Opinion issued March 31, 2011

In The

Court of Appeals

For The

First District of Texas

NO. 01-09-00192-CR

EUGENE WILLIE SEREAL, Appellant
V.

STATE OF TEXAS, Appellee

On Appeal from the 405th District Court
Galveston County, Texas
Trial Court Case No. 08CR0173

MEMORANDUM OPINION

Eugene Willie Sereal was convicted by a jury of possession of cocaine. The jury further found the allegations in two enhancement paragraphs to be true and assessed punishment at 65 years' confinement. In five issues, appellant contests

(1) the denial of his motion to suppress, (2) the admission of the State's defective chain-of-custody affidavit as well as the cocaine found on him, (3) the refusal of a spoliation instruction, (4) legal sufficiency of the evidence, and (5) factual sufficiency of the evidence. We affirm.

Background

At the pretrial hearing on appellant's motion to suppress and at the trial itself, Officer Scott Cogburn testified as to the traffic stop giving rise to the arrest. According to Officer Cogburn, he paced appellant's car using his radar, determined he was speeding, and stopped him. Officer Cogburn recognized appellant from previous encounters, and once he confirmed that appellant's driver's license was suspended and that appellant had two outstanding arrest warrants, Cogburn arrested appellant and patted him down, finding $1,313 in cash in his wallet.

Once appellant was handcuffed and placed in the back of the patrol car, Cogburn saw appellant move his handcuffed hands toward the rear of his pants such that the parked patrol car shook. Cogburn testified that it was common for an arrested person to attempt to hide contraband in his or her anus. Upon arrival of other officers, Cogburn and the other deputies inventoried appellant's vehicle and discovered several small amounts of cocaine which, once field-tested, left nothing to mark as evidence to be admitted into evidence at trial.

Appellant was transported to the Dickinson Police Station for processing where, due to the suspicious activity in Officer Cogburn's vehicle, he was given a full-body search upon arrival. Dickinson Police Officer Justin Lovel conducted the full-body search and found a plastic baggie. Lovel put it in an envelope for Officer Cogburn, who photographed it, weighed it, field tested it, and placed it in an evidence package, which he deposited in a sealed evidence locker at the Galveston County Identification Division, along with a form requesting scientific analysis by the Texas Department of Public Safety (DPS). Andrew Gardiner, a DPS forensic scientist, analyzed the substance and determined that it contained 3.92 grams of cocaine. Officer Cogburn picked up the evidence package, later marked as State's Exhibit 14, from the Galveston County Identification Division on the morning of trial and brought it to court.

Upon denial of appellant's motion for a directed verdict, the defense rested without offering any witness testimony or evidence.

Discussion

Motion to Suppress

In his first issue, appellant contends that the trial court erred when it overruled his motion to suppress all evidence "whether alleged to be on [appellant's] person or within his vehicle."

In reviewing a trial court's ruling on a motion to suppress evidence, we apply a bifurcated standard of review, giving "almost total deference to [the] trial court's determination of historic facts" and reviewing de novo the court's application of the law of search and seizure to those facts. *Carmouche v. State*, 10 S.W.3d 323, 327 (Tex. Crim. App. 2000) (citing *Guzman v. State*, 955 S.W.2d 85, 88–89 (Tex. Crim. App. 1997)). If the refusal to suppress was error, we look for harm. *State v. Daugherty*, 931 S.W.2d 268, 273 (Tex. Crim. App. 1996). We must reverse unless we conclude beyond a reasonable doubt that the error did not contribute to the conviction. *See Long v. State*, 203 S.W.3d 352, 353 (Tex. Crim. App. 2006). If appellant was not harmed by the admission of the complained-of evidence, we affirm the conviction despite any error in the trial court's failure to suppress it. *See* TEX. R. APP. P. 44.2(a); *Neal v. State*, 256 S.W.3d 264, 284 (Tex. Crim. App. 2008); *Ibarra v. State*, 11 S.W.3d 189, 194 (Tex. Crim. App. 1999) (affirming conviction when, even assuming error in admitting evidence, appellant not harmed by its admission).

