**Affirmed and Opinion filed March 28, 2002.**

**In The**

# Fourteenth Court of Appeals

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**NO. 14-00-01023-CR**

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**DIANE RODRIGUEZ GOMEZ, Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

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**On Appeal from the 230th District Court**
**Harris County, Texas**
**Trial Court Cause No. 835,964**

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## O P I N I O N

Diane Rodriguez Gomez appeals a conviction for possession of more than 400 grams of cocaine with intent to deliver[1] on the grounds that: (1) the evidence is legally and factually insufficient to prove that she had the requisite culpable mental state; (2) the trial court erred by denying her motion to suppress an oral statement that she made as a result of an illegal custodial interrogation; (3) cross-examination of an informant and production of his contract with the State were necessary for a fair determination of guilt; and (4) appellant was denied

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[1] A jury found appellant guilty and sentenced her to 15 years confinement.

effective assistance of counsel by her attorney's failure to request an instruction in the court's charge on entrapment which was her only viable defense. We affirm.

**Sufficiency of the Evidence**

Appellant's first point of error contends that the evidence is legally and factually insufficient to show that she had the requisite culpable mental state to be found guilty of cocaine possession with intent to deliver because: (1) no money was exchanged to indicate an actual drug buy; (2) as an informant herself, appellant would be required to act in a manner that would maintain the trust of those involved with drugs; (3) the evidence is insufficient to show that appellant had an intent to break the law or knew that she was breaking the law; (4) the evidence does not support a finding that appellant intentionally and knowingly possessed the drugs; (5) the evidence suggests that appellant wanted to talk to Officer Villanosa, for whom she worked as an informant, about this situation; and (6) the evidence showed her intent to take the package to Villanosa.

*Standard of Review*

In reviewing legal sufficiency, we view the evidence in the light most favorable to the verdict, asking 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, 318-19 (1979); *Burden v. State*, 55 S.W.3d 608, 612 (Tex. Crim. App. 2001). In a legal sufficiency review, all evidence admitted at trial is considered, including that admitted erroneously. *Wilson v. State*, 7 S.W.3d 136, 141 (Tex. Crim. App. 1999).

In reviewing factual sufficiency, we ask whether a neutral review of all the evidence, both for and against the finding, demonstrates that the proof of guilt is either so obviously weak as to undermine confidence in the jury's determination, or, although adequate if taken alone, is greatly outweighed by contrary proof. *King v. State*, 29 S.W.3d 556, 563 (Tex. Crim. App. 2000). We will set aside a verdict for factual insufficiency only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *Wardrip v. State*, 56 S.W.3d 588, 591 (Tex. Crim. App. 2001).

A person commits the offense of possession with intent to deliver a controlled substance if he knowingly or intentionally possesses a drug with the intent to deliver it. TEX. HEALTH & SAFETY CODE ANN. § 481.113(a) (Vernon Supp. 2002). "Possession" means actual care, custody, control, or management. TEX. HEALTH & SAFETY CODE ANN. § 481.002(38) (Vernon Supp. 2002). The element of knowing possession requires evidence that the accused possessed the substance knowingly rather than fortuitously. *Brown v. State*, 911 S.W.2d 744, 747 (Tex. Crim. App. 1995). The elements of possession may be proven by circumstantial evidence. *McGoldrick v. State*, 682 S.W.2d 573, 578 (Tex. Crim. App. 1985).

"Deliver" means to transfer, actually or constructively, a controlled substance to another. TEX. HEALTH & SAFETY CODE ANN. § 481.002(8) (Vernon Supp. 2002). An intent to deliver a controlled substance may also be proved by circumstantial evidence. *Williams v. State*, 902 S.W.2d 505, 507 (Tex. App.—Houston [1st Dist.] 1994, pet. ref'd). A factor considered by courts to determine whether an accused had an intent to deliver a controlled substance is the quantity of narcotics possessed. *See id.*

*Sufficiency Review*

In this case, Houston Police Department ("HPD") Officer Ralph Rodriguez had been working with Laurio Mendoza, a contract informant with a felony case pending against him, for about a month when Mendoza gave Rodriguez a tip on a drug transaction Mendoza had arranged with appellant. On the night the transaction was to occur, Mendoza obtained the narcotics from other individuals, and Rodriguez held the narcotics until Mendoza and appellant were to meet. Along with Rodriguez, HPD Officers Cole Lester and Mark Smith set up a surveillance to observe the transaction.

Lester was parked close to the service station where Mendoza and appellant were to meet and watched the parking lot with binoculars while Mendoza waited for appellant to arrive. Lester saw appellant park beside Mendoza's vehicle, exit her vehicle, and go to the driver's window of Mendoza's vehicle. Mendoza then handed appellant a brown rectangular

package which Lester knew to contain the cocaine that Rodriguez had given Mendoza. Mendoza and appellant then each drove away separately. Lester followed appellant's vehicle until a uniformed HPD officer stopped it two to three minutes later.

