



**In The
Court of Appeals
Seventh District of Texas at Amarillo**

No. 07-22-00010-CR

JOSE LUIS GOMEZ, JR., APPELLANT

V.

THE STATE OF TEXAS

**On Appeal from the 424th District Court
Burnet County, Texas,
Trial Court No. 50374, Honorable Evan C. Stubbs, Presiding**

August 3, 2023

MEMORANDUM OPINION

Before QUINN, C.J., and DOSS and YARBROUGH, JJ.

Following pleas of not guilty, Appellant, Jose Luis Gomez, Jr., was convicted by a jury of one count of unlawful possession of a firearm by a felon,¹ enhanced, and one count of possession of marihuana in an amount of five pounds or less but more than four ounces.² Punishment was assessed at seven and one-half years in the Institutional

¹ TEX. PENAL CODE ANN. § 46.04(a)(1).

² TEX. HEALTH & SAFETY CODE ANN. § 481.121(b)(3).

Division of the Texas Department of Criminal Justice and two years in a state jail facility ordered to run concurrently. By three issues, Appellant contends (1) the evidence is insufficient to support unlawful possession of a firearm by a felon and requests an acquittal, (2) there was prosecutorial misconduct during the State's closing argument in rebuttal, and (3) the trial court improperly admitted evidence as same transaction contextual evidence which did not fall within the exception of Rule 404(b).³ We affirm.

BACKGROUND

On October 29, 2019, sheriff's deputies responded to a report of domestic violence at a three-bedroom mobile home occupied by Appellant, his girlfriend Monica Flores, her four children, and Appellant's brother. When deputies arrived at the residence, they quickly took Appellant into custody on a domestic violence charge and transported him to detention. At booking, he was found to possess \$1,000 in cash.

Meanwhile, Flores gave the deputies access to the mobile home. Inside they smelled raw, cut marihuana and observed what they believed were marihuana plants. A search warrant was obtained and pursuant to the warrant deputies searched the residence. Body-camera footage of the warrant's execution was admitted at trial without objection.

The master bedroom was occupied by Appellant and Flores and there on a chest deputies located an electronic key fob for an automobile with other keys attached.

³ Originally appealed to the Third Court of Appeals, this appeal was transferred to this Court by the Texas Supreme Court pursuant to its docket equalization efforts. TEX. GOV'T CODE ANN. § 73.001. Should a conflict exist between precedent of the Third Court of Appeals and this Court on any relevant issue, this appeal will be decided in accordance with the precedent of the transferor court. TEX. R. APP. P. 41.3.

Evidence established the key fob operated a Dodge Challenger registered to Appellant. Flores testified she had not driven this vehicle prior to October 29. The conventional keys attached to the fob included one that opened a small safe, positioned beside the fob on top of the bedroom chest. Flores testified she did not have access to the safe. A sheriff's department investigator testified seeing "marijuana shake on the dresser and on top of the—I think on the safe too[.]" Among the contents of the safe was a .380 caliber handgun. In testimony, Flores denied the gun was hers. On top of a dresser on the other side of the bedroom was mail addressed to Appellant and an application for a motor vehicle title with a copy of Appellant's driver's license attached. There was no evidence of Appellant's address as it appeared on the mail, title application, or copy of his attached driver's license. In the bedroom closet, deputies found two marihuana plants. According to Flores's testimony, she was unaware of these plants until the night of October 29. At that time, she observed them placed on top of the chest alongside the safe and the key fob to Appellant's vehicle. In the master bedroom closet the deputies found male clothing and plastic baggies containing what they believed was marihuana. Flores testified the male clothing in the closet belonged to Appellant.

ANALYSIS

ISSUE ONE—SUFFICIENCY OF THE EVIDENCE

Appellant argues the evidence was insufficient to prove he possessed the firearm found in the bedroom safe. We disagree.

When reviewing the sufficiency of the evidence an appellate court views the evidence in the light most favorable to the verdict and determines whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable

