Affirmed and Opinion filed November 24, 1999.

In The

Fourteenth Court of Appeals

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NO. 14-98-00306-CR

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FYNEFACE NDUKWE AMECHI, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 208TH District Court
Harris County, Texas
Trial Court Cause No. 719,151

O P I N I O N

Fyneface Ndukwe Amechi appeals a conviction for possession with intent to deliver over 400 grams of cocaine on the grounds that: (1) the evidence was legally and factually insufficient to support the conviction; (2) the trial court erred in sustaining the State's challenge for cause against an objectionable juror; and (3) the prosecutor made an improper sidebar comment. We affirm.

Background

Appellant was arrested outside a restaurant during an undercover narcotics operation involving an informant. He was indicted for possessing cocaine with intent to deliver. At trial, the jury returned a verdict of guilty, and the court assessed punishment at forty years confinement.

Sufficiency of the Evidence

Appellant's first and second issues presented for review contend that the evidence is legally and factually insufficient to establish: (1) an affirmative link between appellant and the contraband; (2) an intent to deliver; and (3) that the quantity of cocaine exceeded 400 grams, including adulterants and dilutants.

Standard of Review

When reviewing legal sufficiency, we view the evidence in the light most favorable to the verdict and determine whether a rational trier of fact could have found the elements of the offense beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *Kutzner v. State*, 994 S.W.2d 180, 184 (Tex. Crim. App. 1999). The trier of fact is the exclusive judge of the credibility of the witnesses and the weight to be given their testimony. *See Jones v. State*, 944 S.W.2d 642, 647 (Tex. Crim. App. 1996).

In reviewing factual sufficiency, we view all the evidence without the prism of "in the light most favorable to the prosecution" and set aside the verdict only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *See Kutzner*, 994 S.W.2d at 184. A factual sufficiency review takes into consideration *all* of the evidence and weighs the evidence tending to prove the existence of the fact in dispute against the contradictory evidence. *See Fuentes v. State*, 991 S.W.2d 267, 271(Tex.Crim. App. 1999).

Affirmative Link

Appellant argues that the evidence in this case shows only that he was present at a place where a substance alleged to contain cocaine was possessed and that for some period of time he held in his hand a bag which contained the substance. He further contends that there is no

evidence that he knew any of the persons who were allegedly involved in the possession of cocaine or that he participated in a sale or delivery of the cocaine.

In order to establish the unlawful possession of a controlled substance, the State must prove that: (1) the accused exercised care, control, and custody over the substance, and (2) the accused knew that the matter possessed was contraband. *See* TEX. HEALTH & SAFETY CODE ANN. § 481.112(a) (Vernon Supp. 1999); *Brown v. State*, 911 S.W.2d 744, 747 (Tex. Crim. App. 1995). Evidence which affirmatively links the accused to the contraband suffices for proof that he possessed it knowingly. *See Brown*, 911 S.W.2d at 747. This evidence can be either direct or circumstantial. *See id.* In either case, the evidence must establish that the accused's connection with the drug was more than just fortuitous. *See id.* However, the evidence need not be so strong that it excludes every reasonable hypothesis other than the defendant's guilt. *See id.* at 748.

The convenience and accessability of the contraband to the accused can be a link. *See Guiton v. State*, 742 S.W.2d 5, 8 (Tex. Crim. App. 1987). Also, a defendant's attempted flight from the scene and the finding of an amount of contraband large enough to indicate that the defendant knew of its existence can create an affirmative link. *See Villegas v. State*, 871 S.W.2d 894, 896-97 (Tex. App.–Houston [1st Dist.] 1994, pet. ref'd); *Chavez v. State*, 769 S.W.2d 284, 288 (Tex. App.–Houston [1st Dist.] 1989, pet. ref'd).

Because no instruction on the law of parties was included in the court's charge in this case, the evidence must show that the appellant, acting on his own, is guilty of the offense as charged. The evidence presented by the State indicated the following: (1) the undercover informant, Chan, negotiated a transaction with Mojtahedi, the owner of the restaurant where the drug transaction took place; (2) Chan arrived at the restaurant with $12,000 and met with Mojtahedi; (3) two other individuals who would be involved in the transaction, Lopez and Vallecilla, arrived about two hours later, and appellant arrived several moments after them; (4) appellant exited his car, scanned the parking lot, entered the restaurant, and immediately approached Mojtahedi, Lopez, and Vallecilla; (5) the foursome then began talking to one

another; (6) after the foursome assembled, Mojtahedi informed Chan, "It's here"; (7) all five men went behind the counter; (8) all five men were gathered around the cocaine when Mojtahedi broke off a piece of it for Chan to sample; (9) appellant saw Mojtahedi provide Chan the sample of cocaine; (10) while this was happening, appellant and Mojtahedi were conversing; (11) after sampling the cocaine, Chan went out to his truck, appellant and one of the other suspects approached Chan, and appellant showed him the cocaine; (12) when the police arrived shortly thereafter and ordered appellant to raise his hands, appellant raised only his left hand and kept his right hand behind his back; (13) appellant was holding the bag of cocaine in his right hand; and (14) when the officer again ordered appellant to raise his hands, appellant threw the bag under a parked car. The foregoing evidence of appellant's involvement in the drug transaction is sufficient to show that appellant possessed the cocaine and did so knowingly.[1]

