Affirmed and Opinion filed November 18, 1999.

In The

Fourteenth Court of Appeals

NO. 14-98-00907-CR

MARSHALL GLEN TAYLOR, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 337th District Court
Harris County, Texas
Trial Court Cause No. 768,360

O P I N I O N

After a jury trial, appellant was found guilty of possession of cocaine and the trial court sentenced him to 30 years in the Institutional Division of the Texas Department of Criminal Justice. Appellant asserts three points of error. Appellant's first point of error concerns statements made by the prosecutor during closing argument. His second point of error concerns the trial court's findings regarding one of the enhancement paragraphs in the indictment. In his final point of error, appellant challenges the sufficiency of the evidence

supporting his conviction. Finding no reversible error, we affirm the judgment of the trial court.

Police officers arrested appellant during a narcotics raid of an apartment in Houston. After securing a warrant to search the residence, two officers went to the apartment to make an undercover narcotics purchase. After making the purchase, the officers radioed the arrest team to proceed to the apartment, since the apartment was occupied. Officer Paul Steffenauer was the first officer to enter the apartment. Once inside, he found two men and three women, whom he arrested. He next searched the premises for other suspects, finding appellant hiding in a closet. Appellant had his hand in the front pocket of his pants, and when the officer ordered him to show his hands, several rocks of crack cocaine wrapped in tiny plastic bags fell to the floor when appellant pulled his hand out of his pocket. After handcuffing appellant, Officer Steffenauer reentered the closet, and found a plate with more crack cocaine on it.

Appellant first asserts that the trial court erred by failing to order a mistrial after the prosecutor interjected new and harmful evidence into the case during his closing argument. We disagree.

During his closing argument, appellant's defense attorney argued that the absence of fingerprint evidence on the baggies of crack cocaine provided reasonable doubt. He argued:

> "There is one piece of evidence that you've all heard of which would resolve the issue–not beyond a reasonable doubt, but 100 percent–as to whether Mr. Taylor ever possessed those packets of cocaine or ever touched that plate with that cookie on it.
>
> What evidence is that and why haven't they brought it to you?
>
> It's fingerprint evidence. What would you think and what could I say if a fingerprint expert came in here and said, "We looked at these baggies. We know

whose fingerprints are on them: Marshall Taylor's. . . ." Where is that evidence? Why didn't they bring it? . . . Why didn't they bring that to you? It would have proven it to you."

In his rebuttal, the prosecutor told the jury: "First of all, [defense counsel] says why are there no fingerprints? I'll tell you exactly why: because you can't get fingerprints off of little things like that." Appellant's defense counsel promptly objected and, when his objection was sustained, asked for and received an instruction for the jury to disregard the prosecutor's remark. The defense counsel next asked for a mistrial which was denied by the court.

There are four permissible areas of jury argument: 1) summation of the evidence; 2) reasonable deductions from the evidence; 3) responses to the defendant's argument; and 4) a plea for law enforcement. *See Lagrone v. State*, 942 S.W.2d 602, 619 (Tex. Crim. App. 1997). Even if the argument does not fall into one of these four areas, it will be reversible error only if the argument is extreme, manifestly improper, injects new and harmful facts into the case, or violates a mandatory statutory provision, and is so inflammatory that its prejudicial effect cannot be cured by a judicial instruction to disregard the argument. *See Long v. State*, 823 S.W.2d 259, 267 (Tex. Crim. App. 1991).

Here, the prosecutor's statement was directly in response to the defense counsel's argument, though we agree with appellant that it goes beyond the record. However, even though the argument interjected new unsworn testimony into the case, we do not find the evidence to be so inflammatory that its effect was not cured by the trial court's instruction to disregard. *See Jacobs v. State*, 787 S.W.2d 397, 406 (Tex. Crim. App. 1990). Based on the record, we find that the prosecutor's statement, while clearly erroneous, did not warrant a mistrial. We overrule appellant's first point of error.

Appellant's second point of error asserts that the State failed to prove the validity of one of the convictions in the indictment's enhancement paragraphs.

The State's indictment contained two enhancement paragraphs. Appellant pled true to one of the paragraphs but entered a plea of not true to the second. In an effort to prove up the convictions, the State entered a penitentiary packet containing the final judgments on both convictions.

Appellant challenged the validity of the second conviction by entering three documents into the record. The first document, titled "Waiver of Constitutional Rights, Agreement to Stipulate, and Judicial Confession," contained the defendant's admission of guilt to the charged offense. It was file-stamped at 9:40 AM on March 19, 1990. The second document contained the admonitions given to the defendant. It, too, was file-stamped at 9:40 AM, March 19, 1990. The third document was the information, which was filed-stamped at either 12:10 PM or 2:10 PM on March 19, 1990.[1] Appellant asserts that this establishes that the trial court did not have jurisdiction over the defendant when he pled guilty to the offense, since the information was not filed until after the trial court accepted his plea. Thus, under appellant's argument his conviction was void and cannot be used to enhance his punishment in this case.

