significantly more persuasive. *Id.*

The court's punishment-range instruction was erroneous, but its error affected only the minimum term of imprisonment the jury was authorized to assess. The minimum was ten years, rather than the thirty years the jury was instructed. The jury correctly was instructed that the maximum term it could assess was confinement "for life or for a term of not more than ninety-nine (99) years . . . ." The jury assessed imprisonment of 99 years.

Courts have found no egregious harm in other cases involving erroneous minimum-term punishment instructions. The Waco Court of Appeals found no egregious harm was shown from a punishment-range instruction of 15-to-99 years or life, when the correct range was 5-to-99 years or life. *Dickey v. State*, No. 10-13-00170-CR, 2014 Tex. App. LEXIS 9277 (Tex. App.—Waco August 21, 2014, pet. ref'd) (mem. op., not designated for publication). As in the case before us, the error arose from the improper use of a state jail felony for enhancement. And, like here, the defendant pled true to the enhancement paragraph and did not object to the punishment-range charge. *Id.* at *13-

14. The case involved the sexual assault of an adult, with a finding that the defendant's hand was used as a deadly weapon. With regard to harm from the erroneous punishment-range instruction, the court noted that the 50-year sentence imposed by the jury was "well above the instructed minimum sentence." It noted also that the jury heard considerable evidence of the victim's injuries and saw pictures depicting them. "Given the severity of the sentence assessed in relation to the instructed minimum sentence," the court held, the record did not show the defendant suffered egregious harm. *Id*. at *15.

The court in *Boone v. State,* No. 06-03-00250-CR, 2005 Tex. App. LEXIS 1950, at *7 (Tex. App.—Texarkana March 16, 2005, pet. ref'd) (mem. op., not designated for publication) reached a like conclusion, finding no egregious harm when the jury incorrectly was told the minimum term was twenty-five years. *Id.* at *7-8 ("[e]ven though the jury was instructed that Boone's minimum sentence was twenty-five years' imprisonment, the jury assessed punishment at eighty-five years' imprisonment. Given the severity of the sentence assessed in relation to the instructed minimum sentence, egregious harm has not been shown"). *See also Holt v. State,* 899 S.W.2d 22, 24-25 (Tex. App.—Tyler 1995 no pet.) (no egregious harm because sentence of eighty years was "considerably more remote from both the correct minimum range, fifteen years, and the erroneous minimum range given to the jury, twenty-five years"). *But cf., Coody v. State,* 812 S.W.2d 631, 634 (Tex. App.—Houston [14th Dist.] 1991), *rev'd on other grounds,* 818 S.W.2d 68 (Tex. Crim. App. 1991) (finding egregious harm where the trial court instructed the jury that the minimum sentence was two years and the maximum was ten years but failed to tell the jury of the alternative then available, confinement in a community correctional facility for a term of not more than one year).

Here, the evidence showed appellant possessed 19.37 grams of methamphetamine with an intent to deliver, in a drug-free zone, in a residence also containing several firearms and other evidence of drug trafficking. Punishment-stage evidence included appellant's twelve prior final felony convictions, all committed over an ten-year period. Testimony also showed appellant's membership in a gang. In view of that evidence, we agree with the State that the record does not show egregious harm from the punishment range error, given the great difference between the 99-year sentence the jury imposed and the minimum term they were instructed they could impose. *Dickey,* 2014 Tex. App. LEXIS 9277, at *15. Finding appellant was not denied a fair and impartial trial as a result of the erroneous instruction, we overrule his fourth issue.[12]

Admissibility of Evidence

In appellant's fifth issue, he argues the trial court reversibly erred when it overruled his objection to the introduction of evidence of the presence of firearms in the house.

The officers testified they found several firearms inside the residence, including an assault rifle, a sawed-off shotgun, a second shotgun and a .45 handgun. The State introduced photographs of the firearms and displayed the firearms themselves to the jury.

[12] Appellant also contends the Court of Criminal Appeals held in *Jordan v. State,* 256 S.W.3d 286 (Tex. Crim. App. 2008), that a punishment-range error like occurred here will never be harmless. That case involved a plea of not true to the State's enhancement allegations, the jury's finding that the enhancement allegations were true, and a subsequent holding by the appellate courts that the evidence was insufficient to support the finding. The Court of Criminal Appeals held that the point of error on appeal properly questioned the sufficiency of the evidence supporting the enhancement, and affirmed the court of appeals' conclusion that no harm analysis should be conducted. *Id*. at 292-93. By contrast, the issue appellant raises here is an assertion of harm from unobjected-to charge error. We do not read the *Jordan* opinion to control the analysis of appellant's fourth issue.

