Affirmed and Opinion filed January 4, 2001.

In The

Fourteenth Court of Appeals

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NO. 14-98-01200-CR

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JORGE HERNANDEZ, Appellant

V.

THE STATE OF TEXAS , Appellee

On Appeal from the 232nd District Court
Harris County, Texas
Trial Court Cause No. 778,135

O P I N I O N

Appellant Jorge Hernandez was convicted by a jury of delivery of more than 400 grams of cocaine, sentenced him to 15 years in prison and fined him $1.00. In two points of error appellant contends the trial court erred in not requiring the state to elect its theory of liability, and challenges the factual sufficiency of the evidence to support his conviction. We affirm.

Fernando Villasana, an undercover Houston police officer, posed as someone who wanted to buy two kilograms of cocaine. A confidential informant arranged a meeting with Gerardo Lara, a suspect who said he could get several kilos of cocaine. Lara met with the two men behind an east Houston restaurant. Lara first wanted to see if the men had the money to

make the purchase; after Villasana showed the money, Lara made a call on a cellular telephone. When Lara terminated the call, he told Villasana and the informant to follow him. They went to a nearby house where, after a wait, they were told to come inside with the money. Villasana wanted to see the cocaine first, so he had the informant wait in the car outside while he went in.

Inside the small house, Lara took Villasana to the kitchen, where he introduced appellant as "his brother, George." Villasana said appellant shook hands with him, and when he asked to "take a look at the stuff," appellant reached down and handed him a one-kilo package of cocaine. Villasana inspected the package and was satisfied; appellant asked him if he wanted a separate bag to put the packages in. Villasana said he would use the bag the money was in and went outside with Lara to get the money.

The raid occurred when they returned to the house with the money. Villasana saw Lara throw the two kilos of cocaine into the trash can in the kitchen when the raid team entered the house. Lara and appellant were arrested; the two kilo packages of cocaine were seized and field-tested positive for cocaine. However, fingerprint experts were unable to lift prints off the packages.

Officer Oscar Pena, a member of the raid team, arrested appellant inside the house. He said appellant had $4,865 in cash on him when he was arrested.

The jury saw a surveillance tape, which began with the meeting outside the restaurant and ended with Villasena and Lara about to go inside the house.

Appellant's brother, Fabian Hernandez II, testified that the raid occurred at the headquarters of Camionetas Hernandez, which translates roughly to Hernandez Bus Company. Hernandez said the company was a family concern which shipped packages to and from the interior of Mexico. He said the company inspected the packages it transports to assure that nothing illegal was being shipped. He also said that one of the company's vans had burned and that the company was looking to replace this van. On cross-examination he said the type of van the business was seeking to replace would typically cost $9,000 to $10,000, and that the company paid cash.

Appellant said he was working behind the desk at Camionetas Hernandez on the day in question. He said Lara, who was related to him by marriage, was supposed to help him buy a new van for the business, and that he had been "in and out" all day. He said that at one point, Lara introduced him to Villasana, but that he continued to work at his desk in the kitchen while Lara and Villasana stayed out in the front room. He said Villasana never came back into the kitchen area, that he never handed a package to Lara and that he never offered to put it in a bag for him. Appellant also said the money found on him was money which was supposed to buy a new van.

Villasana testified on rebuttal that when he was introduced to appellant, all three men were in the kitchen in front of a table and appellant was two feet away.

In his second point of error appellant contends this evidence is factually insufficient to link him to the transaction in question. This court has jurisdiction to review the factual sufficiency of the evidence. *Johnson v. State*, 23 S.W.3d 1 (Tex. Crim. App. 2000). We must look to all the evidence "without the prism of 'in the light most favorable to the verdict.' " *Clewis v. State*, 922 S.W.2d 126, 129 (Tex. Crim. App.1996). In our review, we must be careful not to intrude on the jury's role as the sole judge of the credibility of the witnesses or the weight to be given their testimony. Unless the available record clearly reveals a different result is appropriate, an appellate court must defer to the jury's determination concerning what weight to give contradictory testimonial evidence because resolution often turns on an evaluation of credibility and demeanor. *Johnson*, 23 S.W.3d at 8-9. We may find the evidence insufficient if (1) it is so weak as to be clearly wrong and manifestly unjust or (2) the adverse finding is against the great weight and preponderance of the available evidence. *Id.* at 11. If we find the evidence factually insufficient, we are authorized to grant appellant a new trial. *Clewis*, 922 S.W.2d at 136.