Intent To Deliver

Appellant also argues that there is no evidence to establish the element of intent to deliver other than the police officer's opinion testimony that the 937 grams of cocaine seized was not held for personal use.

A person commits the offense of delivery of a controlled substance if he knowingly or intentionally delivers, or possesses with intent to deliver, a controlled substance. *See* TEX. HEALTH & SAFETY CODE ANN. § 481.112(a) (Vernon 1992).[2] Possession of cocaine with intent to deliver can be inferred from appellant's acts. *See Phillips v. State*, 597 S.W.2d 929,

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1 Although appellant argued that the evidence connecting him to the substance was provided by the informant and was therefore inherently unreliable, some of the testimony of the informant was corroborated by the police officers involved. Moreover, the jury, as the trier of fact, is the sole judge of the credibility of the witnesses and of the strength of the evidence. *See Fuentes,* 991 S.W.2d at 271.

2 "Deliver" means to transfer, actually or constructively, to another a controlled substance regardless of whether there is an agency relationship. *See* TEX. HEALTH & SAFETY CODE ANN. § 481.002(8) (Vernon 1992). "Possession" means actual care, custody, control, or management. *See id.* at § 481.002(38). The jury charge in this case contained both of these definitions.

936 (Tex. Crim. App. 1980); *Gonzales v. State*, 638 S.W.2d 41, 43 (Tex. App.–Houston [1st Dist.] 1982, pet. ref'd). Also, intent to deliver can be proved by circumstantial evidence, including evidence surrounding the possession, and may be inferred from the amount of drugs possessed. *See Reece v. State*, 878 S.W.2d 320, 325 (Tex. App.–Houston [1st Dist.] 1994, no pet.).

In this case, the record reflects that appellant possessed 937 grams of cocaine. Also, as previously stated, appellant was present when Chan sampled the cocaine, an action which indicated Chan was considering purchasing the contraband. Thereafter, appellant brought the cocaine out to Chan's truck and showed it to him. Based on this conduct, the jury could reasonably infer that appellant was attempting to consummate a sale and delivery of the cocaine to Chan. Also, Officer Villasana, a 12-year veteran of the narcotics division, testified that the packaging of the cocaine, its purity, and the amount involved indicated the substance was intended for trafficking rather than personal use. He also testified that the street value of a kilogram (1000 grams) of cocaine was $100,000. In light of the quantity of cocaine, the testimony of the officer, and appellant's actions, the evidence was sufficient to show that appellant intended to deliver the cocaine.

Quantity

Appellant contends that the size of the sample tested, 8.4 milligrams, is less than one one-hundred thousandth of the total substance and that such a small sampling cannot be sufficient to establish that the substance was greater than 400 grams of cocaine. Further, appellant asserts that there was no testimony either that the entire 937.2 grams of substance contained only cocaine, adulterants, and dilutants or that the total weight of those items within the substance exceeded 400 grams.[3]

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[3] When the prosecution charges an aggravated offense under the theory that the combined weight of the controlled substance and any adulterants or dilutants exceeds a particular amount, the prosecution must prove the identity of the illegal substance, that any additional elements have not affected the chemical activity of the named illegal substance, that the additional elements constitute adulterants or dilutants because they were added to the illegal substance to increase the bulk or quantity of the final product, and the weight of the illegal substance, including any adulterants or dilutants. *See*

In this case, the entire substance was in one package. The substance was initially tested by a Houston Police Department drug chemist who did so without unwrapping it. The results of the first test indicated that the weight of the cocaine was 862.4 grams with a purity of 74.2 percent. The District Attorney's office ordered a retest to ensure the reliability of the tests. The drug chemist who then analyzed it, Carolyn Gamble, testified that she performed three tests on the substance: (1) a color test, (2) a gas chromatography, and (3) a microcrystalline test. She used 8.4 milligrams for the chromatography test,[4] 10 milligrams for the color tests, and 5 milligrams for the microcrystalline test. The relevant portions of Ms. Gamble's testimony follow:

> Q.(by Ms. Thomas): And would you tell the jury, in your opinion, what is the substance?
> A. Positive for cocaine.
> * * * *
> Q. Did you have an opportunity to then determine the weight of the substance?
> A. Yes. Approximately 937.2 grams.
> Q. Now, ma'am, can you tell us also whether or not that 937.2 grams includes any adulterants or dilutants?
> A. Yes, it does.
> Q. And when I say adulterants and dilutants, tell the jury what that means.
> A. Adulterants are compounds that are added to enhance the effect of a controlled substance and dilutants are substance compounds that are added just to increase the bulk.
> Q. Did you perform a test to determine the purity of the controlled substance?
> A. Yes. Approximately 76.2 percent.

