Affirmed and Opinion filed July 12, 2001.

In The

Fourteenth Court of Appeals

NO. 14-98-01390-CR

AURELIANO ARTEAGO TELLEZ, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 337th Judicial District Court
Harris County, Texas
Trial Court Cause No. 764,117

O P I N I O N

Aureliano Arteago Tellez appeals from his conviction for delivery of cocaine weighing at least 400 grams. A jury found him guilty, and the trial court assessed punishment at thirty-five years imprisonment. On appeal, Tellez contends that the trial court erred: (1) in admitting evidence concerning an extraneous offense, and (2) in failing to *sua sponte* charge the jury on the burden of proof for extraneous offenses admitted at the guilt/innocense phase of trial. We affirm.

Background

On September 23, 1997, Officer John Garza was working undercover for the Houston Police Department's Narcotics Division, when he was contacted by Carmen Ricajo, whom he had met in a previous investigation. She asked if he was still interested in purchasing cocaine. Officer Garza and Ricajo agreed to a price of $17,000 per kilo, and a meeting was arranged. Ricajo then introduced Officer Garza to two others who in turn introduced him to Juan Florez. Protracted negotiations occurred regarding the details of the money-for-cocaine exchange, and Officer Garza told Florez that, if he took him to meet the owner of the cocaine, Officer Garza would make a call and the money would be there within a few minutes. Florez agreed and led Officer Garza to Bronco's Western Wear.

Aureliano Tellez was standing in front of the store when they arrived. He appeared upset that Florez brought Officer Garza to the store, but he told Officer Garza that if he got the money they could make the transaction in the back of the store. Officer Garza then obtained $50,000 and returned to Bronco's Western Wear. Officer Garza and Florez walked over to the store and told Tellez that the money had arrived. Tellez made a phone call and, a short time later, Ben Garza entered the store. Tellez indicated to Officer Garza that Ben Garza was the person who had the cocaine. Ben Garza then left and went to a residence. Lieutenant Gene Tandy followed him and saw him place a cardboard box in his vehicle. Ben Garza returned to Bronco's Western Wear and was observed carrying a box into the store.

Officer Garza, Ben Garza, and Tellez walked into the back room of the store, and Tellez removed a kilo of cocaine from the box brought by Ben Garza. Tellez cut the package open so that Officer Garza could inspect it while they discussed the deal. Officer Garza then left, ostensibly to retrieve the money. Within seconds, an arrest team entered the premises, arrested Tellez, Ben Garza, and others, and recovered 1.9 kilograms of cocaine, 9 ½ pounds of marijuana, three weight scales, and $14,000.

Extraneous Offense Evidence

Tellez contends that the trial court erred in admitting the evidence concerning the extraneous offense of possession of marijuana. The State offered testimony and exhibits demonstrating that 9 ½ pounds of marijuana were recovered from Bronco's Western Wear immediately after Tellez's arrest.

Tellez's counsel objected to this evidence outside the presence of the jury and repeated the objection when the State attempted to introduce it before the jury. The State initially contends that Tellez failed to object on the basis of relevance and, therefore, waived his argument on appeal. The record, however, demonstrates that although Tellez's counsel never actually spoke the words "relevance" or "relevant" in making the objection, he did cite the proper rule, cite the standard, and make an intelligible argument regarding the admission of an extraneous offense. This was sufficient to preserve the issue for review.

Evidence of other crimes is not admissible to prove a defendant's character in order to show that he acted in conformity therewith. TEX. R. EVID. 404(b). It may, however, be admissible for other purposes, such as proof of motive, intent, knowledge, or absence of mistake or accident. *Id*. Such evidence may also be introduced if it is a part of the *res gestae* of the charged offense. *See Rogers v. State*, 853 S.W.2d 29, 33-34 (Tex. Crim. App. 1993). When a party introduces evidence of other crimes for a purpose other than character conformity, it must at least be relevant. *See Mozon v. State*, 991 S.W.2d 841, 846 (Tex. Crim. App. 1999). The standard of review on the admission of extraneous offenses is abuse of discretion. *Lane v. State*, 933 S.W.2d 504, 519 (Tex. Crim. App. 1996).

