

**Affirmed and Opinion filed December 16, 1999.**



**In The**

**Fourteenth Court of Appeals**

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**NO. 14-98-00125-CR**

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**EMMANULE OLUGDEGA ADEBAYO, Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

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**On Appeal from the 351<sup>st</sup> District Court  
Harris County, Texas  
Trial Court Cause No. 761,358**

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**O P I N I O N**

A jury found appellant, Emmanule Olugdega Adebayo, guilty of possession of at least 400 grams of heroin with intent to deliver and assessed punishment at twenty years' confinement and a \$10,000 fine. In five points of error, Adebayo contends that: (1) and (2) the evidence is legally and factually insufficient to show he was aware he possessed heroin and that he controlled the heroin long enough to permit him to terminate his control; (3) and (4) the evidence is legally and factually insufficient to show he had the requisite intent; and (5) the trial court reversibly erred in overruling a jury instruction about evaluating the credibility of a paid informant. Because the evidence is sufficient and because the trial court did not err in overruling the jury instruction, we affirm.

## I. FACTS

Adebayo's arrest for possession of heroin with intent to deliver was the culmination of a surveillance operation by Drug Enforcement Agency (DEA) agents that began with a woman named Binu McCray. In July 1997, DEA agents arrested McCray, who had received a package of heroin under an assumed name from her uncle in Thailand. After her arrest, McCray agreed to cooperate with the government as an informant. She soon learned that her uncle was sending another package of heroin to her in Houston in August 1997. Her uncle instructed her to deliver 400 of the 700 grams in the package to a third person. She would learn the identity of this third person only after she called a telephone number in Chicago.

McCray informed the DEA about the incoming shipment of heroin, and Agent Trent Broussard intercepted the package on an airplane in Dallas. He found 640.6 grams of heroin in the package concealed inside three ceramic elephants. DEA agents repackaged 401 grams of the heroin with a concealed "agent alert device"<sup>1</sup> in the box for a controlled delivery to the ultimate recipient. They also wrapped it in wrapping paper. Meanwhile, McCray had called her designated telephone number in Chicago and spoke to a woman named Alajah Bola. Ms. Bola told McCray that although she could not personally pick up the heroin, she was sending her stepbrother, "Dayo." Ms. Bola gave McCray a telephone number to call at a Houston motel where her stepbrother was staying. McCray called Adebayo at the motel, told him there was 400 grams of heroin in the package, and arranged to meet him at a Taco Cabana restaurant across the street from his motel. She would be wearing a Nike baseball cap so that he could recognize her.

To take McCray to the meeting, a special agent with the DEA posed as a taxi cab driver and drove her and the heroin package to the Taco Cabana in a taxi. McCray also wore a radio transmitter so that agents could listen to her meeting with Adebayo. At the same time, several other DEA agents surveyed the shopping area around the Taco Cabana. They observed Adebayo scouting the area before his meeting with McCray, looking so carefully

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<sup>1</sup> The agent alert device has a trip wire that signals agents when the package has been opened.

at cars in parking lots that a few undercover agents had to drive away to avoid detection. Finally, Adebayo walked into the Taco Cabana.

Once at the fast food restaurant, Adebayo and McCray spoke in their Nigerian dialect, which the DEA agents were unable to understand over the radio transmitter. McCray testified, however, that Adebayo insisted that she accompany him to his motel room. Although she tried to give him the package in the restaurant, he would not accept it outside his room. After five minutes, they walked over to his room, and DEA agent William W. Owen drove into the motel parking lot. Once inside, McCray gave Adebayo the package. Again, she tried to leave, but he began to look scared and insisted that she stay. He wanted to open the package and repack it in his own way before they left together. He was concerned because he had been stopped in the airport on the way to Houston and his bags had been checked.

When Adebayo opened the package, he exposed and triggered the hidden agent alert device. He turned to McCray and asked her, "What have you given me?" Somewhat panicked, McCray left the room, and Adebayo followed her, yelling and holding the baggie of heroin in his hand. He spotted Agent Owen, who was sitting in a nearby car and wearing a vest that said "Police" on it. Adebayo ran back into his room, and Agent Owen ran after him yelling, "Police, police!" Agent Owen found Adebayo on the floor in the bathroom, shoving the heroin baggie down the toilet with one hand and flushing the toilet repeatedly with the other hand. When Agent Owen and another agent finally pried him from the toilet and handcuffed him, he yelled, "She tricked me!"

When Adebayo triggered the agent alert device, Agent Broussard, who was monitoring the device, received its signal. About a minute later, he and other agents entered Adebayo's room where Agent Owen had chased him. Agent Broussard described the now-open package lying on the floor. Its false bottom, where the agent alert device had been hidden, was ripped open and the device was exposed. He also saw a white, powdery residue around the toilet and a small amount of powder on the bowl, but the baggie and remaining

heroin had been flushed down the drain. The agents ultimately retrieved the heroin baggie from the sewer line to the room.

## **II. SUFFICIENCY OF THE EVIDENCE**

In points of error one through four, Adebayo asserts that the evidence is legally and factually insufficient to establish that he was aware he possessed heroin, he controlled the heroin long enough to permit him to terminate his control; and he had the requisite intent to deliver the heroin.

When reviewing the legal sufficiency of the evidence, we look at the evidence in the light most favorable to the verdict and determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed.2d 560 (1979); *Mason v. State*, 905 S.W.2d 570, 574 (Tex. Crim. App. 1995); *Roberts v. State*, 987 S.W.2d 160, 163 (Tex. App.--Houston [14 Dist.] 1999, pet. ref'd). The jury is the exclusive judge of the credibility of witnesses and of the weight to be given their testimony. *See Jones v. State*, 944 S.W.2d 642, 647 (Tex. Crim. App. 1996). Likewise, reconciliation of conflicts in the evidence is within the exclusive province of the jury. *See id.* This standard of review is the same for both direct and circumstantial evidence cases. *See Chambers v. State*, 711 S.W.2d 240, 245 (Tex. Crim. App. 1986).