Ms. Gamble's testimony establishes that the illegal substance was cocaine, that the substance included adulterants or dilutants, and that the total weight of the illegal substance, including any adulterants or dilutants, was 937.2 grams. This is the extent of the matters which

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Reeves v. State, 806 S.W.2d 540, 542 (Tex. Crim. App. 1990); *McGlothlin v. State*, 749 S.W.2d 856, 860-861 (Tex. Crim. App. 1988).

[4] A gas chromatography test determines the purity of the substance.

must be proved. *See Williams v. State*, 936 S.W.2d 399, 405 (Tex. App.–Fort Worth 1996, pet. ref'd).[5]

However, appellant asserts that there must be some testimony, if only a portion of the substance was tested, that the untested portion was similar to or homogeneous with the remaining substance. *See Gabriel v. State*, 900 S.W.2d 721 (Tex. Crim. App. 1995) (en banc). In *Gabriel*, the appellant argued that the evidence was insufficient to prove a quantity of cocaine in excess of 28 grams because the State was "required to test enough substance to meet the alleged weight amount since the substances were packaged in different packages." *See id.* at 721. The chemist in that case had tested five of the fifty-four baggies seized by the police. *See id.* at 722. The court concluded:

> The State showed the random samples were the alleged controlled substance, and the total weight of the substance seized was within the range of that alleged. *It was rational for the factfinder to conclude that the identically packaged substances, which appear to be the same substance, are in fact the same substance*. The manner of testing the substances by random sampling goes only to the weight the jury may give to the tested substances in determining the untested substance is the same as the tested substance.

See id. at 722 (emphasis added).

In a concurring opinion, joined by Judges Mansfield and Maloney, Judge Clinton noted, after reviewing decisions from other jurisdictions, that the courts having addressed the matter had held that only a random sample of crack cocaine need be tested to establish the requisite amount, whether found in one receptacle or in individual packets, *see id.* at 725, but subsequently stated "[i]t appears from these cases that by and large it is sufficient to

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5 In *Williams*, the court concluded that, due to a change in the definition of "adulterant or dilutant" in the Texas Health and Safety Code, the State no longer had to prove that the added adulterants or dilutants had not affected the chemical activity of the controlled substance; therefore, although a package contained both the controlled substance and a dilutant, the chemist was not required to perform a test to determine how much of the package's contents were a controlled substance and how much was some other material. *See Williams*, 936 S.W.2d at 403-05; *see also Collins v. State*, 969 S.W.2d 114, 116-17 (Tex. App.–Texarkana 1998, pet. ref'd) (same); *Warren v. State*, 971 S.W.2d 656, 660 (Tex. App.–Dallas 1998, no pet.) (same); *Hines v. State*, 976 S.W.2d 912, 913 (Tex. App.–Beaumont 1998, no pet.) (same).

extrapolate from a random sample of an *apparently homogenous* substance found in a single receptacle that the whole of the substance is the same." *Id.* at 726 (emphasis added). Presumably, it is this statement on which appellant relies to assert that the State was required to offer testimony that the powder in this one package was homogenous in order for the random sample to be relied upon as being representative of the whole. We do not interpret this language of the concurring opinion to establish a separate element of required proof. Rather, as recognized in the majority opinion, there must simply be sufficient evidence to support an inference that the substance in the package(s) was the same substance.

In this case, Gamble's testimony referred to the entire contents of the package as a whole and provided evidence that 76.2% of its total weight was either pure cocaine or cocaine combined with adulterants and dilutants. When viewed in the light most favorable to the verdict, the testimony of Gamble is sufficient for a rational trier of fact to find beyond a reasonable doubt that the substance involved was cocaine and was in an amount greater than 400 grams. Also, in light of the contrary evidence, we cannot say that the jury's verdict was so against the great weight of the evidence as to be clearly wrong and unjust. Accordingly, we overrule appellant's first and second issues presented.

Challenge for Cause

Appellant's third issue asserts that the trial court erred in sustaining the State's challenge for cause against an objectionable juror. The State questioned the members of the venire panel as to whether any of them or someone close to them had been accused of a drug crime. A portion of the discussion with the objectionable juror follows:

> Ms. Thomas: Right. And so my question is, if you have two witnesses, one is a police officer and one is not, right now, because of all that, I mean, that's just what happened to you, would you feel like the police officer is less credible than the non-officer?
> Mr. Ruvalcaba: Yes.
> Mr. Leeper: It appears everyone starts with the same slate as witnesses, right?
> Mr. Ruvalcaba: Yes.