doubt.” *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). This type of review takes account of the factfinder’s duty to weigh the evidence, to resolve conflicts in the testimony, and to make “reasonable inferences from basic facts to ultimate facts.” *Id.*; *Villarreal v. State*, No. 03-16-00684-CR, 2017 Tex. App. LEXIS 11182, at *6–8 (Tex. App.—Austin Dec. 1, 2017, no pet.) (mem. op., not designated for publication); TEX. CODE CRIM. PROC. ANN. art. 36.13 (providing “jury is the exclusive judge of the facts”). The appellate court determines “whether the necessary inferences are reasonable based upon the combined and cumulative force of all the evidence when viewed in the light most favorable to the verdict.” *Hooper v. State*, 214 S.W.3d 9, 16–17 (Tex. Crim. App. 2007). The appellate court presumes the factfinder resolved conflicting inferences in favor of the conviction and defers to that determination. *Villarreal*, 2017 Tex. App. LEXIS 11182, at *7. Direct and circumstantial evidence are treated equally, and circumstantial evidence is as probative as direct evidence in establishing the guilt of an actor; it can be sufficient on its own to establish guilt. *Id.* Sufficiency of the evidence is measured by the hypothetically correct jury charge; that is, one which accurately sets out the law, is authorized by the indictment, does not unnecessarily increase the State’s burden of proof or unnecessarily restrict the State’s theories of liability, and adequately describes the particular offense for which the defendant is tried. *Smith v. State*, 500 S.W.3d 685, 692 (Tex. App.—Austin 2016, no pet.). An appellate court will conclude the evidence is insufficient if the record contains no evidence, or merely a modicum of evidence probative of an element of the offense, or if the evidence conclusively establishes a reasonable doubt. *Villarreal*, 2017 Tex. App. LEXIS 11182, at *8.

As noted, Appellant was charged with unlawful possession of a firearm. A person commits that offense if he “has been convicted of a felony” and “if he possesses a firearm . . . after conviction and before the fifth anniversary of the person’s release from confinement following conviction of the felony or the person’s release from supervision under community supervision, parole, or mandatory supervision, whichever date is later.” TEX. PENAL CODE ANN. § 46.04(a)(1). To prove the offense, the State must show: “(1) the accused exercised actual care, control, or custody of the firearm; (2) he was conscious of his connection with it; and (3) he possessed the firearm knowingly or intentionally.” *Villarreal*, 2017 Tex. App. LEXIS 11182, at *8–9. “‘Possession’ means actual care, custody, control, or management,” TEX. PENAL CODE ANN. § 1.07(a)(39), and “is a voluntary act if the possessor knowingly obtains or receives the thing possessed or is aware of his control of the thing for a sufficient time to permit him to terminate his control.” § 6.01(b). “Possession of contraband need not be exclusive and evidence which shows that an accused jointly possessed the contraband with another is sufficient.” *Allen v. State*, 249 S.W.3d 680, 690 (Tex. App.—Austin 2008, no pet.). An appellate court evaluates the sufficiency of the evidence of possession of a firearm by a felon under the standards applied for establishing the sufficiency of the evidence in cases involving possession of a controlled substance. *Majors v. State*, 554 S.W.3d 802, 806 (Tex. App.—Waco 2018, no pet.).

When “the firearm is not found on the defendant or is not in his exclusive possession, the evidence must affirmatively link him to the firearm.” *Villarreal*, 2017 Tex. App. LEXIS 11182, at *9. “The State may establish possession by proving links which demonstrate that the defendant was conscious of his connection with the weapon and

knew what it was.” *Jones v. State*, 338 S.W.3d 725, 742 (Tex. App.—Houston [1st Dist.] 2011), *aff’d*, 364 S.W.3d 854 (Tex. Crim. App. 2012).

Factors that may affirmatively link the defendant to a firearm include:

(1) the defendant’s presence when a search is conducted; (2) whether the contraband was in plain view; (3) the defendant’s proximity to and the accessibility of the [firearm]; (4) whether the defendant was under the influence of narcotics when arrested; (5) whether the defendant possessed other contraband or narcotics when arrested; (6) whether the defendant made incriminating statements when arrested; (7) whether the defendant attempted to flee; (8) whether the defendant made furtive gestures; (9) whether there was an odor of contraband; (10) whether other contraband or drug paraphernalia were present; (11) whether the defendant owned or had the right to possess the place where the [firearm was] found; (12) whether the place where the [firearm was] found was enclosed; (13) whether the defendant was found with a large amount of cash; and (14) whether the conduct of the defendant indicated a consciousness of guilt.

Jones v. State, Nos. 03-17-00720-CR, 03-17-00721-CR, 2018 Tex. App. LEXIS 3869, at *14–15 (Tex. App.—Austin May 31, 2018, pet. ref’d) (mem. op., not designated for publication); *Boyd v. State*, No. 03-17-00353-CR, 2018 Tex. App. LEXIS 1819, at *3–4 (Tex. App.—Austin Mar. 13, 2018, no pet.) (mem. op., not designated for publication). “Although these factors can help guide a court’s analysis, ultimately the inquiry remains that set forth in *Jackson*: based on the combined and cumulative force of the evidence and any reasonable inferences therefrom, was a jury rationally justified in finding” Appellant possessed the firearm beyond a reasonable doubt? See *Tate v. State*, 500 S.W.3d 410, 414 (Tex. Crim. App. 2016) (stating *Jackson* inquiry).