When reviewing the factual sufficiency of the evidence, 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." *Clewis v. State*, 922 S.W.2d 126, 129 (Tex. Crim. App. 1996). Although an appellate court is authorized to disagree with the verdict, a factual sufficiency review must be appropriately deferential so as to avoid substituting our judgment for that of the jury. *See id.* at 133; *Roberts v. State*, 987 S.W.2d at 163.

### **A. Knowledge and Control**

Adebayo claims that there is insufficient evidence that he knew there was heroin in the package he received from Binu McCray. However, the evidence shows that McCray expressly told him over the telephone that the package contained heroin. When he received the package, he was worried about his bag being searched at the airport on the return trip to Chicago. Further, McCray's testimony revealed that Adebayo opened the package, looked at the heroin, and decided to repack it to look like a present. When he saw the agent alert device, he asked her, "What have you given me?", and he was angry that she had tricked him. This evidence, along with the evidence we have detailed above, is both legally and factually sufficient to show that Adebayo knew the package contained heroin.

Additionally, Adebayo claims that he involuntarily possessed the heroin because he controlled it for less than one minute, citing section 6.01 of the penal code:

Possession is a voluntary act if the possessor knowingly obtains or receives the thing possessed or is aware of his control of the thing for a sufficient time to permit him to terminate his control.

TEX. PEN. CODE ANN. § 6.01(b) (Vernon 1994). Again, however, the evidence is legally and factually sufficient to show that Adebayo was aware of his control for a sufficient time to permit him to terminate his control of the heroin. He would only accept the package in his motel room. In his motel room, he opened it, said he wanted to repackage it his own way, walked outside his motel room with the baggie of heroin in his hand, and flushed the baggie down the toilet after he saw the police. Thus, Adebayo was aware of his control of the heroin for a sufficient time. Accordingly, we overrule points of error one and two.

### **B. Intent**

In points of error three and four, Adebayo claims that the evidence is legally and factually insufficient to show that he possessed the heroin with intent to deliver it. Intent to deliver may be proved by circumstantial evidence, including the evidence surrounding its possession. *Smith v. State*, 737 S.W.2d 933, 941 (Tex. App.--Dallas 1987, pet. ref'd). Further, intent to deliver can be inferred from the quantity of the drugs possessed. *Branch*

*v. State*, 599 S.W.2d 324, 325-26 (Tex. Crim. App. [Panel Op.] 1979); *Rhodes v. State*, 913 S.W.2d 242, 251 (Tex. App.–Fort Worth 1995), *affirmed*, 945 S.W.2d 115 (Tex. Crim. App. 1997). Adebayo possessed 401 grams of heroin, and each gram had a value of \$400. A DEA agent testified that such an amount of heroin was absolutely not for personal use. Such testimony by a drug enforcement officer is evidence of intent to deliver. *Rhodes*, 913 S.W.2d at 251; *Reece v. State*, 878 S.W.2d 320, 325 (Tex. App.–Houston [1<sup>st</sup> Dist.] 1994, no pet.). Additionally, McCray testified that Adebayo was being sent to pick up the heroin for his stepsister, Alajah Bola, who lived in Chicago. This is factually and legally sufficient evidence to show that Adebayo possessed the heroin with the intent to deliver it. Accordingly, we overrule points of error three and four.

### III. JURY INSTRUCTION

In his fifth point of error, Adebayo complains that the trial court erred in overruling an instruction in the jury charge about the credibility of paid informants. Specifically, Adebayo wanted to instruct the jury that a paid informant or a witness who hopes to gain more favorable treatment in her own case may have a reason to make a false statement because she wants to strike a good bargain with the government. He cites federal case law in support of such an instruction.

In Texas, it is the jury's responsibility to determine the credibility of the witnesses and the weight to be given their testimony. *Sharp v. State*, 707 S.W.2d 611, 614 (Tex. Crim. App. 1986); *Norman v. State*, 862 S.W.2d 621, 628 (Tex. App.–Tyler 1993, pet. ref'd). It is established law in this state that it is error for the trial court to give instructions that refer to the credibility of the witnesses. *Russell v. State*, 749 S.W.2d 77, 78 (Tex. Crim. App. 1988). Such an instruction would be improper because “[i]t could not have been intended by the lawmaking power in this state that the court should by its charge furnish the jury tests by which to judge the credibility of the witnesses testifying before them.” *Muely v. State*, 31 Tex. Crim. 155, 19 S.W. 915, 916 (1892). Instead, juries use reason and common observation to determine the credibility of witnesses. *See id.*; *Slaughter v. State*, 809 S.W.2d

949, 952 (Tex. App.–Beaumont 1991, no pet.). Thus, an instruction to the jury to consider a witness’s interest is improper, even when the instruction is stated in general terms so as to avoid naming a particular witness. *See Harrell v. State*, 37 Tex. Crim. 612, 40 S.W. 799, 801 (1897); *Slaughter*, 809 S.W.2d at 950-52. Accordingly, the instruction requested by Adebayo is improper under Texas law, and we hold that the trial court did not err in overruling it. Point of error five is overruled.

Having overruled all five of Adebayo’s points of error, we affirm his conviction.

/s/ D. Camille Hutson-Dunn  
Justice

Judgment rendered and Opinion filed December 16, 1999.

Panel consists of Justices Sears, Cannon, and Hutson-Dunn.\*

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

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\* Senior Justices Ross A. Sears, Bill Cannon, and D. Camille Hutson-Dunn sitting by assignment.