Mr. Leeper: And would you listen to the evidence, whether it's a police officer or non-police officer, and make your mind up based on what you believe the evidence is and apply that evidence to the law?
Mr. Ruvalcaba: Yes, but I am still going to have that, what happened.
Ms. Thomas: I have a motion, Judge.
The Court: I am going to grant it. Have a seat.
Ms. Thomas: Thank you. We challenge him.
The Court: Yes. Granted. Who do you want to call?
Mr. Leeper: I don't have anybody else.

Subsequent to this exchange, the jury was empaneled and defense counsel made no further statements concerning the composition of the jury.

Appellant argues that a prospective juror is not subject to challenge merely because he believes non-police officers are more credible than police officers. However, we need not reach the merits of appellant's assertions. If an appellant does not object when a venireman is excused for cause, he may not challenge that ruling on appeal. *See Etheridge v. State*, 903 S.W.2d 1, 8 (Tex. Crim. App. 1994). Because appellant failed to object when the trial court granted the State's challenge against Ruvalcaba, this issue presents nothing for our review. *See id.; Purtell v. State*, 761 S.W.2d 360, 365-66 (Tex. Crim. App. 1988). Therefore, appellant's third issue is overruled.

Remark By Prosecutor

In issue four, appellant asserts that the prosecutor made an improper sidebar comment. Appellant claims that on the re-direct examination of Officer Arista, the prosecutor tried to insinuate a relationship between appellant and the owner of the restaurant, Mr. Mojtahedi, as follows:

Q.(by Ms. Thomas): Now, the defense attorney showed you a picture that he just offered into evidence. I believe it's Defense Exhibit No. 3. Do you see that?
A. Yes.
Q. The person taking this picture, would you say that person is behind the counter in the pizza place?
A. That's correct.
Q. Officer Arista, do you know how Mr. Amechi's defense team got behind the counter of Mr. Mojtahedi's -

Mr. Leeper: I object to that, Your Honor. This is attorney/client privilege, No. 1. I have investigators. That's a bad-faith question and ask the Court - first of all, I object to her statement. I ask for a ruling. I would ask for the jury to be instructed not to - I am just frustrated.

The Court: Let me just mess around with this. Just ask the question without any innuendo.

Q. (by Ms. Thomas): Do you know how Mr. Amechi came to be in possession of a picture taken from behind the counter?

Mr. Leeper: I object to Mr. Amechi being in possession behind the counter. I object to that.

Ms. Thomas: Let me ask another question that won't - -

The Court: Let me ask, so what?

Ms. Thomas: Well, Mr. Mojtahedi owns this place.

The Court: So?

Ms. Thomas: A stranger going behind his counter, taking pictures?

Mr. Leeper: Your Honor, I object to that sidebar remark and ask for a mistrial.

The Court: Disregard that. Overruled.

Appellant argues that this remark should not have been allowed by the trial court and that the instruction to disregard was insufficient to overcome the unfair prejudice of this remark. However, a sidebar comment is a remark of counsel that is neither a question to the witness nor a comment addressed to the court. *See Brokenberry v. State*, 853 S.W.2d 145, 152 (Tex. App.–Houston [14th Dist.] 1993, pet. ref'd). Because the prosecutor's remarks above were all directed to the witness or were addressed to the trial court, none of them was a sidebar comment. Moreover, not every sidebar remark is grounds for reversal. *See id*. Rather, to obtain reversal of a judgment on the basis of an improper sidebar remark, an appellant must prove that the remark interferes with his right to a fair trial. *See id*. Appellant has failed to demonstrate any such interference. Moreover, any ill effects were cured by the trial court's

instruction to disregard.[6] Therefore, we overrule appellant's fourth issue presented and affirm the judgment of the trial court.

/s/ Richard H. Edelman
Justice

Judgment rendered and Opinion filed November 24, 1999.

Panel consists of Justices Amidei, Edelman, and Wittig.

Do not publish — TEX. R. APP. P. 47.3(b).

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6 *See Hendricks v. State*, 640 S.W.2d 932, 939 (Tex. Crim. App. 1982) (holding that the trial court's instruction to disregard cured any harm caused by the prosecutor's improper sidebar comments); *Norris v. State*, 902 S.W.2d 428, 443 (Tex. Crim. App. 1995) (holding that an instruction to disregard was sufficient to cure the prosecutor's improper use of "extortion" during punishment stage); *Boyd v. State*, 811 S.W.2d 105, 122 (Tex. Crim. App. 1991) (holding that an instruction to disregard cured any harm caused by prosecutor's improper question).