Appellant's factual sufficiency point of error is an attack on the credibility of the evidence against him. He argues: 1) the record does not show appellant's involvement prior to the visit to the house; 2) Lara's credibility was doubted by Villasena; 3) Lara was not in the house long enough for his version of events to have occurred; 4) the testimony was consistent with appellant merely being present in the house, running a legitimate business, when Lara met

with Villasena. However, given Villasana's undisputed testimony, the discrepancies pointed out by appellant are not so severe as to indicate that a different result is clearly called for. *Johnson*, 23 S.W.2d at 11. And a different result is not clearly called for merely because the jury resolved conflicts and inconsistencies in favor of the State. *See Cain v. State*, 958 S.W.2d 404, 410 (Tex. Crim. App. 1997). Appellant's second point of error is overruled.

In his first point of error appellant contends the trial court erred in not forcing the state to elect between counts at the jury charge stage. He argues that by permitting the jury to find appellant guilty based on the charge submitted to the jury, the trial court dispensed with the requirement of unanimity. We disagree.

In this case, the jury was charged that:

> If you find from the evidence beyond a reasonable doubt that . . . the defendant, Jorge Luis Hernandez, did then and there unlawfully, intentionally or knowingly deliver by offering to sell to F. Villasana, a controlled substance, namely, cocaine . . . or, if you find from the evidence . . . that another person or persons did then and there unlawfully, intentionally or knowingly deliver by offering to sell to F. Villasana, a controlled substance, namely, cocaine . . . and that the defendant, Jorge Luis Hernandez, with the intent to promote or assist the commission of the offense, if any, solicited, encouraged, directed, aided or attempted to aid the other person or persons to commit the offense, if he did, then you will find the defendant guilty as charged in the indictment.

At the charge conference, appellant sought to force the State to choose between offenses; this request was denied.

This case is governed by *Kitchens v. State*, 823 S.W.2d 256 (Tex. Crim. App. 1991). In *Kitchens*, a capital murder case, the jury was given numerous options for convicting defendant: it could find him guilty of either strangling or shooting the victim, while in the course of committing either sexual assault or robbery. The jury returned a general verdict of guilty. *Id*. at 257 n. 1. The defendant argued this charge authorized the jury to convict without reaching a unanimous verdict, because some members of the jury may have believed he committed murder while committing sexual assault while others believed he committed murder while committing robbery. The court of criminal appeals disagreed. It held that where the indictment charges differing methods of committing the same offense, it is proper for the jury to be charged in the disjunctive. *Id.* at 258. The court further held that in such a case, it

is proper for the jury to return a general verdict of guilty if the evidence is sufficient under any of the theories submitted to support a finding of guilt. *Id. Cf. Francis v. State*, no. 1132-98, slip op. At 3-4, 1999 WL 993609, at *3 (Tex.Crim. App. December 6, 2000)(when conduct consists of separate offenses, state is required to elect).

Here, appellant was charged by indictment with different ways of committing the same offense. The jury returned a general verdict of guilty, and the evidence is sufficient under at least one of the theories presented. Appellant's first point of error is overruled and the judgment of the trial court is affirmed.

/s/ D. Camille Hutson-Dunn
Justice

Judgment rendered and Opinion filed January 4, 2001.

Panel consists of Justices Robertson, Sears, and Hutson-Dunn.*

Do Not Publish — TEX. R. APP. P. 47.3(b).

* Senior Justices Sam Robertson, Ross A. Sears, and D. Camille Hutston-Dunn sitting by assignment.