The court admitted the evidence but granted appellant a running objection to its admission. His argument on appeal is based on Rule of Evidence 403. TEX. R. EVID. 403.

The State argued it sought to show the guns are a common instrumentality of drug trafficking and the evidence was relevant to appellant's intent to deliver the drugs found.

We review a trial court's ruling concerning admission of evidence for an abuse of discretion. *Pawlak v. State,* 420 S.W.3d 807, 810 (Tex. Crim. App. 2010). The trial court's ruling must be upheld so long as it is within the zone of reasonable disagreement. *Id.* (citing *Wheeler v. State,* 67 S.W.3d 879, 888 (Tex. Crim. App. 2002)).

The court may exclude relevant evidence[13] if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence. TEX. R. EVID. 403. Evidence is unfairly prejudicial when it has "an undue tendency to suggest that a decision be made on an improper basis." *Pawlak,* 420 S.W.3d at 809 (*citing Montgomery v. State,* 810 S.W.2d 372, 389 (Tex. Crim. App. 1990) (op. on reh'g) (internal quotations omitted)). Rule 403 favors admissibility of relevant evidence, and the presumption is that relevant evidence will be more probative than prejudicial. *Montgomery,* 810 S.W.2d at 389.

The factors considered in whether evidence is admissible under Rule 403 include but are not limited to: (1) the probative value of the evidence; (2) the potential to impress

[13] Evidence is relevant if it has any tendency to make a fact more or less probable than it would be without the evidence and the fact is of consequence in determining the action. TEX. R. EVID. 401. Generally, relevant evidence is admissible. TEX. R. EVID. 402.

the jury in some irrational, yet indelible, way; (3) the time needed to develop the evidence; and (4) the proponent's need for the evidence. *Hernandez v. State,* 390 S.W.3d 310, 324 (Tex. Crim. App. 2012) (*citing Montgomery,* 810 S.W.2d at 389-90).

The trial court did not abuse its discretion by admitting the evidence of the presence of firearms in the home. Williams testified in some detail to the role that firearms play in drug trafficking. He described the necessity for drug traffickers to provide their own protection from the risks of robbery and similar dangers because of their inability simply to call on law enforcement as a legitimate business could. He described the use of the shotgun and the assault rifle as instruments of intimidation, describing the assault rifle as "scary." In that way, he tied the presence of the firearms and ammunition to the other evidence that the methamphetamine and hydrocodone found in the house were intended for distribution rather than personal use. From Williams' testimony, the jury readily could have seen the presence of the firearms as making it more likely appellant had the intent to distribute the controlled substances found. Because appellant's intent to deliver the drugs was an element of the indicted offense, the probative value of the firearm evidence, with the foundation Williams laid, strongly weighs in favor of its admission. *See Andrada v. State,* No. 07-13-00278-CR, 2015 Tex. App. LEXIS 2449, at *5 (Tex. App.—Amarillo, March 16, 2015, pet. ref'd) (mem. op., not designated for publication) (finding body armor probative of appellant's intent to deliver narcotics) (*citing United States v. Mays,* 466 F.3d 335, 341 (5th Cir. 2006) ("The firearms, body armor, scales, measuring cup, and baggies all qualify as 'tools of the trade' that indicate that [the defendant] did not intend to keep the cocaine base for personal use")); *see also Coleman v. State*, 145 S.W.3d 649, 658 (Tex. Crim. App. 2004) (Cochran, J., concurring) (analyzing "use" of deadly weapons in drug trafficking cases). In the context of the evidence of drug

trafficking, including the sizeable quantity of drugs, the supply of baggies, digital scales, packaged syringes and other contraband, appellant's argument the firearm evidence distracted the jury or invited jurors to convict on an irrational basis is not persuasive. *See State v. Mechler,* 153 S.W.3d 435, 440-41 (Tex. Crim. App. 2005) (evidence not unfairly prejudicial because it "relate[d] directly to the charged offense"). The State introduced some 175 photographs of items found in the house, and admission of those depicting the firearm evidence did not occupy an inordinate amount of time. *See id.* at 441 (because evidence related directly to charged offense, jury could not be distracted away from that offense regardless of time to present).[14] We overrule appellant's fifth issue.