Here, the evidence showed the mobile home residence was leased and Appellant paid the rent. He shared the master bedroom with Flores where deputies located a safe on top of a chest. Beside the safe on the chest was a key fob to Appellant’s vehicle. On

a bedroom dresser lay mail addressed to Appellant and an application for a motor vehicle title in his name. A key attached to Appellant's vehicle key fob unlocked the safe where officers located a .380 caliber handgun. The bedroom closet contained the marijuana plants and male clothing.

We conclude the combined and cumulative force of all of the evidence, when viewed in the light most favorable to the verdict, sufficiently supports the jury's implicit finding that beyond a reasonable doubt Appellant had actual care, custody, control, or management of the .380 caliber firearm found in the master bedroom safe. Appellant's first issue is overruled.

ISSUE TWO—STATE'S CLOSING ARGUMENT AT PUNISHMENT

Appellant next contends the trial court reversibly erred by overruling his objection to the prosecutor's closing argument at the punishment phase that Appellant was selling drugs. The appellate complaint is based on the trial court's ruling to Appellant's objection contained in the following colloquy:

[The Prosecutor]: And I don't want this to turn into Killeen and I don't want this to turn into Austin, but if we don't get serious about people who are selling drugs, not using drugs, selling drugs to our kids in our communities, we're just going to invite more of it.

[Defense Counsel]: Judge, I believe that's -- he's not convicted of selling drugs and trying to put children --

* * *

[The Court]: All right. I believe that the prosecutor is in the position to make a call for enforcement for the benefit of the community. And so do you have a specific objection?

[Defense Counsel]: The allegation is he's selling drugs. He hasn't been accused of that. That allegation was abandoned, so to take that position now would be inconsistent with the State's position.

[The Prosecutor]: My response is that he's guilty of the marijuana at the very least and that was -- there was prices on there and there's not a charge for it.

[The Court]: I'm going to overrule the objection.

We review a trial court's ruling on an objection to closing argument for abuse of discretion. *Aguilar v. State*, No. 03-19-00149-CR, 2020 Tex. App. LEXIS 8063, at *22 (Tex. App.—Austin Oct. 7, 2020, no pet.) (mem. op., not designated for publication). A trial court abuses its discretion when its decision lies outside the zone of reasonable disagreement or is arbitrary or unreasonable. *Id.* at *22–23. A trial court's erroneous ruling on a defendant's objection to improper jury argument is a non-constitutional error that must be disregarded unless it affects the defendant's substantial rights. TEX. R. APP. P. 44.2(b); *Zapien-Garcia v. State*, No. 03-17-00779-CR, 2019 Tex. App. LEXIS 4483, at *14 (Tex. App.—Austin May 31, 2019, no pet.) (mem. op., not designated for publication). To determine whether a defendant's rights were affected, the reviewing court "must independently review the record as a whole." *Loch v. State*, 621 S.W.3d 279, 282 (Tex. Crim. App. 2021).

The purpose of closing argument is to facilitate the jury's proper analysis of the evidence presented at trial in order to arrive at a just and reasonable conclusion based solely on the evidence. *Adair v. State*, No. 03-11-00318-CR, 2013 Tex. App. LEXIS 14923, at *58 (Tex. App.—Austin Dec. 12, 2013, no pet.) (mem. op., not designated for publication). Proper jury argument generally falls within one of four areas: (1) summation of the evidence; (2) reasonable deduction from the evidence; (3) answer to argument of opposing counsel; and (4) plea for law enforcement. *Brown v. State*, 270 S.W.3d 564, 570 (Tex. Crim. App. 2008).

At multiple points during their testimony two sheriff's department investigators referred, without objection, to drug dealing and the implements of that trade they found in the master bedroom and its adjoining closet of Appellant's residence. A supporting video of the search warrant's execution was also played for the jury. We think the prosecutor's challenged argument was proper summation of the evidence as well as a conclusion reasonably deduced from the evidence.

Moreover, assuming but without deciding the challenged portion of the prosecutor's argument was improper, and the trial court accordingly abused its discretion by overruling Appellant's objection, the error was harmless. As noted, Appellant's objection was the prosecutor wrongly accused him of selling drugs. But preceding that objection the prosecutor's argument included the following unobjected-to statements:

We're talking about a guy who crams four kids into one bedroom and sells drugs out of his house.

* * *

It's dealing with kids, drug dealing with kids in the house, four of them. He doesn't care about those kids. He crams them into a bedroom so he can bring his pot-smoking customer brother to take another bedroom by himself.

* * *

But you don't go easy on him. We don't reward drug dealers who decide that that's going to be their career.

* * *

The first thing he did when he got out of prison was go continue his career selling drugs in our community.

Following the trial court's challenged ruling, the prosecutor continued, without objection:

We're talking about someone who took all of those things and all of that opportunity and flushed it down the toilet so he could sell drugs to our kids.

