Affirmed and Opinion filed November 18, 1999.

In The

Fourteenth Court of Appeals

NO. 14-98-01015-CR

MARIA VERONICA ROBLEDO, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 176th District Court
Harris County, Texas
Trial Court Cause No. 776,493

O P I N I O N

Maria Robledo was convicted by a jury of possession with intent to deliver more than 400 grams of cocaine. She was sentenced to twenty-three years confinement in the Texas Department of Criminal Justice, Institutional Division and was assessed a $25,000.00 fine. She appeals her conviction, asserting six instances of reversible error. Finding no reversible error in the record, we affirm the judgment of the trial court.

FACTUAL BACKGROUND

Alerted to the possible movement of a large amount of drugs, the U. S. Customs

Agency, Drug Enforcement Agency, and Houston Police Department set up a surveillance operation of a warehouse from which they believed drugs to be distributed. During this surveillance operation, agents watched a van being loaded with what they thought to be cocaine and followed the van to the parking lot of a Fiesta grocery store on Houston's south side. The driver left the van in the parking lot and was picked up nearby by another vehicle.

A few hours later, a Customs agent spotted yet another vehicle, a Nissan Maxima, circle the parking lot several times before stopping near the van. The Maxima contained two males and Robledo, who occupied the back seat. The Customs agent watched Robledo exit the Maxima and get into the driver's seat of the van. The Customs agent saw her look into the back of the van, start it up, and leave the parking lot. The Maxima followed.

Followed by law enforcement agents in several unmarked vehicles, Robledo entered the freeway and drove several miles. On a signal from the undercover agents, an HPD officer pulled over Robledo since the van was missing a front license plate. He approached the vehicle from the passenger side and, as he peered in, he could see large packages wrapped in aluminum foil and partially covered by a tarp or carpet. He received permission to search the vehicle, asked Robledo to drive it to a more remote location, and discovered it to contain hundreds of packages of cocaine. The HPD officer contacted the other agencies, who found 297 kilos, or over 600 pounds, of powder cocaine in the van. Robledo did not appear surprised or upset at this discovery and later gave a statement to police.

Robledo asserted in her statement and at trial that she did not know that the cocaine was in the vehicle. Rather, she stated that the van belonged to Johnny Garcia, a man whom she had met at a club where she worked. She testified that she and Garcia had been dating for about a month. Robledo also testified that Garcia had asked her to drive his van to a mechanic she knew. Though they were supposed to meet at another location, Garcia paged her at the last minute and arranged to meet at the Fiesta.

According to Robledo's testimony, Garcia was at the Fiesta when she arrived. He was in a white Maxima and was accompanied by a passenger with whom Robledo was acquainted. Garcia explained that his passenger did not know how to drive, making it necessary for Robledo to drive the van to the mechanic's shop. Robledo claimed that Garcia gave her the keys and stated that he would follow her. She denies any knowledge that the van contained cocaine.

The officers discovered the van was registered to someone other than Johnny Garcia or Robledo. They also determined that Robledo was pulled over several exits past the exit Robledo should have taken to go to the mechanic's shop. Further, at trial, she was unable to provide any specific information about Johnny Garcia, his family, or his business, even though they had been dating for a month.

LEGAL SUFFICIENCY OF THE EVIDENCE

Robledo first challenges the legal sufficiency of the evidence to support her conviction, claiming that the State's evidence is legally insufficient to prove that she knowingly possessed cocaine. She argues that the State only proved that she was in the vehicle with the cocaine, which is not enough to establish knowing possession as a matter of law. We disagree and find that the State established facts which support the jury's finding that she knowingly possessed the cocaine.

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 of the 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, 2789, 61 L.Ed. 560 (1979)). When the appellant is challenging legal sufficiency in a possession case, we review the circumstantial evidence presented at trial to see how well it "affirmatively links" the appellant with the contraband. *See Brown v. State*, 911 S.W.2d 744, 747 (Tex. Crim. App.

