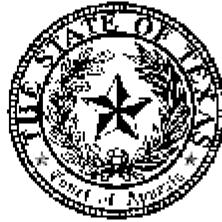
Affirmed and Opinion filed January 4, 2001.



In The

Fourteenth Court of Appeals

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NO. 14-99-01327-CR

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EDWARD HOUSTON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 184th District Court
Harris County, Texas
Trial Court Cause No. 786,360

O P I N I O N

A jury found appellant guilty of possession with the intent to deliver a controlled substance. The trial court, after appellant entered a plea of true to the enhancement paragraphs contained in the indictment, assessed punishment at confinement in the Texas Department of Criminal Justice, Institutional Division, for 40 years and assessed a fine of $5,000.00. In five points of error appellant asserts, 1) the trial court and prosecutor erred in informing the jury during voir dire of appellant's criminal history; 2) the evidence was legally insufficient to support appellant's conviction; 3) the evidence was factually insufficient to support appellant's conviction; 4) the trial court erred in failing to submit an instruction to the jury regarding Article 38.23; and 5) ineffective assistance of counsel. We affirm.

Improper Voir Dire

In his first point of error, appellant contends the trial court and the prosecutor erred by informing the jury panel that appellant had prior convictions. We need not address the merits of appellant's complaint because he failed preserve error for our review.

Prior to voir dire, the trial court explained to the jury panel, the range of punishment for the offense, including the effect prior convictions would have on increasing the range of punishment. The prosecutor, additionally, questioned members of the jury panel regarding whether they felt the increased range of punishment, as a result of prior convictions, was too harsh. Appellant made no objections to either the trial court's instructions, or to the prosecutor's questioning of the jury panel. To preserve an issue for appeal, there must be a timely objection which specifically states the legal basis for that objection. *Rhoades v. State*, 934 S.W.2d 113, 119-20 (Tex. Crim. App. 1996); *Rezac v. State*, 782 S.W.2d 869, 870 (Tex. Crim. App. 1990); *Hicks v. State*, 15 S.W.3d 626, 631 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd). Because appellant is raising this argument for the first time on appeal, any error is waived. Accordingly, we overrule appellant's first point of error.

Legal and Factual Sufficiency

In appellant's second and third points of error, he contends that the evidence was legally and factually insufficient to sustain his conviction. Specifically, appellant complains that the evidence was legally and factually insufficient to establish that he possessed cocaine with the intent to deliver.

In reviewing legal sufficiency challenges, appellate courts are to view the evidence in the light most favorable to the prosecution, overturning the lower court's verdict only if a rational trier of fact could not have found all elements of the offense beyond a reasonable doubt. *Santellan v. State*, 939 S.W.2d 155, 160 (Tex. Crim. App. 1997) (citing *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2871, 2879, 61 L.Ed.2d 560 (1979)). "[I]f any evidence establishes guilt beyond a reasonable doubt, the appellate court may not reverse the fact finder's verdict on grounds of legal insufficiency." *Arthur v. State*, 11 S.W.3d 386, 389 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd).

In reviewing factual sufficiency challenges, appellate courts must determine "whether a neutral

review of all the evidence, both for and against the finding, demonstrates that the proof of guilt is so obviously weak as to undermine confidence in the jury's determination, or the proof of guilt, although adequate if taken alone, is greatly outweighed by contrary proof." *Johnson v. State*, 23 S.W.3d 1, 11 (Tex. Crim. App. 2000). Evidence is factually 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.* The *Johnson* Court reaffirmed the requirement that "due deference must be accorded the fact finder's determinations, particularly those determinations concerning the weight and credibility of the evidence." *Id.* at 9.

Appellant first complains that no juror could have reasonably concluded beyond a reasonable doubt that appellant possessed cocaine with the intent to deliver. We disagree.

At trial, Officers Smith and Corrales testified that they received information that drugs were being sold in a field, under a tree, located in the 100 block of East Tidwell. While conducting surveillance of the field, they observed, on approximately four occasions, persons enter the field, engage in a hand-to-hand transaction with the males under the tree, and immediately turn and leave the field. Officers Smith and Corrales believed these to be drug transactions. Officers Smith and Corrales then enlisted the service of two uniformed officers, McPherson and Eckhert, to aid in approaching the two men under the tree. As the officers approached the two men under the tree, they observed one man throw down a straight metal pipe, and the other, appellant, drop small objects out of a plastic bag. Additionally, officers observed appellant kicking dirt on the bag, and the pieces that fell out of the bag. Officer Corrales recovered the plastic bag, along with several pieces of substance that had fallen out of the bag. The substance field tested positive for cocaine.

Viewing the evidence in the light most favorable to the prosecution, we find the evidence legally sufficient to support appellant's conviction. Accordingly, we overrule appellant's second point of error.

Additionally, appellant contends that the evidence was factually insufficient to support the jury's verdict that he intended to deliver any cocaine. We disagree.

As mentioned previously, Officers Smith and Corrales observed appellant and another man engaged in what they believed to be narcotic transactions. When the officers approached appellant, he

discarded a substance from a plastic bag that tested positive as cocaine. Appellant called only one witness, Rev. Harvey, who testified as to the condition of the field. The record reveals that appellant's defense centered around the condition of the field, and whether the officers could actually observe appellant selling drugs.

After viewing all the evidence, the verdict of guilty is not so weak as to be clearly wrong and manifestly unjust. Accordingly, we overrule appellant's third point of error.

Article 38.23

In his fourth point of error, appellant complains the trial court erred in failing to charge the jury in accordance with article 38.23 of the code of criminal procedure. We disagree.