That officer, Randall Hensarling, had been asked by the narcotics division to stop appellant's vehicle. He did so and asked appellant to sit in his patrol car, which she did. He testified that he asked her some questions and then asked her if the officers could search her vehicle. Appellant consented. During the search, Hensarling saw a rectangular package partially protruding from under the front passenger seat. He then drove appellant to the parking lot of a nearby restaurant.

There, Smith introduced himself to appellant, read her the statutory warnings, and explained that he was with the narcotics division and that HPD had recovered a kilogram of cocaine from her vehicle. Appellant immediately denied any knowledge of the cocaine. Smith then told appellant that he knew she was not telling the truth because narcotics officers had been conducting surveillance of her and had seen what she had just done. Smith testified that appellant looked surprised, began to sob, said something like, the "key" was not hers and she was delivering it to somebody else. The evidence further reflects that appellant had also acted as a drug informant for HPD, had previously provided information to Villanosa about Mendoza, and had left a phone message for Villanosa to call her before she participated in the transaction.

Appellant's knowing possession and intent to deliver the drugs can be inferred from the facts that: (1) as an informant, she had prior knowledge of drugs and drug transactions and had previously contacted Villanosa about Mendoza, presumably regarding drugs; (2) appellant agreed in advance to participate with Mendoza in a transaction that he told officers would involve drugs; (3) appellant carried out the transaction in a manner that an ordinary person would not be expected to use for lawful substances; (4) she attempted to conceal the drug package under the passenger seat of her vehicle; (5) the quantity of cocaine appellant possessed (981.7 grams) was large enough to divide and resell and larger than would be

expected for individual consumption; (6) she did not pay for the cocaine herself, *i.e.*, suggesting that an ultimate buyer to whom the drugs would be delivered had either done so or would do so; and (7) appellant stated to Smith that the "key" was not hers and that she was delivering it to someone else.[2] This evidence is legally sufficient to show that appellant possessed the culpable mental state to be convicted of possession with intent to deliver.

Appellant's factual sufficiency challenge seems to rely on the contention that she was not guilty of possession of cocaine with intent to deliver it because her intent was to possess it to facilitate her effectiveness as a drug informant and/or to deliver it to the police. However, she has cited no authority providing that possession of cocaine under such circumstances is either not an offense or is a defense to the charged offense. Because appellant's first point of error thus fails to demonstrate the legal or factual insufficiency of the evidence, it is overruled.

**Admission of Oral Statement**

Appellant's second point of error argues that the trial court erred by denying her motion to suppress the statement that the key was not hers and that she was delivering it to somebody else (the "statement") because it resulted from a custodial interrogation that was not electronically recorded.[3] It is undisputed that appellant was in custody when she made the statement and that it was not electronically recorded. Moreover, whether the statement was made in response to an "interrogation" is, at best, a close question. *See Rhode Island v. Innis*, 446 U.S. 291, 301 (1980) (interrogation refers not only to express questioning, but also

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2 To the extent that the evidence shows that the transaction with Mendoza was what appellant had left Villanosa a phone message about, as she contends, this further supports her knowledge of the drugs and intent to deliver them.

3 *See* TEX. CODE CRIM. PROC. ANN. art. 38.22 § 3(a) (Vernon Supp. 2002) (no oral statement of an accused made as a result of custodial interrogation shall be admissible against the accused in a criminal proceeding unless an electronic recording is made of the statement, and prior to the statement but during the recording, the accused is warned of his rights to remain silent and to counsel and knowingly, intelligently, and voluntarily waives those rights).

to any words or actions by the police that they should know are reasonably likely to elicit an incriminating response from the suspect).

However, even if the trial court erred in admitting the statement, the violation of the statute will be disregarded unless it affected appellant's substantial rights.[4] A substantial right is affected where the error had a substantial or injurious effect or influence in determining the jury's verdict. *Llamas v. State*, 12 S.W.3d 469, 470 (Tex. Crim. App. 2000).

In this case, the evidence of appellant's custody and control of the drugs is undeniable in that the police officers observed her participating in the drug transaction and receiving the drugs and subsequently found the drugs partly concealed in her car. The evidence of appellant's general knowledge of drug dealings as a drug informant, her participation in the pre-arranged drug transaction, the quantity of drugs she possessed, and the fact that she did not pay Mendoza for the drugs leaves little doubt of her knowledge of the drugs and intent to deliver them to someone else. Therefore, to the extent that appellant's statement reflected a knowledge of the drugs and an intent to deliver them, it was merely cumulative of other undisputed evidence that had been or would be admitted against her. In addition, the State did not emphasize appellant's statement during its closing argument, instead focusing more on what the officers saw during the surveillance of appellant. Under these circumstances, we find no basis to conclude that any error in admitting appellant's statement had a substantial or injurious effect or influence in determining the jury's verdict or otherwise affected her substantial rights. Accordingly, her second point of error is overruled.