1995). Among the links that can be used to establish knowing possession are whether the contraband: (1) was in plain view; (2) was conveniently accessible to the accused; (3) was in a place owned by accused; (4) was in a car driven by accused; (5) was found on the same side of the car as accused; (6) was found in an enclosed space; or (7) emitted an odor. *Fields v. State*, 932 S.W.2d 97, 103-04 (Tex. App.-Tyler 1996, pet. ref'd); *Gilbert v. State*, 874 S.W.2d 290, 298 (Tex. App.--Houston [1st Dist.], 1994, pet. ref'd). Additional links include whether: (8) paraphernalia to use the contraband was in view of or found on the accused; (9) conduct of the accused indicated a consciousness of guilt; (10) the accused had a special relationship to the contraband; (11) occupants of the automobile gave conflicting statements about relevant matters; (12) the physical condition of the accused indicated recent consumption of the contraband found in the car; and (13) affirmative statements connect the accused to the contraband. *Fields*, 932 S.W.2d at 103-04; *Gilbert*, 874 S.W.2d at 298.

Here, the State proved several affirmative links which establish Robledo's knowing possession. First, it established that the cocaine emitted an odor that was perceptible by the officers who searched the van, although they testified that someone unfamiliar with the odor might not recognize it. They also established that some of the cocaine was in plain view, since the tarp only covered three quarters of the packages in the cargo area of the van. On top of the tarp, a box containing more packages of cocaine was visible from the driver's side of the van. The fact that Robledo looked into the back of the van where the cocaine was in plain view supports the inference that she knew the cocaine was in the van.

The State also established other affirmative links. The State established that the street value of the cocaine was over $29 million dollars, and drug dealers would not entrust that much cocaine to a stranger. The sheer volume of the cocaine was another affirmative link establishing knowing possession. The State showed that Robledo's story was implausible and suspicious, especially since she could not remember the name of the mechanic's shop where she was taking the van and had passed the exit where it was

allegedly located when she was stopped by the officers. She also had no knowledge of any personal information regarding the man who allegedly entrusted her with the cocaine, even though they had allegedly been dating for over a month. The cocaine was found in an enclosed space, a van, driven by Robledo. Finally, Robledo's version of the facts conflicts with those attested to by the officers.

Viewing these links in the light most favorable to the prosecution, we find sufficient evidence to establish Robledo's knowing possession of the cocaine. Her first point of error is overruled.

INEFFECTIVE ASSISTANCE OF COUNSEL

Appellant's second and third points of error concern ineffective assistance of counsel. However, since we do not have a motion for new trial or any other method of determining the defense counsel's trial strategy, we find Robledo has not shown that her trial counsel was ineffective. Under the Texas Court of Criminal Appeals' recent decision in *Thompson v. State*, unless an appellant provides a record explaining her counsel's actions at trial, presumably through a motion for new trial, she cannot prevail on her claim of ineffective assistance. *See Thompson v. State*, No. 1532-98, slip op. at 13, 1999 WL 812394 at *5 (Tex. Crim. App. October 18, 1999).

The standard of review for ineffective assistance of counsel during the guilt-innocence phase is the two-step analysis articulated in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 674 (1984). *See McFarland v. State*, 928 S.W.2d 482, 500 (Tex. Crim. App.1996). First, the appellant must demonstrate counsel's representation fell below an objective standard of reasonableness under prevailing professional norms. *Strickland*, 466 U.S. at 688, 104 S.Ct. 2052. Second, the appellant must prove that but for counsel's deficiency the result of the trial would have been different. *McFarland*, 928 S.W.2d at 500. Under this analysis, counsel's competence is presumed, and the appellant must rebut this presumption by identifying the acts or omissions of counsel that are alleged

to be ineffective and affirmatively prove that these acts fell below the norm of professional reasonableness. *See id.* at 500. An ineffectiveness claim cannot be demonstrated by isolating any portion of counsel's representation, but must rather be judged on the totality of the representation. *Strickland*, 466 U.S. at 695, 104 S.Ct. 2052.

Here, appellant claims that her trial counsel committed at least four acts or omissions which made his performance ineffective: 1) the failure to strike a juror for cause; 2) the failure to object to the State's misstatement of law during voir dire; 3) the failure to object to the State's attempts to commit jurors to specific facts during voir dire; and 4) the failure to object to references to crack cocaine during the State's presentation of its case. Viewing these acts against the totality of her trial counsel's representation, appellant contends that her counsel's performance was ineffective.