In the present case, appellant argues cites *Arizona v. Gant* and does not challenge the trial court's refusal to suppress the evidence on any other basis. *Gant*, 129 S. Ct 1710, 1723 (2009). In *Gant*, the United States Supreme Court held that police may only search the passenger compartment of a vehicle as part of a search incident to arrest if (1) the defendant is within reaching distance of the

passenger compartment at the time of the search or (2) it is reasonable to believe the vehicle contains evidence of the offense of arrest. *Id.* *Gant* only pertains to searches of *the passenger compartment of a vehicle* as part of a search incident to arrest. *Id.* The cash and baggie-of-cocaine evidence in this case were both discovered on *appellant's person*. Assuming the court erred in admitting evidence obtained during the search of appellant's vehicle under *Gant*, appellant does not argue that the court abused its discretion in admitting the cash or cocaine. Moreover, appellant was not charged with possession of the cocaine found in his vehicle, but only that found on his person during the full-body search conducted at the police station.

When determining whether a defendant was harmed by the admission of inadmissible evidence, we are to calculate, as nearly as possible, the probable impact of the error on the fact-finder in light of the other evidence. *Jones v. State*, 119 S.W.3d 766, 777 (Tex. Crim. App. 2003). We consider whether the inadmissible evidence added something that caused the fact-finder to return a different verdict than it would have if the evidence had not been admitted. *Hill v. State*, 692 S.W.2d 716, 723 (Tex. Crim. App. 1985). Factors we consider include the importance of the inadmissible evidence to the prosecution's case, whether the evidence was cumulative, the presence or absence of evidence corroborating or contradicting material inadmissible evidence, and the overall strength of the

prosecution's case. *Delaware v. Van Arsdall*, 475 U.S. 673, 684, 106 S. Ct. 1431, 1438 (1986). While we do not focus on the propriety of the outcome of the trial, the presence of overwhelming evidence supporting the finding in question can be a factor in the evaluation of harmless error. *Wesbrook v. State*, 29 S.W.3d 103, 119 (Tex. Crim. App. 2000). We consider whether there was a reasonable possibility that the error, either alone or in context, moved the fact-finder from a state of nonpersuasion to one of persuasion as to the issue in question. *Id*.

Having reviewed the record, we conclude that even assuming the trial court erred in admitting evidence discovered during the search of appellant's vehicle, such error is harmless and does not require reversal because we are convinced beyond a reasonable doubt that its admission had no impact on either the guilty verdict or punishment. *See* TEX. R. APP. P. 44.2(a); *Hernandez v. State*, 60 S.W.3d 106, 108 (Tex. Crim. App. 2001). In reaching this conclusion, we have considered the source and nature of the error, the extent to which the evidence was emphasized by the State, and probable collateral implications of its admission. *See Harris v. State*, 790 S.W.2d 568, 585–87 (Tex. Crim. App. 1989).

We overrule appellant's first issue.

Chain of Custody

In his second issue, appellant contends that the trial court erred in admitting State's Exhibit 14, the cocaine purportedly found on appellant's person during a

full body search conducted at the Dickinson jail after he was arrested, based upon the State's defective chain-of-custody affidavit, which the trial court also erroneously admitted.

At trial, appellant objected to the admission of the chain-of-custody affidavit based upon Texas Code of Criminal Procedure article 38.42, which requires a chain-of-custody affidavit to include, among other things, "the date and method of receipt and the name of the person from whom or location from which the item of physical evidence was received." TEX. CODE CRIM. PROC. ANN. art. 38.42, § 3(4) (West 2005). Appellant also argued that the chain-of-custody affidavit was inadmissible because a copy of the affidavit was not timely served upon defense counsel as required by article 38.42. *See* TEX. CODE CRIM. PROC. ANN. art. 38.42, § 4 (West 2005) (requiring chain-of-custody affidavit introduced under this article to be filed with clerk and served on opposing party "[n]ot later than the 20th day before the trial begins").

A chain-of-custody affidavit is merely one way for a party to establish the chain of custody of physical evidence without the necessity of any person in the chain of custody personally appearing in court. Such an affidavit, however, is not required to establish the chain of custody. *See Ingram v. State*, 213 S.W.3d 515, 520–21 (Tex. App.—Texarkana 2007, no pet.). Even if appellant is correct in arguing that the trial court erred in admitting the chain-of-custody affidavit, such

error would be harmless in light of the fact that the State established the chain of custody through witness testimony.