In responding to Tellez's objection, the State argued solely that the finding of the marijuana was part of the *res gestae* of the offense. Admissible "*res gestae*" extraneous offense evidence has been defined as "same transaction contextual evidence." *See Mayes v. State*, 816 S.W.2d 79, 87-88 (Tex. Crim. App. 1991)(distinguishing it from general background contextual evidence). Under this doctrine, evidence of an extraneous offense that is indivisibly connected to the charged offense and necessary to the State's case in

proving the charged offense may be admissible as relevant to explaining the context of the offense for which the defendant is on trial. *Lockhart v. State*, 847 S.W.2d 568, 571 (Tex. Crim. App. 1992), *cert. denied*, 510 U.S. 849 (1993); *Victor v. State*, 995 S.W.2d 216, 223 (Tex. App.—Houston [14th Dist.] 1999, pet. ref'd). Only if the facts and circumstances concerning the charged offense would make little or no sense without also bringing in the same transaction contextual evidence should the *res gestae* evidence be admitted under Rule 404(b). *Rogers*, 853 S.W.2d at 34. At least three courts have concluded that, under particular circumstances, evidence regarding the simultaneous possession of marijuana was not admissible in a trial for the possession of a different controlled substance. *See Id.* at 35; *Garrett v. State*, 875 S.W.2d 444, 446-47 (Tex. App.—Austin 1994, pet. ref'd); *Garcia v. State*, 871 S.W.2d 769, 771-72 (Tex. App.—Corpus Christi 1994, pet. ref'd).

In the present case, the evidence regarding marijuana possession played no role in the investigation or the negotiations which led up to the cocaine transaction; it played no part in the transaction itself; and it was not an issue in Tellez's arrest, either. The evidence regarding marijuana possession was found only after a post-arrest search of the premises where the transaction took place. It, therefore, cannot be said that the evidence was indivisibly connected to the charged offense, necessary to the State's case in proving the charged offense, or even relevant to explaining the context of the offense for which the defendant was on trial. *See Lockhart*, 847 S.W.2d at 571; *Victor*, 995 S.W.2d at 223. Furthermore, the absence of the evidence concerning marijuana possession would have had no apparent effect on the intelligibility of the facts and circumstances concerning the charged offense of cocaine possession. *See Rogers*, 853 S.W.2d at 34. The trial court abused its discretion in overruling the objection to the evidence regarding the extraneous offense of marijuana possession. *See Lane*, 933 S.W.2d at 519.

We turn then to an analysis of whether the admission of this evidence was harmful error. The question of whether a court erred in admitting evidence of an extraneous offense is an evidentiary issue that does not rise to constitutional levels. *See Webb v. State*, 36 S.W.3d 164, 181 (Tex. App.—Houston [14th Dist.] 2000, pet. filed)(*en banc*).

Accordingly, we shall reverse only if we find that the error affected the substantial rights of the defendant. TEX. R. APP. P. 44.2.

In conducting an analysis under Rule 44.2, the question of whether a substantial right has been affected should not be considered in terms of burden of proof. *Webb*, 36 S.W.3d at 182 (citing *O'Neal v. McAninch*, 513 U.S. 432, 436 (1995)). Instead, the reviewing court must itself examine the record in answering objectively whether the error affected a substantial right. *Id*. The court should apply the legal standard of harmlessness and not attempt to enforce a control mechanism for the presentation of evidence at trial. *Id*. A substantial right is violated when the error made the subject of the appellant's complaint had a substantial and injurious effect or influence in determining the jury's verdict. *King v. State*, 953 S.W.2d 266, 271 (Tex. Crim. App.1997)(citing *Kotteakos v. U.S.*, 328 U.S. 750, 776 (1946)). If the error had no influence or only a slight influence on the verdict, it is harmless. *Johnson v. State*, 967 S.W.2d 410, 417 (Tex. Crim. App.1998). However, if the reviewing court harbors "grave doubts" that an error did not affect the outcome, that court must treat the error as if it did. *Webb*, 36 S.W.3d at 182 (citing *United States v. Lane*, 474 U.S. 438, 449 (1986)). The term "grave doubts" in this context has been defined to mean "in the judge's mind, the matter is so evenly balanced that he feels himself in virtual equipoise as to the harmlessness of the error." *O'Neal*, 513 U.S. at 435. If the reviewing court is unsure whether the error affected the outcome, the court should treat the error as harmful, i.e., as having a substantial and injurious effect or influence in determining the jury's verdict. *Webb*, 36 S.W.3d at 182 (citing *O'Neal*, 513 U.S. at 435).

The record in the present case demonstrates that the evidence concerning marijuana possession played a very minor role in the prosecution for delivery of cocaine. Officer Garza, the State's main witness, did not even mention the marijuana in his testimony. He testified, as described more fully above, regarding the meetings and negotiations leading up to the cocaine transaction. He further testified in detail regarding Tellez's role in the negotiations and the transaction itself, including his actual physical handling of the cocaine packets. The State supported his testimony by entering into evidence a tape

recording taken from a hidden microphone worn by Officer Garza during his dealings with Tellez. While the recorded conversations were apparently mostly conducted in Spanish and were not translated for the jury, we note the tape's admission because, if it had refuted Officer Garza's testimony, it was certainly available for the defense to use in rebuttal, and the defense did not so use it.

Officer Martin Skeen testified regarding the search of the premises during which the marijuana was found. He identified the marijuana in the courtroom and stated that it was found in the same back room as the cocaine. This is by far the most detailed testimony provided by any of the witnesses about the marijuana. Two other officers, Lieutenant Gene Tandy, and Hans Meisel, testified generally regarding the investigation, but neither made any mention of the marijuana.