1. FAILURE TO STRIKE A VENIREPERSON

During voir dire, the State questioned a venireperson regarding her ability to follow the law and hold the State to its burden of proof. When the prosecutor posed these questions to her, the venireperson responded: "I have no use for a drug dealer. My son's in prison because of drugs." However, when questioned again if she would hold the State to its burden of proof, she responded "Yes," "Probably," and "I don't know." This venireperson was selected as a juror. Appellant asserts that her counsel should have struck this juror for cause.

While we agree that this juror's responses in voir dire might have shown some bias, appellant's counsel might have had reasons to keep this juror on the panel. The fact that the juror did not like drug dealers might have been perceived as favorable to appellant, since the basis of her defense was that she had been tricked by drug dealers into driving the van. Since no motion for new trial was filed in this case, we have no idea what appellant's counsel's trial strategy was in leaving this juror in the pool. Since the record is silent as to defense counsel's trial strategy, and in light of the strong presumption against finding

ineffective assistance of counsel, we do not find the defense counsel's failure to strike this venire member ineffective. *See Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994) (en banc).

2. THE STATE'S MISSTATEMENT OF THE LAW

The appellant also argues that her trial counsel was ineffective based on the fact that he did not object to the State's misstatement of the law during voir dire. During voir dire, the State stated several times that knowing possession can be inferred from the quantity of the drugs possessed. We do not find this to be a misstatement of the law, since several courts have found that the amount of narcotics found at the crime scene can be enough to support the inference of knowing possession. *See Villegas v. State*, 871 S.W.2d 894 (Tex. App.–Houston [1st Dist.] 1994, pet. ref'd); *Alvarez v. State* 813 S.W.2d 222, 225 (Tex. App.–Houston [14th Dist.] 1991, pet. ref'd); *Whitworth v. State*, 808 S.W.2d 566, 570 (Tex. App.–Austin 1991, pet. ref'd). However, the prosecutor retreated from this position, noting later that the quantity of the drugs found is only one of the factors to consider in determining whether or not a defendant was in knowing possession of narcotics.

Even though appellant's attorney did not object to the prosecutor's statements, he challenged the prosecutor's statement of the law during his voir dire. The venire also took the prosecutor to task for making this statement. Viewing the totality of the circumstances, we do not find defense counsel's actions so below an objective standard of reasonableness as to be ineffective. Rather, he could have had reasons for attacking the prosecutor on this statement during his voir dire rather than objecting. Again, the absence of a motion for new trial leaves us to speculate about trial counsel's strategy, which is insufficient to overcome the strong presumption against ineffective assistance.

3. THE STATE'S ATTEMPT TO COMMIT JURORS TO SPECIFIC FACTS

Appellant also asserts that her attorney's failure to object to the State's attempt to commit jurors to specific facts in the case constitutes ineffective assistance of counsel. We

again disagree.

As the prosecutor asked and answered questions based on a hypothetical romantic relationship impacting the case, many jurors expressed reservations about their ability to convict females involved in abusive relationships. The prosecutor then inquired if these jurors would make the prosecutor prove something beyond what she was required to prove under the law before they would convict appellant.

During this line of questioning, the following exchange occurred between the prosecutor and a juror:

> Prosecutor: "So you would not be able to convict her if you felt like she was being used by someone else, even if she knew what was going on? You know, even if a boyfriend says, hey, I want you to drop off this, you know, 5 million, $6 million worth of cocaine for me. Make sure you don't, you know, unlock the doors, but I need you to do this, baby, honey."
>
> Juror: "What if he doesn't say cocaine? What if he gives her a package and says, I want you to drop this off for me, and she's known him for a long time?
>
> Prosecutor: "Well, then that's different. I'm saying if I proved to you that she knew what was there either by volume, size, that she knew what she was doing."

Appellant asserts that her trial counsel was ineffective because he did not object to this attempt by the State to commit jurors to specific facts in voir dire. While the use of hypotheticals is appropriate to explain the application of the law, it cannot be used to inquire how a particular venireperson would respond to hypothetical facts. *Atkins v. State*, 951 S.W.2d 787, 789 (Tex. Crim. App. 1997) (en banc). We find that this use of hypothetical facts was not intended to make jurors commit to a particular set of facts, but was being used to search out any bias that jurors had regarding the conviction of females in general. This form of questioning is permitted. *See id.* at 789. Further, this question was posed to only one juror, rather than the systematic use of hypotheticals condemned in

Atkins. We cannot find that defense counsel's failure to object rose to the level of ineffective assistance of counsel.