In the present case, three of the individuals in the chain of custody testified at appellant's trial: Officer Cogburn, the arresting officer; Officer Justin Lovel, the officer who recovered the baggie of cocaine from appellant after the full-body search; and Andrew Gardiner, a DPS forensic scientist.

The State presented testimony that appellant was arrested during a traffic stop and transported to the Dickinson police station where Officer Lovel's search yielded the plastic baggie containing cocaine. Lovel provided the baggie to Cogburn, who photographed it and determined that it contained 4.7 grams of cocaine. Cogburn then placed the cocaine in an evidence package, which he signed, sealed, dated, and turned over to the Galveston County Identification Division, which sent it to the DPS laboratory for testing. Gardiner, a DPS forensic scientist, testified that he analyzed the substance admitted into evidence as State's Exhibit 14 and he determined that it contained 3.92 grams of cocaine. Officer Cogburn further testified that he picked up the evidence package, later marked as State's Exhibit 14, from the Galveston County Identification Division the morning of trial and brought it to court with him. Because there was no showing that the evidence was tampered with or altered, this testimony is sufficient to establish the chain of custody. *See Stoker v. State*, 788 S.W.2d 1, 10 (Tex. Crim. App. 1989)

(stating proof of beginning and end of chain of custody will support admission of evidence barring any showing of tampering or alteration). Whatever gaps occur between the beginning and the end of the chain affect the weight, not the admissibility, of the evidence. *See Lagrone v. State*, 942 S.W.2d 602, 617 (Tex. Crim. App. 1997).

Although he objected to the admission of the chain-of-custody affidavit (State's Exhibit 15) during trial, appellant did not object to the admission of the cocaine (State's Exhibit 14). As a result, appellant failed to preserve this claim for appellate review. *See Powell v. State*, 898 S.W.2d 821, 829 (Tex. Crim. App. 1994) (stating claim that tangible item of evidence improperly admitted due to lack of proper authentication not preserved absent specific and timely objection). Even if appellant had preserved his objection, the admission of State's Exhibit 14 was nonetheless proper because, as previously discussed, the State established the chain of custody through witness testimony.

We overrule appellant's second issue.

Spoliation of Evidence

In his third issue, appellant contends that the court erred in refusing to instruct the jury about spoliation of the evidence, as the result of the State's inability to produce a DVD recording of the traffic stop taken from Officer Cogburn's dashboard camera. Charge error is reviewed under the standard set

forth in *Almanza v. State*, 686 S.W.2d 157 (Tex. Crim. App. 1985). Under *Almanza*, we must first determine whether error exists in the jury charge. *See id*. at 171. If so, we then determine whether the harm was sufficient to require reversal. *Id*. If the error is properly preserved by an objection to the charge, then a showing of only some harm is sufficient to require reversal; if, however, the error is not properly preserved, then a showing of egregious harm is required for reversal. *Id*.

To be entitled to a spoliation instruction, a defendant must affirmatively show the evidence was favorable and material to his or her defense. *White v. State*, 125 S.W.3d 41, 43–44 (Tex. App.—Houston [14th Dist.] 2003, pet. ref'd). Appellant never asserts, either at trial or before us, that the dashboard recording was either material or favorable to his case. Citing to *Arizona v. Youngblood*, 488 U.S. 51, 58, 109 S. Ct. 333 (1988) and *State v. Vasquez*, 230 S.W.3d 744 (Tex. App.—Houston [14th Dist.] 2007, no pet.), appellant argued to the trial court that the DVD "very well *could be* exculpatory to the defense." Evidence that is only *potentially* useful is not material to a defendant's case. *Youngblood*, 488 U.S. at 58, 109 S. Ct. at 337; *Mahaffey v. State*, 937 S.W.2d 51, 53 (Tex. App.—Houston [1st Dist.] 1996, no pet.). In the present case, appellant merely contends that the DVD was *potentially* useful to him, and such a showing fails to satisfy the requirement of materiality. *See Mahaffey*, 937 S.W.2d at 53.