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[4] *See* TEX. R. APP. P. 44.2(b); *Moore v. State*, 999 S.W.2d 385, 402 (Tex. Crim. App. 1999) (applying Rule 44.2(b) non-constitutional harm standard to violation of article 38.22); *see also Hughes v. State*, 24 S.W.3d 833, 837 n.2 (Tex. Crim. App. 2000) (recognizing that a failure to adhere to a statutory procedure that serves to protect a constitutional provision is still a statutory, not constitutional, violation and is therefore subject to harm analysis under Rule 44.2(b) rather than 44.2(a)), *cert. denied*, 531 U.S. 980 (2000).

**Informant**

Appellant's third point of error complains of the trial court's denial of her request for a copy of the contract between the State and the informant, Mendoza. Appellant contends that cross-examination of Mendoza and production of his contract with the State was necessary for a fair determination of Mendoza's motive and whether the State failed to produce exculpatory evidence. The trial court granted appellant's request to disclose Mendoza's identity, but appellant failed to object to Mendoza's unavailability to testify at trial (because he could not be located) and has developed no record of what testimony Mendoza might have given. Appellant has thus waived any complaint as to her inability to cross-examine Mendoza.

With regard to Mendoza's contract with HPD (the "contract"), appellant asserted in the trial court and on appeal that she was entitled to see it because Mendoza's reliability was at issue when the officers acted upon the tip that he provided. Trial testimony reflected that Mendoza had a contract with HPD to provide information about people involved in the narcotics trade in exchange for favorable treatment on a pending charge. It further showed that Rodriguez had received information from Mendoza regarding appellant and directed him to broker the narcotics transaction involving appellant which the officers observed. However, the evidence does not reflect any particulars of what Mendoza said to appellant in arranging the transaction.

Other than Mendoza's motive for arranging the drug transaction, which is reflected in the evidence, appellant does not indicate what further relevance or exculpatory benefit the contract might have had. Moreover, in that the officers observed appellant participate in the drug transaction with Mendoza, appellant has not established that the reliability of Mendoza's tip was of any significance to any issue of her guilt. Accordingly, appellant's third point of error fails to demonstrate error and is overruled.

**Ineffective Assistance of Counsel**

Appellant's fourth point of error argues that she received ineffective assistance of counsel when her trial attorney failed to request an entrapment[5] instruction in the court's charge to the jury, where this was her only viable defense.

To prevail on a claim of ineffective assistance of counsel, an appellant must show, first, that counsel's performance was deficient, *i.e.*, it fell below an objective standard of reasonableness, and, second, that the appellant was prejudiced in that there is a reasonable probability that but for counsel's errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Tong v. State*, 25 S.W.3d 707, 712 (Tex. Crim. App. 2000), *cert. denied*, 532 U.S. 1053 (2001). To be sustained, an allegation of ineffective assistance of counsel must be affirmatively demonstrated in the record. *McFarland v. State*, 928 S.W.2d 482, 500 (Tex. Crim. App. 1996). In reviewing ineffectiveness claims, scrutiny of counsel's performance must be highly deferential. *Strickland*, 466 U.S. at 689; *Tong*, 25 S.W.3d at 712. A court must indulge, and a defendant must overcome, a strong presumption that the challenged action might be considered sound trial strategy under the circumstances. *Strickland*, 466 U.S. at 689; *Tong*, 25 S.W.3d at 712. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight and to evaluate the conduct from counsel's perspective at the time. *Strickland*, 466 U.S. at 689. Thus, the presumption that an attorney's actions were sound trial strategy ordinarily cannot be overcome absent evidence in the record of the

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[5] *See* TEX. PEN. CODE ANN. § 8.06 (Vernon 1994) ("It is a defense to prosecution that the actor engaged in the conduct charged because he was induced to do so by a law enforcement agent using persuasion or other means likely to cause persons to commit the offense. Conduct merely affording a person an opportunity to commit an offense does not constitute entrapment."). Although the defense of entrapment is not available to a defendant who denies commission of the offense, it is available to a defendant who pleads not guilty but does not take the stand or offer any testimony inconsistent with commission of the crime. *See Melton v. State*, 713 S.W.2d 107, 112 (Tex. Crim. App. 1986).

attorney's reasons for his conduct. *Busby v. State*, 990 S.W.2d 263, 268-69 (Tex. Crim. App. 1999).

In this case, because appellant developed no record of her defense counsel's reasons for not requesting an entrapment instruction, appellant has failed to overcome the presumption that counsel's decision not to do so was sound trial strategy. In addition, neither appellant, Mendoza, nor any of the officers testified at trial regarding the specific conversations appellant had with Mendoza to arrange the drug transaction. Therefore, whether Mendoza induced appellant to commit the offense or merely afforded her an opportunity to do so would have been purely a matter of conjecture. Under these circumstances, we have no basis to conclude that defense counsel's failure to request an entrapment instruction was deficient performance or that there is a reasonable probability that the result of the proceeding would have been different if such an instruction had been requested. Accordingly, appellant's fourth point of error is overruled, and the judgment of the trial court is affirmed.

/s/ Richard H. Edelman
Justice

Judgment rendered and Opinion filed March 28, 2002.
Panel consists of Justices Yates, Edelman, and Wittig.[6]
Do Not Publish — TEX. R. APP. P. 47.3(b).

[6] Senior Justice Don Wittig sitting by assignment.