So he's a danger to a pregnant woman's children and unborn child. That's what we're talking about.

Because elsewhere the prosecutor made the same or similar arguments without objection, any error in the trial court's ruling was harmless. See *Myles v. State*, No. 01-11-00188-CR, 2012 Tex. App. LEXIS 4911, at *12–13 (Tex. App.—Houston [1st Dist.] June 21, 2012, pet. ref'd) (“Even if a defendant objects to an improper argument once, failure to object to other instances of the same or similar arguments will result in an appellate court finding that the trial court's error, if any, in failing to sustain the objection is harmless.”) (citing *Howard v. State*, 153 S.W.3d 382, 385 (Tex. Crim. App. 2004)); see also *Roberts v. State*, Nos. 05-19-01374-CR, 05-19-01375-CR, 05-19-01376-CR, 2020 Tex. App. LEXIS 5375, at *11 (Tex. App.—Dallas July 15, 2020, no pet.) (mem. op., not designated for publication) (“Generally, where the ‘same objected-to argument is presented elsewhere during trial without objection, no reversible error exists.’”) (quoting *Moyer v. State*, 948 S.W.2d 525, 531 (Tex. App.—Fort Worth 1997, pet. ref'd)); *Longoria v. State*, 154 S.W.3d 747, 766 (Tex. App.—Houston [14th Dist.] 2004, pet. ref'd) (stating in instance where prosecutor repeated objected-to argument after defendant's objection was sustained, “[w]here the objected-to argument is repeated without objection, no reversible error exists”).

ISSUE THREE—EVIDENTIARY OBJECTION

Appellant argues the trial court erroneously admitted as “same transaction contextual evidence of drug discoveries,” certain allegedly illegal substances found in Appellant's master bedroom, viz., Alprazolam, tetrahydrocannabinol “vape cartridges,” tetrahydrocannabinol “wax,” and ledgers allegedly recording illegal drug transactions.

We review the trial court’s admission of evidence for an abuse of discretion and will not disturb that court’s decision if the ruling was within the zone of reasonable disagreement. *Bigon v. State*, 252 S.W.3d 360, 367 (Tex. Crim. App. 2008). A trial court’s erroneous admission of evidence is non-constitutional error subject to the analysis of appellate rule 44.2(b). TEX. R. APP. P. 44.2(b) (error “that does not affect substantial rights must be disregarded”); *Taylor v. State*, 268 S.W.3d 571, 592 (Tex. Crim. App. 2008) (“error is reversible only when it has a substantial and injurious effect or influence in determining the jury’s verdict”). “An appellant’s substantial rights are not affected by the erroneous admission of evidence if the same or similar evidence is admitted elsewhere without objection.” *Mills v. State*, No. 03-21-00401-CR, 2022 Tex. App. LEXIS 7227, at *15 (Tex. App.—Austin Sept. 28, 2022, no pet.) (mem. op., not designated for publication) (citations omitted).

Same transaction contextual evidence may be admissible where several crimes are intermixed, or blended with one another, or connected so that they form an indivisible criminal transaction, and full proof by testimony of any one of them cannot be given without showing the others. Same transaction contextual evidence is admissible only when the offense would make little or no sense without also bringing in that evidence. The jury is entitled to know all the relevant surrounding facts and circumstances of the charged offense; an offense is not tried in a vacuum. It is well settled that where one offense or transaction is one continuous episode, or another offense or transaction is a part of the case on trial or blended or closely interwoven therewith, proof of all the facts is proper.

Nasipak v. State, No. 03-21-00464-CR, 2022 Tex. App. LEXIS 8528, at *19–20 (Tex. App.—Austin Nov. 18, 2022, no pet.) (mem. op., not designated for publication). Stated differently, “[t]he conduct must be blended or connected to the act for which the defendant is being tried so that they form an indivisible criminal transaction, such that full proof of one could not be given without showing the other.” *Gattis v. State*, No. 03-04-00268-CR,

2006 Tex. App. LEXIS 5668, at *10 (Tex. App.—Austin June 29, 2006, pet. ref'd) (mem. op., not designated for publication) (citing *Lam v. State*, 25 S.W.3d 233, 237 (Tex. App.—San Antonio 2000, no pet.)).

On the State's offer, the trial court admitted, without objection or limitation, a lengthy video/audio recording of deputies searching Appellant's residence and particularly his master bedroom where they located the items of alleged contraband which are the subject of his complaint. These items were mentioned or identified elsewhere in testimony, without objection, during the guilt-innocence phase of trial.

We conclude, even if the trial court erred in admitting the challenged items, the error was harmless because it did not affect a substantial right of Appellant. Appellant's third issue is overruled.

Conclusion

Having overruled Appellant's three issues, the trial court's judgments are affirmed.

Alex Yarbrough
Justice

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