Entitlement to a spoliation instruction for merely *potentially* useful evidence requires a showing that the evidence was destroyed in bad faith. *See White*, 125 S.W.3d at 43–44; *see generally Youngblood*, 488 U.S. at 58, 109 S. Ct. at 337; *Mahaffey*, 937 S.W.2d at 53. Nothing in the record or in appellant's brief indicates any such destruction or bad faith. At most, appellant demonstrated the State's negligence in its handling of the DVD, and a showing of negligence is not equivalent to bad faith. *See Saldana v. State*, 783 S.W.2d 22, 23 (Tex. App.—Austin 1990, no pet.). Accordingly, we hold that the trial court did not err in denying appellant's requested charge.

We overrule appellant's third issue.

Sufficiency of the Evidence

In his fourth and fifth issues, appellant contends that the evidence is both legally and factually insufficient to support his conviction. Specifically, appellant contends that the evidence is legally insufficient because the State failed to establish the chain of custody for the cocaine purportedly found on appellant's person and failed to properly account for the weight of the cocaine. Appellant also contends that the evidence is factually insufficient because the evidence linking appellant to the cocaine (State's Exhibit 14) was so weak as to undermine confidence in the jury's determination. Specifically, appellant contends: "The Jury had nothing before it, rationally, but a bag of a controlled substance which was, at

most, shown only to have been in the custody of the Galveston [Sheriff's Office] at some time, and proof that appellant was arrested in the very general time frame alleged. There was evidence that 'a' bag was taken from the accused, but nothing which properly linked that bag to the specimen admitted as SX-14."

We now apply the *Jackson v. Virginia*, 443 U.S. 307, 320, 99 S. Ct. 2781, 2789 (1979), sufficiency standard of review to complaints styled as legal or factual sufficiency challenges concerning the elements of a criminal offense. *See Ervin v. State*, 331 S.W.3d 49, 52–56 (Tex. App.—Houston [1st Dist.] 2010, pet. ref'd) (citing *Brooks v. State*, 323 S.W.3d 893, 894–913 (Tex. Crim. App. 2010)). Under the *Jackson* standard, evidence is insufficient to support a conviction if, considering all the record evidence in the light most favorable to the verdict, no rational fact-finder could have found that each essential element of the charged offense was proven beyond a reasonable doubt. *See Jackson*, 443 U.S. at 317, 319, 99 S. Ct. 2788, 2789; *Laster v. State*, 275 S.W.3d 512, 517 (Tex. Crim. App. 2009); *Williams v. State*, 235 S.W.3d 742, 750 (Tex. Crim. App. 2007). It is the function of the trier of fact to resolve any conflict of fact, to weigh any evidence, and to evaluate the credibility of any witnesses. *See Dewberry v. State*, 4 S.W.3d 735, 740 (Tex. Crim. App. 1999). We therefore resolve any inconsistencies in the evidence in favor of the verdict, and "defer to the jury's credibility and weight

determinations." *See Marshall v. State*, 210 S.W.3d 618, 625 (Tex. Crim. App. 2006).

Here, the State's burden was to prove beyond a reasonable doubt that appellant knowingly or intentionally possessed cocaine in an amount of one gram or more but less than four grams. *See* TEX. HEALTH & SAFETY CODE ANN. § 481.115(a), (c) (West 2010). As previously discussed in our analysis of the chain-of-custody issue, the State presented witness testimony sufficient to link appellant to the cocaine admitted into evidence as State's Exhibit 14. Under the *Jackson* standard, any conflicts or inconsistencies in the witness's testimony, including any conflicts regarding the weight of the cocaine, were exclusively within the jury's province to resolve. *See Dewberry*, 4 S.W.3d at 740; *Marshall*, 210 S.W.3d at 625 (requiring appellate courts to resolve any inconsistencies in evidence in favor of verdict and "defer to the jury's credibility and weight determinations"). Viewing the evidence in the light most favorable to the verdict, we conclude that a rational fact-finder could have found, beyond a reasonable doubt, that appellant committed the charged offense and therefore, we hold that the evidence is sufficient to support appellant's conviction.

We overrule appellant's fourth and fifth issues.

Conclusion

We affirm the judgment of the trial court.

Jim Sharp
Justice

Panel consists of Justices Jennings, Alcala, and Sharp.

Do not publish. TEX. R. APP. P. 47.2(b).