NO. 12-23-00145-CR

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

SAMUEL X. BAMBURG, APPELLANT	*§*	***APPEAL FROM THE***
V.	*§*	***COUNTY COURT AT LAW NO. 3***
THE STATE OF TEXAS, APPELLEE	*§*	***SMITH COUNTY, TEXAS***

MEMORANDUM OPINION

Samuel X. Bamburg appeals his conviction for possession of a controlled substance. In his sole issue, he contends that the evidence is insufficient to support the jury's verdict. We affirm.

BACKGROUND

Appellant was charged by information with one count of possession of less than twenty-eight grams of a controlled substance in Penalty Group Three (PG-3), namely codeine. The information contained a punishment enhancement paragraph, to which Appellant ultimately pleaded "true." Appellant pleaded "not guilty" to the offense and the matter proceeded to a jury trial.

The testimony at trial revealed that, on October 11, 2022, Tyler Police Department Officers Tyler Osmer and Bryston Parker patrolled a parking lot of an apartment complex and noticed a vehicle "hanging out" by a dumpster in the lot. Osmer and Parker decided to investigate.

Osmer approached and contacted the occupants of the vehicle. Appellant owned the vehicle, but he was in the passenger seat, while Jackie McNeely occupied the driver seat. Osmer knew McNeely due to previous encounters with her.

Osmer captured the detention on his body camera video, which was admitted into evidence without objection. Osmer testified that Appellant was cooperative during the search. As the owner of the vehicle, Appellant consented to the search of his vehicle and his person. When Osmer reached into Appellant's pocket, he pulled out a small plastic baggy with three round pills stamped with an "M" on one side and a "3" on the other. Appellant identified them as "Tylenol 3" he obtained from a friend for a toothache, and agreed they require a prescription. No illegal items were found in the vehicle. Osmer arrested Appellant for possession of the three pills and transported him to the Smith County Jail.

Later, Texas Department of Public Safety Crime Laboratory forensic scientist James Marzelli weighed one of the pills, placed it in a gas chromiograph mass spectrometer (GC-MS), and verified it contained codeine.[1] According to his analysis, the pill he analyzed weighed 0.43 grams in net weight. The lab had no equipment for assessing codeine concentration. Next, Marzelli performed a visual inspection and found the pill on "Drugs.com," which he described as a commonly used and respected pharmaceutical reference used by him and other forensic scientists in the scientific community. In the lab report Marzelli prepared, he wrote "Contains Codeine" and the following note:

> Pharmaceutical information indicates not more than 1.8 grams of codeine, or any of its salts, per 100 milliliters or not more than 90 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts[.][2]

At trial, Marzelli said a combination of factors led him to the PG-3 conclusion: (1) the instrumental analysis showed there was codeine in the pill; (2) he performed a visual analysis, and nothing about the pills' color, size, or markings suggested they were counterfeit; and (3) pharmaceutical information for pills identical to the one he analyzed had PG-3 codeine levels and acetaminophen in recognized therapeutic amounts. The pharmaceutical reference information was admitted into evidence as an exhibit. The reference contained detailed photos and size measurements of the pills, describing them as "white," "round," "11.00 mm," and stamped with an "M" on one side, and "3" on the other. The reference also stated that pills of such a size contain

[1] Marzelli did not perform a formal analysis on the remaining two pills other than to say they appeared to be identical to the pill he tested.

[2] The note tracks the Texas Health and Safety Code's PG-3 controlled substance statute for codeine. *See* TEX. HEALTH & SAFETY CODE ANN. § 481.104(a)(4) (West Supp. 2023).

a strength of "300 mg of acetaminophen" and "30 mg of codeine phosphate." Finally, as relevant here, it described the pill as a "narcotic analgesic combination" used to treat "osteoarthritis; pain; cough."

Under cross-examination, Marzelli admitted he could not "absolutely say" the pills fell under PG-3 or PG-4 because he: (1) had not scientifically verified the percentage of codeine in the pill he tested; and (2) "the minutiae of differentiating between the two penalty groups is not something I do in my everyday work, and it—it's not really something I've been trained to deal with or worry about."

After denying Appellant's motion for directed verdict, the jury found Appellant "guilty" of the offense under PG-3. After a punishment hearing, the jury assessed Appellant's punishment at 365 days of confinement in the Smith County Jail. This appeal followed.

SUFFICIENCY OF THE EVIDENCE

In his sole issue, Appellant contends that the evidence is insufficient to support the jury's "guilty" finding because the State failed to prove the amount of codeine in the pills resulted in a PG-3 offense.

Standard of Review

In our evidentiary sufficiency review, we view all the evidence in the light most favorable to the verdict to determine whether any rational factfinder could have found the crime's essential elements beyond a reasonable doubt. ***Jackson v. Virginia***, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979); ***Queeman v. State***, 520 S.W.3d 616, 622 (Tex. Crim. App. 2017).

This standard gives full play to the factfinder's responsibility to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. *See* ***Jackson***, 443 U.S. at 319, 99 S. Ct. at 2789; ***Queeman***, 520 S.W.3d at 622.