Sufficiency of the Evidence[15]

In appellant's sixth issue, he argues the State presented insufficient links to prove beyond a reasonable doubt that he possessed the methamphetamine found in the camera case. Appellant acknowledges he had access to the home[16] but says that access was not exclusive.

In assessing the sufficiency of the evidence, we review all the evidence in the light most favorable to the verdict to determine whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Jackson v.*

[14] In this Court, appellant argues there was ample evidence that the possessor of the drugs intended their distribution, and the contested issue was appellant's link to their possession. We do not agree that, in the arguments in the trial court, appellant conceded that intent to deliver would be shown by the evidence.

[15] Because sustaining the issue would entitle appellant to an acquittal, we typically would address an evidentiary-sufficiency issue before addressing other appellate issues. In this case, we choose to address appellant's issues in the order he presented them.

[16] Evidence showed appellant possessed a key to the residence.

Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); *Brooks v. State,* 323 S.W.3d 893, 912 (Tex. Crim. App. 2010). "[O]nly that evidence which is sufficient in character, weight, and amount to justify a fact finder in concluding that every element of the offense has been proven beyond a reasonable doubt is adequate to support a conviction." *Brooks*, 323 S.W.3d at 917. When reviewing all of the evidence under the *Jackson* standard of review, we consider whether the jury's finding of guilt was a rational finding. *Id.* at 907. We are "required to defer to the jury's credibility and weight determinations because the jury is the sole judge of the witnesses' credibility and the weight to be given their testimony." *Id.* at 899-900.

A person commits the offense of possession of a controlled substance if he knowingly or intentionally possesses it. TEX. HEALTH & SAFETY CODE ANN. § 481.115(a). Under this indictment, the State had to prove beyond a reasonable doubt that the accused (i) intentionally or knowingly (ii) possessed, i.e., exercised actual care, custody, control, and management over methamphetamine (iii) in an amount of more than 4 grams but less than 200 grams on or about the date set forth in the indictment. *See* TEX. HEALTH & SAFETY CODE ANN. §§ 481.115(d); *Poindexter v. State,* 153 S.W.3d 402, 405-06 (Tex. Crim. App. 2005); *Brown v. State,* 911 S.W.2d 744, 747 (Tex. Crim. App. 1995).

We note at the outset that a rational juror could conclude from the evidence presented that appellant was in exclusive possession or control of the residence. The only direct evidence that another person was present came from appellant's statement to Lewis that a woman he did not identify was in the house. Officers found no other person in the house. That the back door was standing open does not prove the presence of another person. There was circumstantial evidence suggesting other people had

connection with the residence, such as a prescription bottle bearing a female name, other paper items bearing the names of other people and the locked door to one bedroom to which appellant apparently did not have a key. But that evidence is hardly conclusive.

We nonetheless conduct an analysis of appellant's links to the contents of the camera case. When the accused is not in exclusive possession or control of the place where the contraband is found, it cannot be concluded that he had knowledge of and control over the contraband unless there are additional independent facts and circumstances linking him to the contraband. *Poindexter*, 153 S.W.3d at 405. These elements may be established by circumstantial evidence. *Id.* at 405-06. The evidence must establish that the accused's connection with the contraband was more than just fortuitous. *Poindexter*, 153 S.W.3d at 406; *Brown,* 911 S.W.2d at 747. This link or connection "generates a reasonable inference that the accused knew of the contraband's existence and exercised control over it." *Roberson v. State,* 80 S.W.3d 730, 735 (Tex. App.—Houston [1st Dist.] 2002, pet. ref'd). There is no set formula of facts necessary to support an inference of knowing possession. *Pierce v. State,* No. 03-06-00492-CR, 2007 Tex. App. LEXIS 9505 (Tex. App.—Austin Dec. 5, 2007, no pet.) (mem. op., not designated for publication) (citations omitted). The force of these links does not need to exclude every other alternative hypothesis except the defendant's guilt. *Id*. (citation omitted). Possession of contraband need not be exclusive, and evidence that shows an accused jointly possessed the contraband with another is sufficient. *Id.* (citing *Martin v. State,* 753 S.W.2d 384, 387 (Tex. Crim. App. 1988); *Whitworth v. State,* 808 S.W.2d 566, 569 (Tex. App.—Austin 1991, pet. ref'd)). "But mere presence at the location where drugs are found is insufficient, by itself, to establish actual care, custody, control or management of those drugs." *Id.* (citing *Evans v. State,* 202 S.W.3d 158, 162 (Tex. Crim. App. 2006)).

