

Affirmed and Opinion filed December 21, 2000.



In The

Fourteenth Court of Appeals

NO. 14-98-01316-CR

FLAVIAN ST. LUCE, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the 176th District Court
Harris County, Texas
Trial Court Cause No. 775,021**

O P I N I O N

A jury convicted appellant, Flavian St. Luce, of delivery of less than one gram of cocaine, and the trial court assessed punishment at two years' confinement in a state jail. St. Luce appeals in four points of error, contending that (1) the trial court committed fundamental error in failing to instruct the jury about eyewitness identification testimony; (2) the trial court erred in overruling his objection to the State's closing argument; (3) the evidence of identification was legally insufficient; and (4) the evidence of identification was factually insufficient. We affirm the trial court's judgment.

BACKGROUND

An undercover narcotics officer purchased a twenty-dollar-rock of crack cocaine from St. Luce in an apartment parking lot. Immediately after the buy, she identified St. Luce as the person who had sold her the cocaine by choosing his photograph from fifty persons' photographs. Additionally, she identified him shortly after the drug purchase when he was stopped for a traffic violation by other officers. Finally, she identified him in court as the man who sold her the cocaine.

JURY INSTRUCTION

In his first point of error, St. Luce contends that the trial court committed fundamental error in failing to instruct the jury about eyewitness identification testimony. Specifically, St. Luce argues that the trial court should have included an instruction about evaluation of identification evidence that tracked Instruction 1.29 of the Fifth Circuit's pattern jury instructions and the instruction in *Barber v. United States*, 412 F.2d 775 (5th Cir. 1969).

The standard of review for errors in the jury charge depends on whether the defendant properly objected. *Mann v. State*, 964 S.W.2d 639, 641 (Tex. Crim. App. 1998); *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1984) (opinion on reh'g); *Toney v. State*, 3 S.W.3d 199, 204 (Tex. App.—Houston [14th Dist.] 1999, pet. ref'd). If a defendant does not object to the charge, as St. Luce did not, reversal is required only if the harm is so egregious that the defendant has not had a fair and impartial trial. *Almanza*, 686 S.W.2d at 171. Errors which result in egregious harm are those which affect "the very basis of the case," deprive the defendant of a "valuable right," or "vitaly affect a defensive theory." *Id.* at 172. If the jury charge contains error, the reviewing court must conduct a harm analysis considering the following four factors: (1) the charge itself; (2) the state of the evidence including contested issues and the weight of the probative evidence; (3) arguments of counsel; and (4) any other relevant information revealed by the record of the trial as a whole. *Abdnor v. State*, 871 S.W.2d 726, 733 (Tex. Crim. App. 1994). Egregious harm is a difficult standard to prove and such a determination must be done on a case-by-case basis. *Hutch v. State*, 922 S.W.2d 166, 171 (Tex. Crim. App. 1996).

The court of criminal appeals has held that a charge on identity is an improper comment on the weight of the evidence and should not be given. *Roberson v. State*, 852 S.W.2d 508, 511 (Tex. Crim.

App. 1993); *see also Giesberg v. State*, 984 S.W.2d 245, 250 (Tex. Crim. App. 1998). Accordingly, the trial court did not err in failing to instruct the jury about eyewitness identification. We overrule point of error one.

JURY ARGUMENT

In his second point of error, St. Luce complains that the trial court reversibly erred in overruling an objection to the State's closing argument. Specifically, he argues that the State impermissibly bolstered its witnesses' testimony. However, his objection at trial was that the argument "calls for a conclusion." To preserve error for review, the complaint on appeal must comport with the objection at trial. *See Turner v. State*, 805 S.W.2d 423, 431 (Tex. Crim. App. 1991). Because St. Luce's objection at trial was not an objection to bolstering, he has not preserved error for review. Accordingly, we overrule point of error two.