4. FAILURE TO OBJECT TO THE STATE'S DISCUSSION OF CRACK COCAINE

Appellant's final contention in her ineffective assistance of counsel claim is that the defense attorney's failure to object to the State's mention of crack cocaine made his representation ineffective. We again disagree.

During the State's case-in-chief, two witnesses discussed crack cocaine. The first witness to broach this subject, Houston Police Officer A. B. Laws, testified that the street value of the cocaine recovered in this bust, based on its being converted to crack cocaine, was $29,000,000. He also testified that the wholesale value of this cocaine would be lower. The second witness, HPD chemist Claudia Busby, testified about the personal use amounts of crack and powder cocaine and expressed her opinion that the amount recovered in this case was not a personal use amount.

While references to crack cocaine in cases where the appellant is charged with possessing powder cocaine are generally objectionable, *Cabrales v. State*, 932 S.W.2d 653, 659 (Tex. App.–Houston [14th Dist.] 1996 , no pet.), such references are reversible error only when they affect the outcome of the entire trial. *Castiblanco-Gomez v. State*, 882 S.W.2d 564, 569 (Tex. App.–Houston [1st Dist.] 1994, pet. ref'd). The record, however, is again silent as to counsel's trial strategy in refraining from objecting to this evidence. Since the appellant has failed to sustain her burden in proving that this was not part of defense counsel's trial strategy, we cannot find these actions ineffective.

Because Robledo has failed to meet her burden of proof in her ineffective assistance of counsel claims, we find her counsel to have been effective under both the U.S. and Texas constitutions.

FAILURE TO REQUIRE DISCLOSURE OF MATERIAL WITNESSES

During his cross-examination of U.S. Customs Special Agent Gene Lowery, Robledo's attorney asked Special Agent Lowery to disclose the identities of the two men in the Maxima. The State objected to these questions, and the trial court sustained the State's objections. Robledo's attorney then continued his cross-examination without objection.

For an error to be preserved for appellate review, the complaining party must object with sufficient specificity to give the trial court notice of the objection and obtain a ruling on that objection from the court. TEX. R. APP. P. 33.1(a). Here, appellant did not object and failed to preserve any error. Further, however, we fail to see how the trial court's decision was erroneous when appellant admitted at trial that she knew the identity of at least one of the occupants, a man whom she dated at least a month. She also knew the first name of the other occupant of the vehicle. The State should not be required to disclose the identity of witnesses equally available to the appellant. Further, appellant never established anything more than mere conjecture that these individuals were informants, much less that they could provide relevant testimony. Appellant must establish both of these before disclosure is required. *See Bodin v. State*, 807 S.W.2d 313, 318 (Tex. Crim. App.1991); *Gonzalez v. State*, 967 S.W.2d 503, 505 (Tex. App.–Houston[14th Dist.] 1998, pet. ref'd). We find no error here.

FAILURE TO SUSTAIN APPELLANT'S RULE 401 AND 403 OBJECTIONS

Appellant's fifth and sixth issues on appeal concern the trial court's rulings on two evidentiary issues at trial. The first ruling challenged by Robledo is the trial court's decision to allow the State to admit each of the 297 kilos of cocaine recovered from the van individually. The second ruling appellant challenges is the trial court's admission of cumulative testimony regarding the street value of the cocaine. We find no reversible error in either ruling.

1. INTRODUCTION OF THE COCAINE

Appellant contends that the trial court erred in overruling her objections to the admission of the cocaine by the kilo. These objections were based on Texas Rules of Evidence, Rule 403, which provides in part: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence." TEX. R. EVID. 403; *Montgomery v. State*, 810 S.W.2d 372, 389 (Tex. Crim. App.1991) (on rehearing). Rule 403 favors admissibility of relevant evidence, and the presumption is that relevant evidence will be more probative than prejudicial. *Montgomery*, 810 S.W.2d at 389.