Appellant had possession of the only vehicle that was parked at the residence when police arrived. As he left the residence he had on his person a baggie with a small amount of methamphetamine and a pill bottle containing hydrocodone. The camera case contained both bagged methamphetamine crystals and numerous hydrocodone pills. The baggie containing methamphetamine carried the same red marking as baggies in the camera case. Those facts give rise to a reasonable inference the methamphetamine he possessed came from the camera case, but appellant argues his possession of the small amount suggests only that he is a user, and does not sufficiently connect him with possession of the larger amounts in the camera case. The great weakness in appellant's argument is his possession of the key to the house. That appellant had a key to the house and locked the front door[17] when he departed under the officers' surveillance gave the jury reason to be satisfied beyond reasonable doubt that appellant was not merely present at the location where the drugs were found.[18] *Evans,* 202 S.W.3d at 162; *see Flores v. State*, 440 S.W.3d 180, 190 (Tex. App.—Houston [14th Dist.] 2013 pet. ref'd and judgment vacated on other grounds, 427 S.W.3d 399 (Tex. Crim. App. 2014)) (possession and use of key to gain entry and to lock up when exiting connected defendant to residence; citing cases). And, that evidence further shows the connection between his possession of the red-marked baggie of methamphetamine and the red-marked baggies in the camera case was more than just fortuitous. *Poindexter*, 153 S.W.3d at 406.

[17] Lewis testified he gained access to the house with "the key that we obtained from Mr. Flores that unlocked the door."

[18] The jury heard Williams respond in the negative when he was asked whether "users not affiliated with the residence typically have keys to the house."

Further evidence supporting the same conclusion is the sticky note police found attached to the back of the dresser in the bedroom containing the drugs. The photograph of the note shows that it bears two words: the names Flores and Sanchez. The jury reasonably could have seen appellant's name on that item of furniture as connecting him with that bedroom, and it was that room in which the drugs and three of the weapons were found. The jury was free to infer from these facts appellant was a person with care, custody or control of the methamphetamine. We find, viewing the evidence under the requisite standard, the affirmative evidence is sufficient to support a finding appellant knowingly and intentionally possessed the methamphetamine for which he was charged. *Hargrove v. State,* 211 S.W.3d 379, 386-87 (Tex. App.—San Antonio 2006, pet. ref'd). We resolve appellant's sixth issue against him.

Objections to State's Punishment Argument

In appellant's last issue, he argues the trial court reversibly erred when it denied his motion for a mistrial and when it overruled his objection to the State's closing argument during the punishment phase of trial. Appellant complains of two statements by the prosecutors. We will address them separately.

Permissible jury argument falls into one of four areas: (1) summation of the evidence; (2) reasonable deduction from the evidence; (3) an answer to the argument of opposing counsel; or (4) a plea for law enforcement. *Wesbrook v. State,* 29 S.W.3d 103, 115 (Tex. Crim. App. 2000). "Even when an argument exceeds the permissible bounds of these approved areas, such will not constitute reversible error unless, in light of the record as a whole, the argument is extreme or manifestly improper, violative of a mandatory statute, or injects new facts harmful to the accused into the trial proceeding."

Id. Generally, an instruction to disregard the remarks will cure the error. *Id.* We presume that a jury will follow the judge's instructions. *Gamboa v. State,* 296 S.W.3d 574, 580 (Tex. Crim. App. 2009).

The first statement occurred during the State's argument focusing on appellant's history of repeated convictions and imprisonments. The prosecutor assailed appellant's decision to sell drugs, knowing the consequences of a lengthy prison sentence. He continued, telling the jury:

> But what should really concern you is that a 12 time convicted felon, knowing, knowing that he can't possess any firearms - - you remember what we found in the house? I mean should these alone not scare you? You heard Officer . . . .

Appellant objected, arguing the argument was improper because "he's trying to invoke the feeling or emotion of fear into the jury." The trial court overruled the objection. On appeal, appellant asserts the prosecutor's comments do not fit within any of the four areas of permissible jury argument.