SUFFICIENCY OF THE EVIDENCE

In his third and fourth points of error, St. Luce contends that the evidence is legally and factually insufficient to support his conviction. Specifically, he challenges the sufficiency of the evidence of his identity as the cocaine dealer. 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 would have found the essential elements of the crime beyond a reasonable doubt. *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 642, 647 (Tex. Crim. App. 1996). The trier of fact 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. *Id.*

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." *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 to avoid our substituting our judgment for that of the fact finder. *Id.* at 133; *Roberts v. State*, 987 S.W.2d 160, 163 (Tex. App.—Houston [14th Dist.] 1999, pet. ref'd).

We will reverse for factual insufficiency if our review demonstrates that the proof of guilt is so obviously weak as to undermine confidence in the jury's determination, or the proof of guilt, although adequate if taken alone, is greatly outweighed by contrary proof. *Johnson v. State*, 23 S.W.3d 1, 11 (Tex. Crim. App. 2000).

The evidence shows that on the night of the drug transaction, Deputy Sandra Kitchens worked undercover as a cocaine buyer, Officer Russell White coordinated the buy and watched for Deputy Kitchens's safety from a distance with binoculars, and two uniformed officers were present nearby to help. The area of Harris County they were investigating is known to be a high narcotics area.

Deputy Kitchens testified that around dusk, she drove an unmarked car slowly into an apartment complex's parking lot with her passenger-side window rolled down. As she did so, a black male approached. She asked him if he had a "twenty," which is slang for twenty-dollars worth of crack cocaine, and he told her to return in ten minutes. She did so and exchanged a twenty-dollar bill for a small rock. Deputy Kitchens testified that when he brought her the cocaine, St. Luce pulled his shirt over his nose. She asked him if he was cold, and he pulled the shirt down enough that she could see his face. Deputy Kitchens testified that she concentrated on his face because she knew that she would have to identify him later. She described him as a black male with wide eyes and a moustache, who was wearing a white knit Nike cap and who spoke with a Jamaican-sounding accent.

After she left the parking lot with the crack rock, Deputy Kitchens met at a staging area with Officer White. There she looked for five minutes through a three-ring binder with fifty to sixty photographs. She looked carefully through the entire book and identified a photograph of St. Luce as the man who had approached her car both times and sold her the crack cocaine. She also testified that shortly later, other officers stopped St. Luce for a traffic violation. At that time, she drove slowly by the car where St. Luce was standing and again positively identified him. Finally, she testified that she was positive that St. Luce was the man who delivered the crack to her.

The other officers involved with the operation also testified. Officer White explained that he watched the transaction through binoculars, but was unable to clearly see St. Luce's face. He was only

able to identify the drug dealer as a black male wearing a white cap. Officer White also listened for a distress signal over a cellular telephone, which was turned on in Deputy Kitchens's car. Even so, he was unable to clearly hear St. Luce's conversation with her. He also testified that in drug transactions, sometimes the officers have a camera or wear a wire. However, such equipment was not available to them that night. Additionally, because they did not expect to arrest St. Luce that night, the twenty-dollar bill used to purchase the cocaine was neither marked nor its serial number recorded. Finally, although he looked for the photograph book for trial, he was unable to find it.

Lastly, a uniformed officer testified that he was given a description and St. Luce's name immediately after the cocaine buy. When he saw a man matching the description driving, he stopped him for failing to use a turn signal. The man's driver's license confirmed that he was Flavian St. Luce, and he spoke with an islander's accent. At this point, the officer testified that Deputy Kitchens drove by to affirm whether St. Luce was the dealer. Finally, the officer stated that he arrested St. Luce only because the car he was driving had a false inspection sticker. However, searches of St. Luce and his car incident to the arrest revealed no twenty-dollar bills or drugs.

Reviewing the evidence in the light most favorable to the verdict, there is legally sufficient evidence from which a rational trier of fact could determine beyond a reasonable doubt that St. Luce was the man who sold the crack to Deputy Kitchens. Further, reviewing all the evidence without such deference to the verdict, the evidence of St. Luce's identification is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Accordingly, we overrule points of error three and four.

Having overruled all four points of error, we affirm the trial court's judgment.

/s/ Sam Robertson
Justice

Judgment rendered and Opinion filed December 21, 2000.

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

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*Senior Justices Sam Robertson, Ross A. Sears, and D. Camille Hutson-Dunn sitting by assignment.