The factfinder alone judges the evidence's weight and credibility. *See* TEX. CODE CRIM. PROC. ANN. art. 38.04 (West 1979); ***Queeman***, 520 S.W.3d at 622. We may not reevaluate the evidence's weight and credibility and substitute our judgment for the factfinder's. ***Queeman***, 520 S.W.3d at 622. Instead, we determine whether the necessary inferences are reasonable based on the evidence's cumulative force when viewed in the light most favorable to the verdict. ***Murray v. State***, 457 S.W.3d 446, 448 (Tex. Crim. App. 2015). We must presume that the factfinder

resolved any conflicting inferences in favor of the verdict, and we must defer to that resolution. ***Id.*** at 448–49.

Circumstantial evidence is as probative as direct evidence in establishing the guilt of an actor, and circumstantial evidence alone can be sufficient to establish guilt. ***Clayton v. State***, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007). The Court of Criminal Appeals has held that even if every fact does not point directly and independently to the guilt of the accused, the cumulative force of all the circumstantial evidence can be sufficient for a jury to find the accused guilty beyond a reasonable doubt. ***Powell v. State***, 194 S.W.3d 503, 507 (Tex. Crim. App. 2006). The duty of a reviewing court is to ensure that the evidence presented actually supports a conclusion that the defendant committed the crime charged. *See* ***Williams v. State***, 235 S.W.3d 742, 750 (Tex. Crim. App. 2007).

Applicable Law

The Texas Court of Criminal Appeals has described the statutory scheme regarding the illegal unprescribed possession of codeine as "somewhat confusing." *See* ***Biggers v. State***, 630 S.W.3d 74, 76 (Tex. Crim. App. 2021). "The statutory scheme criminalizing the unauthorized possession of codeine establishes different tiers of punishment for illegal unprescribed codeine possession." ***Id***. The Court described the three different tiers in relevant part as follows:

> • Penalty Group 1: "Codeine not listed in Penalty Group 3 or 4." TEX. HEALTH & SAFETY CODE ANN. § 481.102(3)(A) [West Supp. 2023].
>
> • Penalty Group 3: A mixture of "not more than 1.8 grams of codeine . . . per 100 millimeters or not more than 90 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts." [TEX. HEALTH & SAFETY CODE ANN.] § 481.104(a)(4) [West Supp. 2023].
>
> • Penalty Group 4: A mixture "that includes one or more nonnarcotic active medicinal ingredients in sufficient proportion to confer on the . . . mixture . . . valuable medicinal qualities other than those possessed by the narcotic drug alone" and "not more than 200 milligrams of codeine per 100 milliliters or per 100 grams." [TEX. HEALTH & SAFETY CODE ANN.] § 481.105(1) [West 2017].

Id. (quotations and citations in original).

Discussion

The information alleged, in relevant part, that Appellant:

> did, then and there intentionally or knowingly possess a controlled substance, namely, a material, compound, mixture, or preparation in an amount of less than 28 grams, that contained not more than

> 1.8 grams of CODEINE, or any of its salts, per l00 milliliters or not more than 90 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts[.]

Appellant argues the penalty-group proof is insufficient because Marzelli did not scientifically verify the codeine/acetaminophen amounts in the pills and would not testify the pills unequivocally fell under PG-3. As support for his argument, Appellant chiefly relies on the Texas Court of Criminal Appeals' opinion in ***Biggers***. *See generally* ***id.***

In ***Biggers***, police officers observed a Sprite bottle and a white Styrofoam cup during a buy-bust operation, both filled with "a purple-type substance." ***Id.*** at 75. The defendant admitted that the substance was "lean"—a commonly used term for codeine cough syrup mixed in a beverage. ***Id***. The substance field-tested positive for codeine, and officers arrested him for possession of a controlled substance. ***Id***. During the subsequent trial, the prosecutor proffered testimony from a chemist regarding the contents of the Sprite bottle and a Styrofoam cup. ***Id***. The chemist testified that both items "had a similar odor to cough syrup or something of the like" and that both contained "an unspecified amount of codeine and promethazine." ***Id.***

The chemist explained on voir dire that she was not asked to quantify the amount of codeine and promethazine in the Sprite bottle or the Styrofoam cup, and she did not know the concentration level of codeine in either sample. ***Id***. She testified, however, that labels on "common cough syrup" do "usually state that it is a Penalty Group 4" and has "not more than 200 milligrams of codeine per 100 milliliters." ***Id***. Finally, the chemist testified that promethazine was a nonnarcotic active medicinal ingredient, but she never testified as to "whether the combination of promethazine and codeine had valuable medicinal qualities other than those possessed by the codeine alone." ***Id***. The prosecutor asked, "Does the promethazine add something to this mixture medicinally . . . ?" ***Id.*** The chemist responded, "It appears to, but I can't say for sure." ***Id***. The Court upheld the Amarillo Court of Appeals' judgment of acquittal, reasoning that although the liquid contained codeine and promethazine, the chemist failed to testify whether the codeine was combined with the promethazine in recognized therapeutic amounts or "in sufficient proportion to confer on the compound valuable medicinal qualities other than those possessed by the codeine alone." ***Id***. at 79. Furthermore, there was no other evidence to show the concentration of the substances in the liquid mixture. *See* ***id***.