In reviewing the court's balancing-test determination, we reverse the trial court's judgment "rarely and only after a clear abuse of discretion." *Mozon v. State*, 991 S.W.2d 841, 846-47 (Tex. Crim. App. 1999) (citing *Montgomery*, 810 S.W.2d at 389). We cannot simply conclude, however, that "the trial judge did in fact conduct the required balancing and did not rule arbitrarily or capriciously." *Id.* Rather, we measure the trial court's ruling against the relevant criteria by which a Rule 403 decision is made. *Id.* We must look at the proponent's need for the evidence in addition to determining the relevance of the evidence. *Id.* (citing *Montgomery*, 810 S.W.2d at 392-93).

The criteria used to determine whether the prejudicial effect of relevant evidence outweighs its probative value include: (1) how compellingly the evidence serves to make a fact of consequence more or less probable; (2) the potential the other evidence has to impress the jury "in some irrational but nevertheless indelible way"; (3) the time the proponent will need to develop the evidence, during which the jury will be distracted from consideration of the indicted offense; (4) the force of the proponent's need for this evidence to prove a fact of consequence, i.e., does the proponent have other probative evidence available to him to help establish this fact, and is this fact related to an issue in dispute. *See id.* at 847 (citing *Santellan v. State*, 939 S.W.2d 155, 169 (Tex. Crim. App.1997)).

Here, the cocaine was relevant to prove knowing possession, since the quantity of the contraband is one factor to consider in establishing this element of the crime alleged by the State. The State introduced the cocaine in this fashion to show that the appellant had to know the cocaine was present in the van. The quantity of cocaine recovered is very compelling circumstantial evidence in this case that appellant knew the evidence was in the van. While introducing this evidence in the manner chosen by the State might have the potential to make the jury reach an irrational decision, we find this unlikely due to the other strong affirmative links to this evidence presented by the State. Introducing the evidence piece by piece was time-consuming and its admission comprised twenty pages of the record. However, since the quantity of the evidence, rather than the method of introducing the evidence itself, is what is probative in this case, we believe the jury was not that distracted from the charged offense while the evidence was introduced. Each kilo strengthened the affirmative links needed to prove Robledo's knowing possession. On the other hand, the State had alternate means, such as photographs, to establish the sheer bulk of the cocaine, although these would not have been as effective as the State's presentation at trial.

Viewing all of these factors, we find no error in the trial court's decision to allow the State to admit each kilo of cocaine individually. We do not find the probative value of the cocaine is outweighed by the risk of undue prejudice, especially since the actual physical presence of the cocaine is quite probative of the appellant's knowledge of its presence in the van. We accordingly overrule appellant's fifth issue.

2. THE "STREET VALUE" TESTIMONY

Appellant also asserts that the trial court erred in allowing an HPD officer and a U.S. Customs Agent testify about the street value of the recovered cocaine. Generally, testimony about the value of cocaine is admissible. *See Kemner v. State*, 589 S.W.2d 403, 406 (Tex. Crim. App. [Panel Op.] 1979). Such testimony realistically conveys to the

fact-finders the amount of the contraband and its effects on persons in terms that are understandable. *Id.* Here, appellant lodged an objection based upon the cumulative nature of the testimony, claiming that since one officer had testified about the street value of the recovered cocaine, there was no need for another witness to testify to that effect.

The State, however, argues that the appellant has waived any argument that this error is reversible. The State points out that after Special Agent Lowery testified to the street value of the cocaine, Officer Laws testified that the street value was about $100,000.00 a kilo. Appellant did not object to this testimony. Only when Officer Laws again began discussing the street value did appellant object. The State contends that this constitutes a waiver of complaint. The State also points out that this testimony was not cumulative since Special Agent Lowery testified that an HPD officer would be in a better position to testify about the street value of the cocaine.

In addressing this argument, we need not decide if the trial court's ruling was erroneous. Overruling an objection is not reversible error when other such evidence is received without objection, either before or after the objection was lodged. *Leday v. State*, 983 S.W.2d 713, 718 (Tex. Crim. App. 1998). Here, since the evidence was presented at least twice before the objection was lodged, any error is not reversible. We, therefore, overrule appellant's sixth point of error.

The judgment of the trial court is affirmed.

/s/ Paul C. Murphy
Chief Justice

Judgment rendered and Opinion filed November 18, 1999.

Panel consists of Chief Justice Murphy and Justices Anderson and Hudson.

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