We disagree. The trial court reasonably could have seen the argument as a summation of the evidence, or a reasonable deduction from it. *Wesbrook,* 29 S.W.3d at 115. Williams, in his testimony, characterized the assault rifle as a "scary weapon" that can "do some real damage." The deputy also testified to the danger posed by the other weapons found, including a modified shotgun he characterized as causing "very devastating" damage, and to the danger of the hollow-point ammunition in the magazine of a pistol. The jury also had heard a peace officer testify that convicted felons may not lawfully possess firearms. The State is "afforded wide latitude in its jury arguments and may draw all reasonable, fair, and legitimate inferences from the evidence." *Flores v.*

State, Nos. 01-10-00531-CR, 01-10-00532-CR, 01-10-00534-CR, 2013 Tex. App. LEXIS 1809, at * 67 (Tex. App.—Dallas Feb. 26, 2013, no pet.) (mem. op., not designated for publication) (*citing Allridge v. State,* 762 S.W.2d 146, 156 (Tex. Crim. App. 1988)). Further, "[i]t is well settled that the prosecutor may argue his opinions concerning issues in the case so long as the opinions are based on the evidence in the record and do not constitute unsworn testimony." *Allridge,* 762 S.W.2d at 156 (citations omitted). We see no abuse of discretion in the court's overruling of appellant's objection. *See Garcia v. State*, 126 S.W.3d 921, 924 (Tex. Crim. App. 2004) (applying abuse of discretion standard to ruling on objection to jury argument).

The second trial court ruling appellant challenges occurred during the State's final argument. Appellant adduced punishment evidence through cross-examination of one of the State's punishment witnesses, but otherwise presented no punishment-phrase evidence. During final argument, the prosecutor was arguing that appellant's crimes show that he chose criminal behavior to get money because "that's the only thing that matters to him." She continued, telling the jury, "It isn't -- you heard nothing about family. You heard nothing mitigating about Mr. Flores. So what I am going to ask you to do . . . ." Appellant objected that the argument was improper because the defense has no burden to produce evidence. The trial court sustained the objection and, at appellant's request, instructed the jury to disregard the argument. Appellant moved for a mistrial but the court implicitly denied the motion.

We review a trial court's denial of a motion for mistrial for an abuse of discretion. *Gonzalez v. State,* 455 S.W.3d 198, 205-06 (Tex. App.—Houston [1st Dist.] 2014, pet. ref'd) (citing *Ocon v. State,* 284 S.W.3d 880, 884 (Tex. Crim. App. 2009)). A mistrial is

an appropriate remedy in "extreme circumstances" for a narrow class of highly prejudicial and incurable errors. *Id.* (citations omitted). A prompt instruction from the trial judge is usually enough to cure the error and avoid the need for a mistrial. *Id.* (citing *Wesbrook,* 29 S.W.3d at 115-16). Whether an error requires a mistrial must be determined by the particular facts of the case. *Id.* (citation omitted). We balance three factors to evaluate whether the trial court's denial of a mistrial for improper argument was an abuse of discretion. *Hawkins v. State*, 135 S.W.3d 72, 77 (Tex. Crim. App. 2004). Those factors are: (1) the severity of the misconduct (prejudicial effect); (2) curative measures; and (3) the certainty of the punishment assessed absent the misconduct (likelihood of the same punishment being assessed). *Id*.

On appeal, appellant argues the prosecutor's remarks were highly prejudicial because they indicated appellant "had such bad character he had no family to testify for him, nor any evidence, through other witnesses or Appellant taking the stand, to show why he should be given a lesser punishment." Appellant contends the statements were more harmful because they were delivered shortly before the jury retired to deliberate on his sentence. As to the second factor, appellant asserts the court's instruction to disregard the argument had no curative effect because of the manner in which it was worded. And appellant contends the State's punishment evidence was weak and did not support the ninety-nine year sentence he received.

Assuming, without deciding, that appellant is correct that the objected-to statement carried some prejudicial effect, we nonetheless find that the court's prompt instruction was effective and find the likelihood is high that the jury would have assessed the same sentence had the argument not been voiced. The court's instruction to disregard the

prosecutor's argument was emphatic. Appellant's contention the punishment evidence was weak ignores the substantial volume of controlled substances found in the house and the evidence of appellant's intent to distribute the drugs, the evidence of possession of a stolen vehicle and unlawful possession of firearms that accompanied the proof at trial and appellant's extraordinary record of twelve felony convictions over a ten-year period of time. While the punishment assessed appellant was near the maximum available, it is unlikely the single comment by the prosecutor influenced the jury's sentencing decision. No abuse of discretion is shown in the court's denial of a mistrial. We overrule appellant's final appellate issue.

Conclusion

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

James T. Campbell
Justice

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