Sharmishta Patel, an HPD chemist, testified that she examined both the cocaine and the marijuana and received positive test results on each. Robert Smith, an identification officer with the HPD latent print lab testified that he checked the box that had contained the marijuana for prints but found none. The testimony from these two witnesses did little to connect Tellez to the marijuana or to the crime charged. The defendants called no witnesses of their own. In sum, the marijuana is mentioned on only nine pages of the reporter's record out of a total of just under 150 pages of testimony. Although this comparison of pages is certainly not conclusive of the importance of the evidence, it is further indicative of the fact that the marijuana was simply not a major issue in the case.

The State made no mention of marijuana in closing argument. Tellez's counsel mentioned it in closing but only to say that there was no connection established between Tellez and the controlled substance, including the facts that there were no fingerprints lifted from the box of marijuana and no marijuana residue found on the scales in the store. Co-defendant Garza's counsel mentioned the substance several times and even tried to suggest that the box Garza was seen carrying into the store may have contained the marijuana and not cocaine. He also stressed that the defendants were not charged with possession or delivery of marijuana. The comments by defense counsel were aimed at

diffusing any impressions created by the evidence concerning marijuana, and, except for the very mention of it, they cannot be read as helping establish any harmful link between the evidence of marijuana possession and the evidence of cocaine delivery.

It is clear from our reading of the record that the evidence of marijuana possession was not a significant factor in the State's case on the charged offense. There was, in fact, no direct link ever established between Tellez and the marijuana. Under the circumstances, we do not harbor grave doubts that the trial court's error in admitting evidence of the extraneous offense had a substantial and injurious effect or influence on the jury's verdict. *See King*, 953 S.W.2d at 271. Accordingly, we hold that Tellez did not have his substantial rights violated and overrule this point of error. *See* TEX. R. APP. P. 44.2(b).

The Jury Charge

Tellez further contends that the trial court erred in failing to *sua sponte* charge the jury on the burden of proof for extraneous offenses admitted at the guilt/innocense phase of trial. The law is clear that when a defendant requests an instruction on the burden of proof for extraneous offenses, the court must submit such an instruction. *See George v. State*, 890 S.W.2d 73, 76 (Tex. Crim. App. 1994). Tellez contends, however, that such instructions are mandatory under the recent Texas Supreme Court case of *Huizar v. State*, 12 S.W.3d 479 (Tex. Crim. App. 2000). In *Huizar* the Court of Criminal Appeals held that trial courts must instruct the jury on the burden of proof in regard to extraneous offenses in the punishment phase, even when no such request is made. *See Id.* at 484. Tellez contends that the logic of *Huizar* is persuasive that such instructions must also be given *sua sponte* in the guilt/innocense phase.

However, we need not trod directly through that minefield as we find that no reasonable doubt instruction would have been necessary even if the *res gestae* extraneous offense evidence had been relevant and properly admitted in this case. Under certain circumstances, as discussed above, *res gestae* offenses are admissible to show the context in which the charged offense occurred. *See Wesbrook v. State*, 29 S.W.3d 103, 115 (Tex.

Crim. App. 2000); *Rogers*, 853 S.W.2d at 34. Such evidence is not being used for any purpose other than to provide the jury with a clear and accurate view of events. *See Wesbrook*, 29 S.W.3d at 115. A reasonable doubt instruction is, therefore, not required beyond the one already required concerning proof of the crime charged. *See Id.* (holding that limiting instruction not required). Relevant *res gestae* extraneous offenses are simply not attempting to prove or disapprove any fact other than the defendant's guilt for the crime charged.

Furthermore, even if a reasonable doubt instruction would have been appropriate, Tellez waived the argument by failing to request a limiting instruction at the time the State offered the evidence. *See Phelps v. State*, 999 S.W.2d 512, 521 (Tex. App.—Eastland 1999, no pet.); *Saldivar v. State*, 980 S.W.2d 475, 493 (Tex. App.—Houston [14th Dist.] 1998, pet. ref'd). *See also* TEX. R. EVID. 105(a); *Wesbrook*, 29 S.W.3d at 128; *Garcia v. State*, 887 S.W.2d 862, 878 (Tex. Crim. App. 1994)(the party opposing evidence must request a limiting instruction and if he fails to do so the evidence becomes part of the general evidence in the case and may be used to the full extent of its rational persuasive power). Accordingly, we overrule this point of error.

The judgment of the trial court is affirmed.

/s/ Eric Andell
Justice

Judgment rendered and Opinion filed July 12, 2001.

Panel consists of Justices Lee, Amidei, and Andell.*

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

* Senior Justice Norman Lee and Former Justices Maurice Amidei and Eric Andell sitting by assignment.