Article 38.23 provides:

> No evidence obtained by an officer in violation of any provisions of the Constitution or laws of the State of Texas or of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case.
>
> In any case where the legal evidence raises an issue hereunder, the jury shall be instructed that if it believes, or has a reasonable doubt, that the evidence was obtained in violation of the provisions of the article, then . . . the jury shall disregard any such evidence so obtained.

TEX. CODE CRIM. PROC. ANN. art. 38.23(a) (Vernon Pamp. 2000). An Article 38.23 instruction is only required when the evidence at trial raises a factual issue concerning whether the evidence was obtained in violation of the federal or state constitutions. *Bell v. State*, 938 S.W.2d 35, 48 (Tex. Crim. App. 1996); *Moreno v. State*, 987 S.W.2d 195, 202 (Tex. App.—Corpus Christi 1999, pet. ref'd); *Angelo v. State*, 977 S.W.2d 169, 177 (Tex. App.—Austin 1998, pet. ref'd).

Appellant claims there are factual issues as to whether the officers committed a trespass when arresting appellant. These are not factual questions but are legal questions as to, 1) whether appellant had standing to contest the seizure of any evidence on the property; and 2) whether the evidence seized should have been excluded. Appellant does not contend there is any factual dispute as to how the evidence was obtained. "Only when there is a fact issue regarding the manner in which the evidence was obtained does

Article 38.23 require the court to submit an instruction to the jury." *Angelo*, 977 S.W.2d at 178.

The testimony at trial indicated that the field was entirely fenced. Appellant and another individual were standing under a tree in the field. Officers Smith and Corrales observed several individuals enter the north side of the field through a hole in the fence. Believing that appellant and the other individual were selling drugs, Officers Smith, McPherson, and Corrales approached appellant, at which time he emptied a plastic bag on the ground. Office Corrales located pieces of substance that field tested positive for cocaine. Appellant puts on no evidence that raises a factual dispute as to the seizure of the cocaine. Accordingly, we overrule appellant's fourth point of error.

Ineffective Assistance of Counsel

In point of error five, appellant contends that defense counsel's failure to specifically object to the prosecutor's remark during closing argument, that the evidence was uncontroverted, amounted to ineffective assistance of counsel under the United States and Texas Constitutions. We disagree. Appellant has brought forth no proof of ineffective assistance of counsel.

The U.S. Supreme Court established a two prong test to determine whether counsel is ineffective at the guilt/innocence phase of a trial. First, appellant must demonstrate that counsel's performance was deficient and not reasonably effective. Second, appellant must demonstrate that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Essentially, appellant must show: 1) that his counsel's representation fell below an objective standard of reasonableness, based on prevailing professional norms; and 2) that there is a reasonable probability that, but for his counsel's unprofessional errors, the result of the proceeding would have been different. *Id.*; *Hathorn v. State*, 848 S.W.2d 101, 118 (Tex. Crim. App. 1992). "A reasonable probability is 'a probability sufficient to undermine confidence in the outcome of the proceedings.'" *Stults v. State*, 23 S.W.3d 198, 208 (Tex. App.—Houston [14th Dist.] 2000, no pet. h.) (quoting *Jackson v. State*, 973 S.W.2d 954, 956 (Tex. Crim. App. 1998)). Moreover, the appellant bears the burden of proving his claims by a preponderance of the evidence. *Jackson*, 973 S.W.2d at 956.

In *Jackson*, the court of criminal appeals refused to hold counsel's performance deficient given the absence of evidence concerning counsel's reasons for choosing the course he did. 877 S.W.2d 768,

772 (Tex. Crim. App. 1994); *see Jackson v. State*, 973 S.W.2d 954, 956-57 (Tex. Crim. App.1998) (finding the record on appeal inadequate to evaluate that trial counsel provided ineffective assistance). "It is critical for an accused relying on an ineffective assistance of counsel claim to make the necessary record in the trial court." *Stults*, 23 S.W.3d at 208. When there is no hearing on ineffective assistance of counsel, an affidavit is vital to the success of an ineffective assistance claim. *Stults*, 23 S.W.3d at 208; *Howard v. State*, 894 S.W.2d 104, 107 (Tex. App.—Beaumont 1995, pet. ref'd).

Appellant did not file a motion for a new trial, and therefore failed to develop evidence of trial counsel's strategy. *See Kemp v. State*, 892 S.W.2d 112, 115 (Tex. App.—Houston[1st Dist.] 1994, pet. ref'd) (holding that generally, the trial court record is inadequate to properly evaluate ineffective assistance of counsel claims; in order to properly evaluate an ineffective assistance claim, a court needs to examine a record focused specifically on the conduct of trial counsel such as a hearing on application for writ of habeas corpus or motion for new trial.). The record is silent as to the reasons appellant's trial counsel failed to object to the prosecutor's statement during closing arguments. The first prong of *Strickland* is not met in this case. *Jackson*, 877 S.W.2d at 771; *Jackson*, 973 S.W.2d at 957. Due to the lack of evidence in the record concerning trial counsel's reasons for his alleged act of ineffectiveness, we are unable to conclude that appellant's trial counsel's performance was deficient. Accordingly, we overrule appellant's fifth point of error.

Having overruled all of appellant's points of error, we affirm the judgment of the trial court.

/s/ Paul C. Murphy
Chief Justice

Judgment rendered and Opinion filed January 4, 2001.

Panel consists of Chief Justice Murphy and Justices Amidei and Hudson.[1]

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

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[1] Former Justice Maurice Amidei sitting by assignment.