When an indictment is waived, a court gains personal jurisdiction over a criminal defendant only after a proper information is filed. TEX. CONST. art. V, § 12. An information is presented when it has been filed by the proper officer in the proper court. TEX. CODE CRIM. PROC. ANN. art. 12.07 (Vernon 1977). Further, the information is considered filed when it is left with the clerk, regardless of whether a file-mark is placed on it. *See Williams v. State*, 767 S.W.2d 868, 871-72 (Tex. App.–Dallas 1989, pet. ref'd).

[1] The copy of this instrument in the record is unclear. Which of the two times is correct is immaterial to this case, since either time would have the indictment filed after the defendant's guilty plea was accepted.

The file-stamp on a document is not evidence of when the document was filed, but rather serves as evidence that the document was accepted by the clerk.

We are guided in this case by our recent decision in *Birdwell v. State*, 996 S.W.2d 381 (Tex. App.–Houston [14th Dist.] 1999, no pet. h.). There, when faced with similar facts, we held the file-stamps insufficient to overcome notations in the docket sheet showing that the indictment was filed before the defendant was adjudicated guilty. *Id.* at 383. In that case, a defendant was challenging his conviction based on the file-stamps on the various instruments in his case. The file-stamps there revealed that the indictment was file-stamped later than all other documents in his case, including the plea admonishments and the defendant's confession. *Id.* at 382-83. The court relied on the docket sheet showing the correct order of filing (i.e., the indictment was filed first) and found the appellant did not meet his burden of proof in proving his conviction void.

Here, though we do not have a docket sheet in the record, the judgment recites that the defendant was charged under the indictment before he entered his plea and received his admonitions. This document clearly establishes the order of events, and provides that the information was filed first. As in *Birdwell*, we would have to speculate about the order of filing with insufficient information, which is something we hesitate to do on the record before us. Appellant could have removed this speculation by admitting the reporter's record from the conviction challenged by appellant but failed to do so. Since appellant has failed to prove by a preponderance of the evidence that his conviction is void, we overrule his second point of error.

In appellant's third point of error, he asserts that the there was insufficient evidence to convict him of possession of more than one gram of cocaine, since the State did not elicit evidence from the chemist that the presence of adulterants and dilutants had no effect on the chemical activity of the cocaine. We disagree.

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)). In reviewing factual sufficiency questions, in contrast, the court of appeals must 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 or unjust. *Clewis v. State*, 922 S.W.2d 126, 129 (Tex. Crim. App. 1996). The court accomplishes this objective by viewing all of the evidence adduced at trial, using enough deference to keep the appellate court from substituting its own judgment for that of the fact finder. *Santellan*, 939 S.W.2d at 164. The appellate court will overrule the fact finder only when its finding is "manifestly unjust," "shocks the conscience," or "clearly demonstrates bias." *Id.* at 165 (citing *Clewis*, 922 S.W.2d at 135).

In this case, the cocaine which appellant was charged with possessing weighed 1.07 grams and was 87.7% pure. Thus, appellant possessed less than one gram of pure cocaine, but the cumulative weight, which includes the weight of the adulterants and dilutants, was over one gram. Appellant contends that the State should have been unable to use the weight of the adulterants and dilutants in computing the total weight of the cocaine, since no evidence was elicited to prove that the presence of these additives did not affect the chemical activity of the cocaine. This argument is based in large part on *Cawthon v. State*, 849 S.W.2d 346 (Tex. Crim. App. 1992) and its progeny, which required the State to prove that the adulterants or dilutants added to increase the weight of the controlled substance, had no effect on its chemical activity. *See id.* at 348-49.

Several other courts of appeal have addressed this situation since the enactment of TEX. HEALTH & SAFETY CODE ANN. § 481.002(49) (Vernon Supp. 1999), which provides

a statutory definition of the term "adulterant or dilutant." Under this definition adulterants and dilutants are "any material that increases the bulk or quantity of a controlled substance, *regardless of its effect on the chemical activity of the controlled substance*." *Id*. (emphasis added). Every court addressing this issue since the enactment of this provision has held that the statutory definition abrogated *Cawthon*'s requirement that the State prove that the adulterants and dilutants have no effect on the chemical activity of the controlled substance. *See Hines v. State*, 976 S.W.2d 912, 913 (Tex. App.–Beaumont 1998, no pet.); *Warren v. State*, 971 S.W.2d 656, 660 (Tex. App.–Dallas 1998, no pet.); *Williams v. State* 936 S.W.2d 399, 405 (Tex. App.–Fort Worth 1996, pet. ref'd). Based on these precedents, we agree that the State is not required to prove whether or not the adulterants or dilutants have an effect on the chemical activity of the controlled substance.

We find the evidence, therefore, factually and legally sufficient to support appellant's conviction for possession of more than one gram of cocaine. Appellant's third argument is overruled.

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.
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