Biggers is distinguishable from the facts in the present case. There, the substance contained a liquid mixture, making it impossible to determine the amount or concentration of

codeine relative to the remainder of the non-narcotic liquid without specific testing. Here, Marzelli testified that the tested pill contained codeine. But his analysis went further, and he explained that these were pills, containing specific size, color, shape, weight, and markings that appeared to be identical to that from a reliable pharmaceutical database, and the pills did not appear to be counterfeit. The trial court admitted the database reference material on the substance, which showed a narcotic concentration of "30 mg of codeine" per pill, and a non-narcotic therapeutic concentration of "300 mg acetaminophen" per pill. Marzelli's report confirmed this concentration based on his analysis in his report. The Fort Worth Court of Appeals recently held that similar testimony regarding hydromorphone pills with similar facts to the present case was sufficient to support the jury's "guilty" verdict. *See* ***Furstonberg v. State***, No. 02-21-00078-CR, 2022 WL 5240473, at *2-3 (Tex. App.—Fort Worth Oct. 6, 2022, pet. ref'd) (mem. op., not designated for publication) (post-***Biggers*** case rejecting defendant's contention that chemist's visual identification of prescription hydromorphone pills without specific chemical test was insufficient, holding that unlike other cases, chemist relied not only on extrajudicial admission that pills were hydromorphone, but also that pills had distinctive characteristics allowing chemist to compare them with database she described as reliable source of information). We agree with the reasoning in ***Furstonberg***. Furthermore, it was reasonable for the jury to infer that the identical untested pills contained the same codeine and acetaminophen concentrations as the pill Marzelli tested. *See* ***Davis v. State***, No. 14-18-00392-CR, 2019 WL 4785755, at *4-5 (Tex. App.—Houston [14th Dist.] Oct. 1, 2019, no pet.) (mem. op., not designated for publication) (holding that untested pills appearing identical to tested pill and found in same container authorized jury to reasonably conclude that untested pills were same illicit substance in tested pill).

Finally, the jury could compare the pills seized from Appellant with the detailed photos in the database, the descriptive information in the reference material, and Marzelli's testimony, and reasonably conclude that the pills fell within the PG-3 statute. *See* ***Melton v. State***, 120 S.W.3d 339, 343–44 (Tex. Crim. App. 2003) (holding it was reasonable for jury to infer that all 35-40 "rocks" contained cocaine when they were all found in the same bag, random testing of some rocks was positive for cocaine, and the jury was able to inspect the rocks to determine their homogeneity); ***Allen v. State***, 249 S.W.3d 680, 685 n.5 (Tex. App.—Austin 2008, no pet.) ("The random sampling of apparently homogeneous substances contained within a single receptacle is sufficient to prove the whole is contraband."); *see also* ***Dent v. State***, No. 14-14-00536-CR, 2015

WL 1143077, at *3–4 (Tex. App.—Houston [14th Dist.] Mar. 12, 2015, pet. ref'd) (mem. op., not designated for publication) (applying ***Melton*** in context of pills); ***Woods v. State***, No. 14-07-00940-CR, 2009 WL 1975547, at *10 (Tex. App.—Houston [14th Dist.] July 9, 2009, pet. ref'd) (mem. op., not designated for publication) (same).

In summary, we do not evaluate whether the jury must conclude with absolute certainty that the pills fell within PG-3, but whether they could reasonably conclude that the pills fell within PG-3 beyond a reasonable doubt. *See, e.g.,* ***Queeman***, 520 S.W.3d at 622. Based on the foregoing analysis, we hold that the jury could reasonably reach the conclusion that the pills fell within PG-3, which was the only contested essential element of the offense in this case.

Accordingly, Appellant's sole issue is overruled.

DISPOSITION

Having overruled Appellant's sole issue, we ***affirm*** the trial court's judgment.

BRIAN HOYLE
Justice

Opinion delivered April 10, 2024.
Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.

(DO NOT PUBLISH)

COURT OF APPEALS
TWELFTH COURT OF APPEALS DISTRICT OF TEXAS
JUDGMENT

APRIL 10, 2024

NO. 12-23-00145-CR

SAMUEL X. BAMBURG,
Appellant

V.

THE STATE OF TEXAS,
Appellee

Appeal from the County Court at Law No 3
of Smith County, Texas (Tr.Ct.No. 003-81011-23)

THIS CAUSE came to be heard on the appellate record and briefs filed herein, and the same being considered, it is the opinion of this court that there was no error in the judgment.

It is therefore ORDERED, ADJUDGED and DECREED that the judgment of the court below **be in all things affirmed**, and that this decision be certified to the court below for observance.

Brian Hoyle, Justice.
Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.